

OFFICIAL CODE
OF
GEORGIA

ANNOTATED



VOLUME 11

Title 13. Contracts

2010 Edition



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OFFICIAL CODE OF GEORGIA ANNOTATED

With Provision for Subsequent Pocket Parts

Prepared by

The Code Revision Commission
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and

The Editorial Staff of LexisNexis®



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Volume 11 **2010 Edition**

Title 13. Contracts

Including Acts of the 2010 Session of the General Assembly of Georgia
and Annotations taken from the Georgia Reports
and the Georgia Appeals Reports

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OFFICE OF SECRETARY OF STATE

I, Brian P. Kemp, Secretary of State of the State of Georgia, do hereby certify that

the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia: all as same appear of file and record in this office.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 9th day of July, in the year of our Lord Two Thousand and Ten and of the Independence of the United States of America the Two Hundred and Thirty-Fifth.

B. P. Kemp

Brian P. Kemp, Secretary of State

Preface

This volume cumulates and replaces the 1982 edition of Volume 11 of the Official Code of Georgia Annotated, as supplemented by the 2009 Cumulative Supplement. The 1982 Volume 11 and its 2009 Supplement may be recycled or, if so desired, retained for historical purposes. This volume contains all laws specifically codified in Title 13 by the General Assembly through the 2010 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through April 30, 2010. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2008, 2009, and 2010 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2008 Session of the General Assembly, the user should consult the Georgia Laws.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

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Cross references. — Prohibition against passage of law impairing obligation of contracts, U.S. Const., Art. I, Sec. 10, Cl. 1; Ga. Const. 1983, Art. I, Sec. 1, Para. X; and § 1-3-5. Revenue bonds generally, Ch. 82, T. 36. Competition for public work bids, Ch. 84, T. 36.

Law reviews. — For article examining the significance of distinguishing between tort and contract in Georgia, see 30 Mercer L. Rev. 303 (1978). For article surveying 1979 developments in Georgia Contract Law, see 31 Mercer L. Rev. 27 (1979). For annual

survey on contracts, see 36 Mercer L. Rev. 151 (1984). For annual survey of contract law, see 39 Mercer L. Rev. 105 (1987). For annual survey of law of contracts, see 40 Mercer L. Rev. 135 (1988). For annual survey on law of contracts, see 42 Mercer L. Rev. 125 (1990). For annual survey article on contract law, see 45 Mercer L. Rev. 109 (1993). For annual survey of labor and employment law, see 58 Mercer L. Rev. 211 (2006). For article, "The Cost of Consent: Optimal Standardization in the Law of Contract," see 58 Emory L.J. 1401 (2009).

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Cited in *Futran v. Ring Radio Co.*, 501 F. Supp. 734 (N.D. Ga. 1980).

RESEARCH REFERENCES

ALR. — Implied warranty upon retail sale of garment for personal wear, 27 ALR 1507.

Conflict of laws as to contract to adopt, 81 ALR2d 1128.

Rights of parties to oil and gas lease or royalty deed after expiration of fixed term where production temporarily ceases, 100 ALR2d 885.

Order awarding temporary support or living expenses upon separation of unmarried partners pending contract action based on services relating to personal relationship, 35 ALR4th 409.

Employer's state-law liability for withdraw-

ing, or substantially altering, job offer for indefinite period before employee actually commences employment, 1 ALR5th 401.

Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death, 14 ALR5th 242.

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Person signing with blanks left to be filled in by other party is bound. *Butts v. Atlanta Fed. Sav. & Loan Ass'n*, 152 Ga. App. 40, 262 S.E.2d 230 (1979).

Cited in *Trustees of Jesse Parker Williams Hosp. v. Nisbet*, 189 Ga. 807, 7 S.E.2d 737 (1940).

RESEARCH REFERENCES

ALR. — Judgment against less than all parties to contract as bar to action against others, 1 ALR 1601; 2 ALR 124.

Right to revoke will executed pursuant to contract, 3 ALR 172.

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Intermarriage of parties as affecting contract for services, 14 ALR 1013.

Mutuality and enforceability of contract to furnish another with his needs, wants, desires, requirements of a certain commodity, 14 ALR 1300; 26 ALR2d 1139.

Right of purchaser under land contract to anticipate time of payment fixed by contract, 17 ALR 866.

Right of vendee who enters under parol contract, to recover for improvements where vendor refuses to convey, 17 ALR 949.

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Mistake in lease as ground for relief, 26 ALR 472.

Steamship ticket as a contract, 26 ALR 1375.

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Validity of provision in contract with corporation waiving liability of stockholders, 40 ALR 371.

Mutuality and enforceability of an agreement upon the sale of goods, to give the purchaser an option or the exclusive sale similar goods without a corresponding obligation on his part, 45 ALR 1197.

Liability of contractee in principal contract who discontinues same for damages to or loss of profits by subcontractor, 48 ALR 458.

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Promise of additional compensation for completing building or construction contract, 55 ALR 1333; 138 ALR 136.

Province of court and jury respectively as to construction of written contract where extrinsic evidence as to intention has been introduced, 65 ALR 648.

Provision in sale contract to the effect that only conditions incorporated therein shall be binding, 75 ALR 1032; 127 ALR 132; 133 ALR 1360.

Validity and enforceability of contract the making or performance of which involves breach of a contract made by one of the parties with a third person or impairs his ability to perform such contract, 83 ALR 32.

Validity and effect of promise made after filing of petition in bankruptcy, but before discharge, to pay existing debt, 83 ALR 1295.

Liability of municipality or other governmental body on implied or quasi contract for value of property or work, 84 ALR 936; 110 ALR 153; 154 ALR 356; 33 ALR3d 1164.

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gations upon the vendor, 84 ALR 1008; 38 ALR2d 1310.

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Formal or written instrument as essential to completed contract where the making of such instrument is contemplated by parties to verbal or informal agreement, 165 ALR 756.

Validity, construction, and application of express restrictions on right of action by individual holder of one or of a series of corporate bonds or other obligations, 174 ALR 435.

Mutuality and enforceability of contract to furnish another with his needs, wants, desires, requirements, and the like, of certain commodities, 26 ALR2d 1139.

Liability of municipality on quasi contract for value of property or work furnished without compliance with bidding requirements, 33 ALR3d 1164.

Deed as superseding, or merging, provisions of antecedent contract imposing obligations upon the vendor, 38 ALR2d 1310.

Provision for post-mortem payment or performance as affecting instrument's character and validity as a contract, 1 ALR2d 1178.

Validity of anti-assignment clause in contract, 37 ALR2d 1251.

Landlord's duty under express covenant to repair, rebuild, or restore, where property is damaged or destroyed by fire, 38 ALR2d 682.

Construction and operation of attorney's general or periodic retainer fee or salary contract, 43 ALR2d 677.

"Escalator" price adjustment clauses, 63 ALR2d 1337.

Validity, construction, and enforcement of 'business opportunities or "finder's fee" contract, 24 ALR3d 1160.

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Measure and elements of damages for breach of contract to lend money, 4 ALR4th 682.

Liability to pay for allegedly unauthorized repairs on motor vehicle, 5 ALR4th 311.

Applicability of UCC Article 2 to mixed contracts for sale of goods and services, 5 ALR4th 501.

Husband's death as affecting periodic payment provision of separation agreement, 5 ALR4th 1153.

Liability of termite or other pest control

or inspection contractor for work or representations, 32 ALR4th 682.

Failure of building and construction artisan or contractor to procure business or occupational license as affecting enforceability of contract or right of recovery for work done—modern cases, 44 ALR4th 271.

Duty and liability of subcontractor to employee of another contractor using equipment or apparatus of former, 55 ALR4th 725.

Contractual jury trial waivers in state civil cases, 42 ALR5th 53; 93 ALR Fed. 688.

13-1-1. Contract defined — Generally.

A contract is an agreement between two or more parties for the doing or not doing of some specified thing. (Orig. Code 1863, § 2676; Code 1868, § 2672; Code 1873, § 2714; Code 1882, § 2714; Civil Code 1895, § 3631; Civil Code 1910, § 4216; Code 1933, § 20-101.)

Law reviews. — For article discussing the anachronistic nature of the Georgia Contracts Code as dramatized by comparing the doctrine of consideration as it is formulated in the Restatements of Contracts and in Code 1933, Title 20 (now this title), and the

interpretative approach Georgia courts have taken in dealing with such Code, see 13 Ga. L. Rev. 499 (1979). (But see amendments by Ga. L. 1981, p. 876.) For article surveying contract law in 1984-1985, see 37 Mercer L. Rev. 161 (1985).

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Requisites of an explicit contract are a meeting of the minds of the parties, mutuality, and the clear expression of the terms of the agreement. *Jackson v. Easters*, 190 Ga. App. 713, 379 S.E.2d 610 (1989).

Consideration. — Where plaintiff patient sued defendant manufacturer of a surgically implanted medical device, alleging breach of contract, in that manufacturer's representative orally agreed to pay for patient's two prior surgeries, manufacturer's motion for summary judgment under O.C.G.A. §§ 13-1-1 and 13-1-5(b) was granted because while the patient submitted email correspondence patient received from representative requesting all bills for surgeries where representative stated a need for record of what it had cost the patient "out of pocket," there was no evidence that consideration was given for the promise. *Trickett v. Advanced Neuromodulation Sys.*, 542 F. Supp. 2d 1338 (S.D. Ga. 2008).

Mere labels are not determinative of legal

relationships, even as between parties to the contract. *Stewart v. Midani*, 525 F. Supp. 843 (N.D. Ga. 1981).

Evidence of an agreement or promise is required to support a claim under a theory of oral contract. *Mooney v. Mooney*, 245 Ga. App. 780, 538 S.E.2d 864 (2000).

Contract not void for uncertainty unless intention of parties cannot be fairly ascertained and effectuated. *Pierson v. General Plywood Corp.*, 76 Ga. App. 853, 47 S.E.2d 605 (1948).

Parties must have distinct intention common to both and without doubt or difference; until all understand alike, there can be no assent, and, therefore, no contract. *Weill v. Brown*, 197 Ga. 328, 29 S.E.2d 54 (1944).

If the agreement was merely to reach an agreement, such was not enforceable. *Overton Apparel, Inc. v. Russell Corp.*, 264 Ga. App. 306, 590 S.E.2d 260 (2003).

Agreement must be plainly expressed. — To be valid, an agreement must be expressed

plainly and explicitly enough to show what the parties agreed upon, and an agreement expressed in incomplete or incomprehensive terms cannot be enforced. *Patel v. Gingrey Assocs.*, 196 Ga. App. 203, 395 S.E.2d 595 (1990).

Terms of agreement must be such that neither party can reasonably misunderstand.

— One seeking to establish a contract must establish by proof a contract that is certain, definite, clear, and so precise in its terms that neither party can reasonably misunderstand it, and such proof must establish existence of contract beyond reasonable doubt. *Liberty Nat'l Bank & Trust Co. v. Diamond*, 229 Ga. 677, 194 S.E.2d 91 (1972).

Offer must be definite enough for court to fix legal liability of parties. — Where offer is in any case so indefinite as to make it impossible for court to decide just what it means, and to fix exactly the legal liability of parties, its acceptance cannot result in an enforceable agreement. *Weill v. Brown*, 197 Ga. 328, 29 S.E.2d 54 (1944).

If contract is substantially alleged some mere details may be implied, if implication is warranted by facts and circumstances of particular case. *Pierson v. General Plywood Corp.*, 76 Ga. App. 853, 47 S.E.2d 605 (1948).

When no identification of subject matter, nor agreement upon price, there is no valid contract. *North Ga. Lumber Co. v. Lawson*, 40 Ga. App. 680, 150 S.E. 865 (1929).

Definition of option contract. — An option is a contract by which owner of property agrees with another that latter shall have right to buy former's property at fixed price within certain time upon agreed terms and conditions. *Jones v. Vereen*, 52 Ga. App. 157, 182 S.E. 627 (1935).

Before option contract is completed there must be agreement on terms and conditions. *Jones v. Vereen*, 52 Ga. App. 157, 182 S.E. 627 (1935).

Agreement to reach agreement is contradiction in terms and imposes no obligation on parties thereto. *Wells v. H.W. Lay & Co.*, 78 Ga. App. 364, 50 S.E.2d 755 (1948).

Contract to enter contract in future ineffective unless all terms and conditions agreed upon. — Unless all terms and conditions are agreed on, and nothing is left to future negotiations, a contract to enter into a contract in future is of no effect. *Wells v.*

H.W. Lay & Co., 78 Ga. App. 364, 50 S.E.2d 755 (1948).

An agreement merely not to be "unreasonable" in the future is so uncertain, indefinite, and vague that it cannot be an enforceable contract. *Patel v. Gingrey Assocs.*, 196 Ga. App. 203, 395 S.E.2d 595 (1990).

Executive warrant authorizing state treasury to pay money pursuant to appropriation, not a contract. — Executive warrant upon treasury of state, authorizing payment of money in pursuance of appropriation made by law, is not a contract or in nature of a contract. *Fletcher v. Renfro*, 56 Ga. 674 (1876).

Contingency fee contract not found. — Since it was clear that the parties had not arrived at a meeting of the minds regarding expenses as set forth in a contingency fees provision, no binding contract existed with regard to the parties and the trial court therefore properly entered judgment in favor of withholding defendant. *Donohue v. Green*, 209 Ga. App. 381, 433 S.E.2d 431 (1993).

Party asserting existence of contract has burden of proving contract's existence and terms. *Carter v. Kim*, 157 Ga. App. 418, 277 S.E.2d 776 (1981).

One seeking recovery under contract must show all essentials of valid contract are met. — Burden to show that there had been a contract between itself and defendants as a basis of indebtedness is on plaintiff, and to carry this burden, it is necessary for plaintiff to show, by preponderance of evidence, every necessary essential of a valid contract, which on facts, included acceptance of policies of insurance by defendants after the defendants had unconditionally assented to all terms of contracts. *Associated Muts., Inc. v. Pope Lumber Co.*, 200 Ga. 487, 37 S.E.2d 393 (1946).

Contract unenforceable when parties and scope unclear. — In a Chapter 11 bankruptcy proceeding, the debtor had a valid objection to an allowance of a claim arising from pending state court litigation; an alleged contract was not sufficiently definite to be enforceable because the parties and the scope of the contract were both unclear. In *re LjL Truck Ctr., Inc.*, 299 B.R. 663 (Bankr. M.D. Ga. 2003).

Estoppel from claiming contract too indefinite to enforce. — Fact that the creditor

bank's promise to forbear setoff lacks term of duration does not render contract too indefinite to enforce, where creditor-bank promised another creditor not to exercise setoff against account of mutual debtor, and then for its benefit breached its promise at first opportunity by exercising setoff after the promisee-creditor had relied on the bank's promise to its detriment. *Pepsi Cola Bottling Co. v. First Nat'l Bank*, 248 Ga. 114, 281 S.E.2d 579 (1981).

No burden of disproving any essentials of a valid contract rests on defendant. *Associated Muts., Inc. v. Pope Lumber Co.*, 200 Ga. 487, 37 S.E.2d 393 (1946).

Contract may give rise to duties which exceed contract's bounds. — It is possible for a contractual relationship to give rise to a duty which exceeds the bounds of the contract itself. *Kaiser Aluminum & Chem. Corp. v. Ingersoll-Rand Co.*, 519 F. Supp. 60 (S.D. Ga. 1981).

Partnership's exercise of right of first refusal on establishing a second airport motel created a contract. *Bouy, Hall & Howard & Assocs. v. Savannah Airport Comm'n*, 256 Ga. 181, 345 S.E.2d 349 (1986).

Seller's proposal accepted by buyer was contract. — Proposal for the furnishing of a model home that specified the parties, the work to be performed, the consideration, the place of performance, and the type of furnishings to be installed, which was accepted by the buyer, constituted a contract under O.C.G.A. § 13-1-1, but questions remained as to whether the contract was breached by the buyer, making summary judgment for the seller improper. *Hampton Island Club, LLC v. B2 Creative, Inc.*, 300 Ga. App. 258, 685 S.E.2d 751 (2009).

Judgment rendered in action for a tort, growing out of the wrongful conversion of personal property, is not a contract. *McAfee v. Covington*, 71 Ga. 272, 51 Am. R. 263 (1883).

Cited in *Helmer v. Helmer*, 159 Ga. 376, 125 S.E. 849 (1924); *Friedlander v. Schloss Bros. & Co.*, 43 Ga. App. 646, 159 S.E. 870 (1931); *Smith v. Gholstin*, 45 Ga. App. 287, 164 S.E. 217 (1932); *Aero Constr. Co. v. Grizzard*, 76 Ga. App. 749, 46 S.E.2d 767 (1948); *Russell v. Smith*, 77 Ga. App. 70, 47 S.E.2d 772 (1948); *Gray v. Aiken*, 205 Ga. 649, 54 S.E.2d 587 (1949); *Reid v. Hemphill*, 82 Ga. App. 391, 61 S.E.2d 201 (1950); *Flatauer v. Goodman*, 84 Ga. App. 881, 67 S.E.2d 794 (1951); *Bregman v. Rosenthal*, 212 Ga. 95, 90 S.E.2d 561 (1955); *Weiss v. Johnson & Johnson Constr. Co.*, 98 Ga. App. 858, 107 S.E.2d 708 (1959); *Peachtree Medical Bldg., Inc. v. Keel*, 107 Ga. App. 438, 130 S.E.2d 530 (1963); *Weikert v. Logue*, 121 Ga. App. 171, 173 S.E.2d 268 (1970); *Dowis v. Lindgren*, 132 Ga. App. 793, 209 S.E.2d 233 (1974); *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691 (1976); *CCE Fed. Credit Union v. Chesser*, 150 Ga. App. 328, 258 S.E.2d 2 (1979); *Citicorp Indus. Credit, Inc. v. Rountree*, 185 Ga. App. 417, 364 S.E.2d 65 (1987); *Poulos v. Home Fed. Sav. & Loan Ass'n*, 192 Ga. App. 501, 385 S.E.2d 135 (1989); *Jackson v. Williams*, 209 Ga. App. 640, 434 S.E.2d 98 (1993); *Sanders v. Commercial Cas. Ins. Co.*, 226 Ga. App. 119, 485 S.E.2d 264 (1997); *Mooney v. Mooney*, 235 Ga. App. 117, 508 S.E.2d 766 (1998); *Baldwin Rental Ctrs. Inc. v. Case Credit Corp.*, 277 Bankr. 152 (Bankr. S.D. Ga. 2000).

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Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 1 et seq., 5 et seq.

C.J.S. — 17 C.J.S., Contracts, § 1.

ALR. — Contract to refrain from contesting will, 55 ALR 811.

Requisites as to definiteness of agreement to pay employee share of profits, 18 ALR2d 211.

Hospital's liability for negligence in con-

nection with preparation, storage, or dispensing of drug or medicine, 9 ALR3d 579.

Requirements as to certainty and completeness of terms of lease in agreement to lease, 85 ALR3d 414.

Duty of publisher with regard to distribution and promotion of book, 43 ALR4th 1182.

13-1-2. Contract defined — Executed and executory contracts.

(a) An executed contract is one in which all the parties thereto have performed all the obligations which they have originally assumed.

(b) An executory contract is one in which something remains to be done by one or more parties. (Orig. Code 1863, § 2677; Code 1868, § 2673; Code 1873, § 2715; Code 1882, § 2715; Civil Code 1895, § 3632; Civil Code 1910, § 4217; Code 1933, § 20-102.)

JUDICIAL DECISIONS

Executed contract is one in which object of contract is performed, as where each does what each assumes to do, and nothing remains for either to do. *Snellgrove v. Dingelhof*, 25 Ga. App. 334, 103 S.E. 418 (1920).

Executory contract, founded on no consideration, is nudum pactum and cannot be enforced. *Lowe v. Bryant*, 32 Ga. 235 (1861); *Georgia Cas. & Sur. Co. v. Hardrick*, 211 Ga. 709, 88 S.E.2d 394 (1955).

Courts will not intervene to disturb illegal executed contracts, or to enforce illegal executory contracts. *Bugg v. Towner*, 41 Ga. 315 (1870); *Tufts v. DuBignon*, 61 Ga. 322 (1878); *Watkins v. Nugen*, 118 Ga. 372, 45 S.E. 262 (1903).

A structured settlement agreement was not executory. *In re Terry*, 245 Bankr. 422 (Bankr. N.D. Ga. 2000).

Deed becomes an executed contract when signed and delivered. It is not essential that possession should be obtained under the deed. *Watkins v. Nugen*, 118 Ga. 372, 45 S.E. 262 (1903).

Contract, whereby title not to pass until purchase price paid and deed executed, was executory. — Contract whereby title to realty and personalty located thereon was not to pass and delivery of possession was not to be made until buyer paid purchase price and seller executed general warranty deed to property was mere executory agreement to sell and did not constitute sale. *Hambrick v. Bedsole*, 93 Ga. App. 192, 91 S.E.2d 205 (1956).

Claim for breach of executory contract. — To show a claim for breach of an

executory contract, plaintiff must show plaintiff's own readiness and willingness to perform. Otherwise, the plaintiff would not be entitled to a judgment either for breach of contract or for a tort. *James v. Mitchell*, 159 Ga. App. 761, 285 S.E.2d 222 (1981).

Essentials of enforceable executory contract for future sale of commodity. — Executory contract for future sale of commodity not enforceable unless by its terms it is so intended, and there is mutuality of obligation and certainty as to subject matter and price. *Tift v. Shiver & Aultman*, 24 Ga. App. 638, 102 S.E. 47 (1919). See also *Chickamauga Mfg. Co. v. Augusta Grocery Co.*, 23 Ga. App. 163, 98 S.E. 114 (1919).

Performance of contractual obligations. — Military truck refurbishing company's foreign corporate representative was entitled to summary judgment, where the representative performed the representatives's obligations under the contract, the contract was no longer executory, and the representative suffered compensatory damages as a result; therefore, the company was not entitled to a directed verdict. *Commercial & Military Sys. Co. v. Sudimat, C.A.*, 267 Ga. App. 32, 599 S.E.2d 7 (2004).

Cited in *Shore Acres Properties, Inc. v. Morgan*, 44 Ga. App. 128, 160 S.E. 705 (1931); *Twin City Fire Ins. Co. v. Wright*, 46 Ga. App. 537, 167 S.E. 891 (1933); *Blue Ridge Apt. Co. v. Telfair Stockton & Co.*, 205 Ga. 552, 54 S.E.2d 608 (1949); *Dowis v. Lindgren*, 132 Ga. App. 793, 209 S.E.2d 233 (1974); *In re Terry*, 245 Bankr. 422 (Bankr. N.D. Ga. 2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, § 5.

C.J.S. — 17 C.J.S., Contracts, § 8.

ALR. — Moral obligation as a consideration for an executory promise, 17 ALR 1299; 79 ALR 1346; 8 ALR2d 787.

Agreements in relation to exchange or remittance as within statute of frauds, 19 ALR 1140.

Claim in receivership for breach of contract which was still executory when receiver was appointed, 33 ALR 508.

Assignability of contract to furnish all of buyer's requirement or to take all of seller's output, 39 ALR 1192.

Right of purchaser to acquire and assert outstanding title as against vendor, 40 ALR 1078.

Right of vendee under an executory land contract to a lien for amount paid on the purchase price, 45 ALR 352; 33 ALR2d 1384; 82 ALR3d 1040.

Bankruptcy or insolvency of corporation as affecting its executory contract for the sale of its own stock, 46 ALR 1172.

Vendee's right to recover amount paid under executory contract for sale of land, 59 ALR 189; 102 ALR 852; 134 ALR 1064.

Right of vendee under executory contract to bring action against third person for damage to land, 151 ALR 938.

Enforceability, as between parties, of an executory agreement made in fraud of creditors, 172 ALR 1121.

Moral obligation as consideration for contract—modern trend, 8 ALR2d 787.

Right of vendee under executory land contract to lien for amount paid on purchase price, 33 ALR2d 1384; 82 ALR3d 1040.

Mechanic's lien based on contract with vendor pending executory contract for sale of property as affecting purchaser's interest, 50 ALR3d 944.

Right of vendee under executory land contract to lien for amount paid on purchase price as against subsequent creditors of or purchasers from vendor, 82 ALR3d 1040.

13-1-3. Contract defined — Contract of record.

A contract of record is one which has been declared and adjudicated by a court having jurisdiction or which is entered of record in obedience to or in carrying out the judgment of a court. (Orig. Code 1863, § 2678; Code 1868, § 2674; Code 1873, § 2716; Code 1882, § 2716; Civil Code 1895, § 3633; Civil Code 1910, § 4218; Code 1933, § 20-103.)

JUDICIAL DECISIONS

Judgment on contract rendered by court of competent jurisdiction is contract of record. — Where one person sues another in court of competent jurisdiction upon contract, and court renders judgment thereon in favor of plaintiff that judgment becomes a contract of record. *Little Rock Cooperage Co. v. Hodge*, 112 Ga. 521, 37 S.E. 743 (1900).

Contract of record conclusive between parties and effects merger of original cause of action. — A contract of record has the following peculiar properties or characteristics: It operates as an estoppel and is conclusive between parties. It effects or works a

merger of original cause of action. *Howell v. A. Shands & Co.*, 35 Ga. 66 (1866); *Fannin v. Durdin*, 54 Ga. 476 (1875); *McAfee v. Covington*, 71 Ga. 272, 51 Am. R. 263 (1883); *Daniel v. Gibson*, 72 Ga. 367, 53 Am. R. 845 (1884).

When judgment is obtained, precedent cause of action merges into and is extinguished by judgment and becomes new cause of action upon which new suit may be maintained. *Southern Ry. v. City of Rome*, 179 Ga. 449, 176 S.E. 7 (1934).

Judgment of divorce granting alimony not contract of record. *Phillips v. Phillips*, 73 Ga. App. 18, 35 S.E.2d 520 (1945).

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Contracts, §§ 1, 10.

13-1-4. Contract defined — Specialty contract.

A specialty is a contract under seal and is considered by the law as entered into with more solemnity, and consequently of higher dignity, than ordinary, simple contracts. (Orig. Code 1863, § 2679; Code 1868, § 2675; Code 1873, § 2717; Code 1882, § 2717; Civil Code 1895, § 3634; Civil Code 1910, § 4219; Code 1933, § 20-104.)

Cross references. — Time limitation on bringing of actions upon instruments under seal, § 9-3-23. Effect of affixing seal to writ-

ing evidencing contract for sale or offer to buy or sell goods, § 11-2-203.

JUDICIAL DECISIONS

Common-law definition of specialty followed in this state. — At common law a bond was known as a specialty. The common-law definition is followed in this state. *Cosgro v. Quinn*, 219 Ga. 272, 133 S.E.2d 343 (1963).

Discussion of common-law rules as to specialties requiring no consideration. — See *Trustees of Jesse Parker Williams Hosp. v. Nisbet*, 189 Ga. 807, 7 S.E.2d 737 (1940).

Obligations recognized as specialties and requiring no consideration at common law. — Common law recognized as specialties, requiring no consideration, not only double or conditional bonds with penalty and defeasance clause, but other sealed and formally delivered obligations known as single bonds; these rules as to specialties remain of force in this state, and include like instruments creating gifts of money payable in future. *Trustees of Jesse Parker Williams Hosp. v. Nisbet*, 189 Ga. 807, 7 S.E.2d 737 (1940).

Discussion of double bonds, containing defeasance clauses, and single bonds, as specialties at common law. — See *Trustees of Jesse Parker Williams Hosp. v. Nisbet*, 189 Ga. 807, 7 S.E.2d 737 (1940).

Absence of consideration is not a defense when a contract is under seal. *Paige v. Jurgensen*, 204 Ga. App. 524, 419 S.E.2d 722 (1992).

Lease executed under seal is a specialty. *United Leather Co. v. Proudfit*, 151 Ga. 403, 107 S.E. 327 (1921).

Effect of considering insurance policy under seal as specialty. — Insurance policy under seal constituted a specialty, and such that there could be no recovery by insurer of money paid under the policy, on ground of false representations, as long as the policy remained uncanceled, and suit to cancel and recover such payment was not barred on ground that complainant had adequate and complete remedy at law. *Massachusetts Protective Ass'n v. Kittles*, 2 F.2d 211 (5th Cir. 1924).

Cited in *Seawright v. Dickson*, 16 Ga. App. 436, 85 S.E. 625 (1915); *Citizens' Bank v. Hall*, 179 Ga. 662, 177 S.E. 496 (1934); *Peerless Cas. Co. v. Housing Auth.*, 228 F.2d 376 (5th Cir. 1955).

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Contracts, §§ 1, 10.

ALR. — Necessity of consideration to support option under seal, 21 ALR 137.

Liability of undisclosed principal on sealed contract, 32 ALR 162.

Modification of sealed instrument by subsequent parol agreement, 55 ALR 685.

Waiver by parol of provision in sealed instrument, 55 ALR 700.

13-1-5. Contract defined — Simple contract.

(a) All other contracts than those specified in Code Sections 13-1-2 through 13-1-4 are termed simple contracts.

(b) Simple contracts may either be in writing or rest only in words as remembered by witnesses. (Orig. Code 1863, §§ 2680, 2681; Code 1868, §§ 2676, 2677; Code 1873, §§ 2718, 2719; Code 1882, §§ 2718, 2719; Civil Code 1895, §§ 3635, 3636; Civil Code 1910, §§ 4220, 4221; Code 1933, §§ 20-105, 20-106.)

JUDICIAL DECISIONS

Contract partly in writing and partly in parol is considered parol contract. — When contract is not wholly in writing, but is partly in writing and partly in parol, entire contract is considered as one in parol. *Jankowski v. Taylor*, 154 Ga. App. 752, 269 S.E.2d 871, aff'd, 246 Ga. 804, 273 S.E.2d 16 (1980).

Definiteness. — Like written contracts, oral contracts must be certain and definite in their terms. *Pharr v. Olin Corp.*, 715 F. Supp. 1569 (N.D. Ga. 1989).

Effect of oral agreement relating to condition not expressed in note. — An oral agreement between the parties, made contemporaneously with the execution of a note or prior thereto, relating to a condition not expressed in the note, is incompetent to change the contract as represented on the face of the note. *Curtis v. First Nat'l Bank*, 158 Ga. App. 379, 280 S.E.2d 404 (1981).

Proof of oral agreement. — A party is not precluded from proving the existence of a separate oral agreement as to which the basic written document is silent and which is not inconsistent with its terms. *Turner v. Clark & Clark*, 158 Ga. App. 79, 279 S.E.2d 323 (1981).

Contracts for insurance must be in writing and may not be partially parol. *Atlanta Metro Taxicab Group, Inc. v. Bekele*, 154 Ga. App. 831, 269 S.E.2d 902 (1980).

Georgia law does not require real estate listings to be reduced to writing and oral contracts are enforceable. *Thomas v. Memory*, 154 Ga. App. 756, 270 S.E.2d 24 (1980).

Enforcement of oral contract. — An oral contract is legal and equally as enforceable as a written contract in an action at law. *Turner v. Clark & Clark*, 158 Ga. App. 79, 279 S.E.2d 323 (1981).

Evidence was sufficient to support a jury's verdict finding a breach of contract in a real estate development dispute, as there was no requirement for the agreement to be in writing where the agreement did not directly involve the sale or conveyance of an interest in land; plaintiff proved all of the essential elements of the breach of contract claim through plaintiff's testimony and that of another person. *Cline v. Lee*, 260 Ga. App. 164, 581 S.E.2d 558 (2003).

Where plaintiff patient sued defendant manufacturer of a surgically implanted medical device, alleging breach of contract, in that manufacturer's representative orally agreed to pay for patient's two prior surgeries, manufacturer's motion for summary judgment under O.C.G.A. §§ 13-1-1 and 13-1-5(b) was granted because while the patient submitted email correspondence patient received from representative requesting all bills for surgeries where representative stated a need for record of what it had cost the patient "out of pocket," there was no evidence that consideration was given for the promise. *Trickett v. Advanced Neuromodulation Sys.*, 542 F. Supp. 2d 1338 (S.D. Ga. 2008).

Cited in *Nodvin v. Krabe*, 160 Ga. App. 310, 287 S.E.2d 236 (1981).

RESEARCH REFERENCES

- C.J.S.** — 17 C.J.S., Contracts, §§ 1, 10, 17A authorized repairs on motor vehicle, 5 C.J.S., Contracts, § 382. ALR4th 311.
- ALR.** — Liability to pay for allegedly un-

13-1-6. Contract defined — Parol contracts.

Parol contracts shall include only contracts in words as remembered by witnesses. (Orig. Code 1863, § 2681; Code 1868, § 2677; Code 1873, § 2719; Code 1882, § 2719; Civil Code 1895, § 3636; Civil Code 1910, § 4221; Code 1933, § 20-106.)

Cross references. — Parol evidence generally, Ch. 6, T. 24.

JUDICIAL DECISIONS

An oral contract is legal and may be enforced by an action at law. Venable v. Block, 138 Ga. App. 215, 225 S.E.2d 755 (1976).

For oral contracts to be enforceable, there must be meeting of minds of contracting parties i.e., mutuality as to every essential element of oral agreement. Super Valu Stores, Inc. v. First Nat'l Bank, 463 F. Supp. 1183 (M.D. Ga. 1979).

Oral promises cannot be enforced where underlying employment contract, being terminable at will, is unenforceable. Walker v. GMC, 152 Ga. App. 526, 263 S.E.2d 266 (1979).

Contract partly in writing and partly in parol is considered parol contract. — When contract is not wholly in writing, but is partly in writing and partly in parol, entire contract is considered as one in parol. Jankowski v. Taylor, 154 Ga. App. 752, 269 S.E.2d 871, aff'd, 246 Ga. 804, 273 S.E.2d 16 (1980).

Effect of parol evidence rule generally. — The parol evidence rule fixes the finality of a written contract which is unmixed with fraud respecting the subject matter. It is, moreover, a rule of substantive law, and though parol evidence be admitted without objection or over objection, it is without probative value to vary terms of a written contract. Crooks v. Crim, 159 Ga. App. 745, 285 S.E.2d 84 (1981).

Effect of oral agreement relating to con-

dition not expressed in note. — An oral agreement between the parties, made contemporaneously with the execution of a note or prior thereto, relating to a condition not expressed in the note, is incompetent to change the contract as represented on the face of the note. Curtis v. First Nat'l Bank, 158 Ga. App. 379, 280 S.E.2d 404 (1981).

Contracts for insurance must be in writing and may not be partially parol. Atlanta Metro Taxicab Group, Inc. v. Bekele, 154 Ga. App. 831, 269 S.E.2d 902 (1980).

Georgia law does not require real estate listings to be reduced to writing and oral contracts are enforceable. Thomas v. Memory, 154 Ga. App. 756, 270 S.E.2d 24 (1980).

Breach of oral contract proven. — Evidence was sufficient to support a jury's verdict finding a breach of contract in a real estate development dispute, as there was no requirement for the agreement to be in writing where the agreement did not directly involve the sale or conveyance of an interest in land; plaintiff proved all of the essential elements of the breach of contract claim through plaintiff's testimony and that of another person. Cline v. Lee, 260 Ga. App. 164, 581 S.E.2d 558 (2003).

Cited in Security Dev. & Inv. Co. v. Ben O'Callaghan Co., 125 Ga. App. 526, 188 S.E.2d 238 (1972); Nodvin v. Krabe, 160 Ga. App. 310, 287 S.E.2d 236 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 67, 68, 262, 265.

C.J.S. — 17 C.J.S., Contracts, §§ 9, 10.

ALR. — Admissibility of parol evidence to vary or explain the contract implied from the regular endorsement of a bill or note, 22 ALR 527; 35 ALR 1120; 54 ALR 999; 92 ALR 721.

Rights of parties under oral agreement to buy land or bid it in at judicial sale for another, 42 ALR 10; 135 ALR 232; 27 ALR2d 1285.

Modification of sealed instrument by subsequent parol agreement, 55 ALR 685.

Waiver by parol of provision in sealed instrument, 55 ALR 700.

Oral contracts of insurance, 69 ALR 559; 92 ALR 232.

Formal or written instrument as essential to completed contract where the making of

such instrument is contemplated by parties to verbal or informal agreement, 122 ALR 1217; 165 ALR 756.

Oral agreement restricting use of real property as within statute of frauds, 5 ALR2d 1316.

Rights of parties under oral agreement to buy or bid in land for another, 27 ALR2d 1285.

Oral contract for personal services so long as employee is able to continue in work, to do satisfactory work, or the like, as within statute of frauds relating to contracts not to be performed within year, 28 ALR2d 878.

Recovery for services rendered by persons living in apparent relation of husband and wife without express agreement for compensation, 94 ALR3d 552.

Liability to pay for allegedly unauthorized repairs on motor vehicle, 5 ALR4th 311.

13-1-7. Contract defined — Absolute and conditional contracts.

(a) A contract may be absolute or conditional. In an absolute contract, every covenant is independent and the breach of one does not relieve the obligation of another. In a conditional contract, the covenants are dependent upon each other and the breach of one is a release of the binding force of all dependent covenants.

(b) The classification of every contract must depend upon a rational interpretation of the intention of the parties. (Orig. Code 1863, § 2683; Code 1868, § 2679; Code 1873, § 2721; Code 1882, § 2721; Civil Code 1895, § 3638; Civil Code 1910, § 4223; Code 1933, § 20-109.)

JUDICIAL DECISIONS

Absolute contracts. — The decline in quality of maintenance and repair under a lease agreement to provide, maintain, and repair trucks does not go to the whole consideration of the agreement and is not the breach of a dependent covenant which excuses lessee's performance on the agreement. *Complete Trucklease, Inc. v. Auto Rental & Leasing, Inc.*, 160 Ga. App. 568, 288 S.E.2d 75 (1981).

An unconditional contract is one that has no condition in it. *Dye v. Garrett*, 78 Ga. 471, 3 S.E. 692 (1887); *Rodgers v. Caldwell*, 112 Ga. 635, 37 S.E. 866 (1901).

Condition precedent requires perfor-

mance before performance by other party. *Daniel v. Dalton News Co.*, 48 Ga. App. 772, 173 S.E. 727 (1934).

Effect of indefinite and unenforceable collateral provisions. — Collateral provisions in a contract, though indefinite and thus unenforceable, will not destroy the validity of the contract if the main purpose of the parties is sufficiently clear to be capable of enforcement. *Hartrampf v. Citizens & S. Realty Investors*, 157 Ga. App. 879, 278 S.E.2d 750 (1981).

Contract which embraces more than a stipulation may be in part unconditional, and partly conditional. *Monk v. National*

Bank, 12 Ga. App. 253, 76 S.E. 278, later appeal, 13 Ga. App. 740, 79 S.E. 484 (1913).

Discussion of application of section where covenants appear to be partially dependent. — See *Brenard Mfg. Co. v. Kingston Supply Co.*, 22 Ga. App. 280, 95 S.E. 1028 (1918).

Effect of contract to make a contract in the future. — Unless an agreement is reached as to all terms and conditions and nothing is left to future negotiations, a contract to enter into a contract in the future is of no effect. Such an agreement lacks the necessary specificity and mutuality to be enforceable and, therefore, an absolute covenant cannot be made dependent upon it. *Hartrampf v. Citizens & S. Realty Investors*, 157 Ga. App. 879, 278 S.E.2d 750 (1981).

One may contract to convey property in future, conditioned upon one's acquisition of title thereto. *Northington-Munger Pratt Co. v. Farmers' Gin & Whse. Co.*, 119 Ga. 851, 47 S.E. 200, 100 Am. St. R. 210 (1904).

Waiver of alimony conditioned on spouse's compliance with agreement was conditional contract. — Fact that wife and husband executed written agreement in which she waived alimony and other claims, conditional upon his compliance with terms of agreement would not preclude her from obtaining temporary alimony, where condition of agreement required that he pay \$50.00 in cash, and this amount was not paid or tendered. *Fulenwider v. Fulenwider*, 188 Ga. 856, 5 S.E.2d 20 (1939).

Offer to pay upon receipt of possession and title not conditional upon vendor's acquiring title. — Written offer of \$1,000.00 for a described gin outfit and to pay for the gin outfit upon other party giving possession and good title, when duly accepted, is an absolute contract of bargain and sale and not conditional upon vendor being able to acquire title so as to make delivery. *Northington-Munger Pratt Co. v. Farmers' Gin & Whse. Co.*, 119 Ga. 851, 47 S.E. 200, 100 Am. St. R. 210 (1904).

Stipulation in note for attorney's fees ordinarily not unconditional contract. — Stipulation in promissory note to pay attorney's fees is not, and by law cannot ordinarily be made an unconditional contract; for the payment of attorney's fees is absolutely conditioned upon timely service of notice required by law. *Savannah Bank & Trust Co. v. Purvis*, 6 Ga. App. 275, 65 S.E. 35 (1909);

Pendergrast v. Greeson, 6 Ga. App. 47, 64 S.E. 282 (1909), for other cases, see 4 Cum. Dig. 38.

"Time of the essence" clause. — Plaintiff's contention that a "time of the essence clause" warranted contract's expiration upon failure to close realty sale on date specified was without merit, since there was no expiration date in the contract and no clause imposing a condition of closing by the date specified. Instead, contract's provisions merely bound the parties to timely performance or response for breach. *Seпарк v. Caswell Bldrs., Inc.*, 209 Ga. App. 713, 434 S.E.2d 502 (1993).

Plaintiff must allege or excuse performance of any condition precedent. — When plaintiff's right to recover on contract depends on condition precedent to be performed by the plaintiff, the plaintiff, must allege and prove performance of such condition precedent, or allege sufficient legal excuse for its nonperformance. *Daniel v. Dalton News Co.*, 48 Ga. App. 772, 173 S.E. 727 (1934); *Mutual Benefit Health & Accident Ass'n v. Hulme*, 57 Ga. App. 876, 197 S.E. 85 (1938), later appeal, 60 Ga. App. 65, 2 S.E.2d 750 (1939).

When performance of condition precedent is in issue, court to instruct, without request, on statute. — When in suit on written contract, sole contested issue was whether or not admitted condition precedent of contract had been performed, it was duty of court, without request, to instruct jury as to substance of legal rules embodied in the statutes controlling conditional contracts and conditions precedent. *Rice v. Harris*, 52 Ga. App. 42, 182 S.E. 404 (1935).

Independent covenants in contract. — In a suit by a manufacturer against a mill for breach of contract, it was error to direct a verdict for the mill. The manufacturer's obligation to pay for tufted yarn and the mill's obligation to return unused yarn and backing were independent covenants, not dependent ones; thus, a jury was authorized to find that the manufacturer's breach did not excuse the mill's breach. *Beaulieu Group, LLC v. S&S Mills, Inc.*, 292 Ga. App. 455, 664 S.E.2d 816 (2008).

Cited in *Burnside v. Terry*, 45 Ga. 621 (1872); *Pope v. Harper*, 40 Ga. App. 573, 150 S.E. 470 (1929); *Jordan Realty Co. v. Chambers Lumber Co.*, 176 Ga. 624, 168 S.E. 601

(1933); *Campbell v. Rybert*, 178 Ga. 28, 172 S.E. 52 (1933); *Felton Beauty Supply Co. v. Levy*, 198 Ga. 383, 31 S.E.2d 651 (1944); *Webb v. National Life & Accident Ins. Co.*, 81 Ga. App. 198, 58 S.E.2d 548 (1950);

Whitehead v. Cranford, 210 Ga. 257, 78 S.E.2d 797 (1953); *Sachs v. Swartz*, 233 Ga. 99, 209 S.E.2d 642 (1974); *Walter E. Heller & Co. v. Aetna Bus. Credit, Inc.*, 158 Ga. App. 249, 280 S.E.2d 144 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 320 et seq., 355, 361, 362, 443, 445, 449, 507.

C.J.S. — 17 C.J.S., Contracts, § 10.

ALR. — Acceptance of offer with condition which law would imply, 1 ALR 1508.

Performance by vendor of covenant to make improvement as condition of his right to foreclose or forfeit contract, 128 ALR 656.

Restrictive clause in employment or sales contract to prevent future competition or performance of services for other affected

by breach by party seeking to enforce it, of his own obligations under the contract, 155 ALR 652.

Provision in contract for sale of real property which makes performance conditional upon purchaser's or third person's satisfaction with condition of property, 167 ALR 411.

Limitation to quantum meruit recovery, where attorney employed under contingent fee contract is discharged without cause, 92 ALR3d 690.

13-1-8. Contract defined — Entire and severable contracts.

(a) A contract may be either entire or severable. In an entire contract, the whole contract stands or falls together. In a severable contract, the failure of a distinct part does not void the remainder.

(b) The character of the contract in such case is determined by the intention of the parties. (Orig. Code 1863, § 2687; Code 1868, § 2683; Code 1873, § 2725; Code 1882, § 2725; Civil Code 1895, § 3643; Civil Code 1910, § 4228; Code 1933, § 20-112.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ENTIRE CONTRACTS

SEVERABLE CONTRACTS

General Consideration

Discussion of criterion for determining whether contract is entire or severable. —

See *Dolan v. Lifsey*, 19 Ga. App. 518, 91 S.E. 913 (1917); *Carlton v. Moultrie Banking Co.*, 170 Ga. 185, 152 S.E. 215 (1930); *Burns v. Mitchell*, 55 Ga. App. 862, 191 S.E. 870 (1937); *Evans v. Hartley*, 57 Ga. App. 598, 196 S.E. 273 (1938); *Piedmont Life Ins. Co. v. Bell*, 103 Ga. App. 225, 119 S.E.2d 63 (1961); *Yeargin v. Bramblett*, 115 Ga. App. 862, 156 S.E.2d 97 (1967).

Issue of severability of contract is determined by intention of parties, as evidenced

by the terms of the contract. *Horne v. Drachman*, 247 Ga. 802, 280 S.E.2d 338 (1981).

Whether contract is upon one consideration important in ascertaining parties' intent. — If contract is upon one consideration, this fact is of great importance in determining whether parties intended contract to be entire or severable. *Bearden Mercantile Co. v. Madison Oil Co.*, 128 Ga. 695, 58 S.E. 200 (1907); *Spalding County v. Chamberlain & Co.*, 130 Ga. 649, 61 S.E. 533 (1908).

Contract of guaranty as entire or divisible,

General Consideration (Cont'd)**depending on when consideration passes. —**

There is entire consideration in guaranty contract when all of it passes at time of execution of contract, but when guaranty is to apply not only to indebtedness already incurred, but as well to future obligations, it is divisible and separable. *Haynie v. First Nat'l Bank*, 117 Ga. App. 766, 162 S.E.2d 27 (1968).

Global settlement agreements would tend to be entire rather than severable; thus, the trial court erred in ruling that an agreement was severable since appellee's agreement to execute the mutual releases provided part of the consideration for appellant's agreement to pay money. *Imerman v. London*, 255 Ga. App. 140, 564 S.E.2d 544 (2002).

Courts are not bound by severability provisions in antenuptial agreements. — Husband's argument that an antenuptial agreement contained a severability clause and that, under O.C.G.A. § 13-1-8(a), the failure to abide by the portion of the agreement concerning attachment of lists showing property owned or held did not void the entire agreement was without merit; the trial court was not bound by the language of the agreement as to severability, but the question was whether there was a misrepresentation or nondisclosure of a material fact. *Alexander v. Alexander*, 279 Ga. 116, 610 S.E.2d 48 (2005).

Cited in *Harden v. Lang*, 110 Ga. 392, 36 S.E. 100 (1900); *Atlantic Coast Line R.R. v. Sweat*, 177 Ga. 698, 171 S.E. 123 (1933); *Gower v. Ozmer*, 55 Ga. App. 81, 189 S.E. 540 (1936); *Fulenwider v. Fulenwider*, 188 Ga. 856, 5 S.E.2d 20 (1939); *Stafford v. Birch*, 189 Ga. 405, 5 S.E.2d 744 (1939); *Irvindale Farms, Inc. v. W.O. Pierce Dairy, Inc.*, 78 Ga. App. 670, 51 S.E.2d 712 (1949); *Blue Ridge Apt. Co. v. Telfair Stockton & Co.*, 205 Ga. 552, 54 S.E.2d 608 (1949); *Dumas v. Dumas*, 84 Ga. App. 265, 66 S.E.2d 129 (1951); *Littlegreen v. Gardner*, 208 Ga. 523, 67 S.E.2d 713 (1951); *Southern Airways Co. v. DeKalb County*, 102 Ga. App. 850, 118 S.E.2d 234 (1960); *Spindel v. National Homes Corp.*, 110 Ga. App. 12, 137 S.E.2d 724 (1964); *Union Camp Corp. v. Dyal*, 460 F.2d 678 (5th Cir. 1972); *Clarke's Super Gas, Inc. v. Tri-State Sys.*, 129 Ga. App. 650, 200 S.E.2d 472 (1973); *Austin v. Benefield*, 140

Ga. App. 96, 230 S.E.2d 16 (1976); *Dozier v. Shirley*, 240 Ga. 17, 239 S.E.2d 343 (1977); *Genins v. Geiger*, 144 Ga. App. 244, 240 S.E.2d 745 (1977); *Toole v. Brownlow & Sons Co.*, 151 Ga. App. 292, 259 S.E.2d 691 (1979); *O.H. Carter Co. v. Buckner*, 160 Ga. App. 627, 287 S.E.2d 636 (1981); *Atlanta Professional Ass'n for Thoracic & Cardiovascular Surgery, P.C. v. Allen*, 163 Ga. App. 400, 294 S.E.2d 647 (1982); *Kem Mfg. Corp. v. Sant*, 182 Ga. App. 135, 355 S.E.2d 437 (1987); *Gray v. Higgins*, 205 Ga. App. 52, 421 S.E.2d 341 (1992); *Toncee, Inc. v. Thomas*, 219 Ga. App. 539, 466 S.E.2d 27 (1995); *Turnipseed v. Jaje*, 267 Ga. 320, 477 S.E.2d 101 (1996); *Chaichimansour v. Pets Are People, Too, No. 2, Inc.*, 226 Ga. App. 69, 485 S.E.2d 248 (1997).

Entire Contracts

If contract was to take whole or none, then contract would be entire. *Horne v. Drachman*, 247 Ga. 802, 280 S.E.2d 338 (1981).

If each party's promise is only part consideration for other party's promise, contract is entire. *Pittsburgh Plate Glass Co. v. Jarrett*, 42 F. Supp. 723 (M.D. Ga. 1942), modified, 131 F.2d 674 (5th Cir. 1942).

An entire contract is one in which consideration is entire on both sides. Entire fulfillment of promise by either in absence of any agreement to contrary, or waiver, is condition precedent to fulfillment of any part of promise by other. *Carlton v. Moultrie Banking Co.*, 170 Ga. 185, 152 S.E. 215 (1930).

In indivisible contract, fulfillment of promise by either is condition precedent to performance by other. — In indivisible contract, entire fulfillment of promise by either, in absence of any agreement to contrary, or waiver, is condition precedent to fulfillment of any part of promise by the other. *Hill v. Balkom*, 79 Ga. 444, 5 S.E. 200 (1888); *Dolan v. Lifsey*, 19 Ga. App. 518, 91 S.E. 913 (1917); *Williams v. Claussen-Lawrence Constr. Co.*, 120 Ga. App. 190, 169 S.E.2d 692 (1969).

Contract may be an entire one and yet contain stipulation for delivery by installments. *Branch, Sons & Co. v. Palmer*, 65 Ga. 210 (1880).

Entire contract not apportionable at law or in equity. — Contract to pay a gross sum for certain and definite consideration is an en-

tire contract, and is not apportionable either at law or in equity. *Carlton v. Moultrie Banking Co.*, 170 Ga. 185, 152 S.E. 215 (1930); *Williams v. Claussen-Lawrence Constr. Co.*, 120 Ga. App. 190, 169 S.E.2d 692 (1969).

Entire contract void in part is void in toto. — Contract made for sale of real and personal property, which is entire and founded upon one and same consideration, if void in part is void in toto. *Mims v. Gillis*, 19 Ga. App. 53, 90 S.E. 1035 (1916).

Repudiation of one of two vital obligations in an entire contract is repudiation of all of contract. *Unity Life Ins. Co. v. Beasley*, 64 Ga. App. 277, 13 S.E.2d 32 (1941).

Where contract is entire, purchaser cannot accept part of goods and reject remainder. — Where purchaser rejects part of goods sold under an entire contract, because rejected goods are of quality inferior to those contracted for, purchaser is not bound for full amount of agreed price, but is to be treated as if the purchaser had accepted goods of quality inferior to that covered by express warranty. *Fleischer Knitting Mills, Inc. v. Greenberg*, 54 Ga. App. 552, 188 S.E. 458 (1936).

Where single promise based on single consideration, whole contract void if either is illegal. — Where agreement consists of single promise, based on single consideration, if either is illegal, the whole contract is void. But where agreement is founded on legal consideration containing a promise to do several things or to refrain from doing several things, only some of which are illegal, promises which are not illegal will be held valid. *Martell v. Atlanta Biltmore Hotel Corp.*, 114 Ga. App. 646, 152 S.E.2d 579 (1966).

Statute of limitations begins running when work under indivisible contract terminates or is completed. — As against cause of action to recover compensation for services rendered under an entire indivisible contract, statute of limitations begins to run when services are terminated or work is completed, although work may consist of numerous parts or items, and although contract provides that compensation shall be made at stated intervals, or in installments. *Burns v. Mitchell*, 55 Ga. App. 862, 191 S.E. 870 (1937).

Six year limitation period was applicable as contract obligation was entire. — Contract

obligation was entire as the contractual consideration at issue was a single sum certain to be paid in one lump sum; the fact that the whole sum could have been due at different times, whichever came first, according to the contract, did not render the contract divisible; accordingly, the six year statute of limitations found in O.C.G.A. § 9-3-24 for breaches of written contracts applied and time barred defendant's counterclaim. *Bridge Capital Investors II v. Small*, No. 3:02-CV-80 (CAR), 2005 U.S. Dist. LEXIS 17088 (M.D. Ga. Aug. 11, 2005).

Where claims arise from entire contract for continuous services, demand will be considered entire. *Burns v. Mitchell*, 55 Ga. App. 862, 191 S.E. 870 (1937).

In action on entire contract, defendants pleading breach by plaintiff need not allege amount damaged. — Where in contract which is basis of action was an entire contract, and defendants can plead that plaintiff had breached in certain particulars, setting the particulars forth, it is not incumbent upon the defendants to allege amount that the defendants had been damaged by reason of such breaches. *Dolan v. Lifsey*, 19 Ga. App. 518, 91 S.E. 913 (1917).

On facts, contract of sale covering lot of goods not severable. *Smith v. Harrison*, 26 Ga. App. 325, 106 S.E. 191 (1921); *Fleisher Knitting Mills, Inc. v. Greenberg*, 54 Ga. App. 552, 188 S.E. 458 (1936).

In entire contract, appreciable material deficiency in quantity delivered defeats recovery by seller. — Where contract is entire any appreciable material deficiency in quantity of goods delivered would ordinarily defeat recovery by seller, since whole contract must stand or fall together. *Frank & Meyer Neckwear Co. v. White*, 29 Ga. App. 694, 116 S.E. 855 (1923), later appeal, 32 Ga. App. 613, 124 S.E. 116 (1924).

Note for purchase price, stated only in aggregate, is an entire contract. — In suit upon note for purchase price of various kinds and quantities of fertilizers, price of which is stated only in aggregate, there can be no recovery for any of purchase price if sold in violation of law. The contract sued upon, being entire, must fail altogether if consideration is in any part illegal. *Bartow Guano Co. v. Adair*, 29 Ga. App. 644, 116 S.E. 342 (1923).

Contract for complete construction of building at stipulated price not divisible. —

Entire Contracts (Cont'd)

Contract whereby one agrees to furnish all material and labor for construction of building, and to turn over the building in finished state to another on payment of stipulated price, such contract is an entire one and is not to be held as divisible because the contract contains a stipulation that when building has arrived at certain stage of completion owner may suspend further work, and that, if owner elects to do so, a stated sum is to be compensation for labor done and material furnished. *Hunnicuttt & Bellingrath Co. v. Van Hoose*, 111 Ga. 518, 36 S.E. 669 (1900).

Lease contract held to be entire. — Lease contract was entire and not severable, where the agreement provided a lump sum monthly rental rate of \$2,250 for all laboratory "systems" provided, but did not segregate the laboratory equipment nor assign a monthly rental value for each system, and the lease designated a single sale price for the equipment. *Medical Doctor Assocs. v. Lab-Quip Co.*, 201 Ga. App. 880, 412 S.E.2d 625 (1991).

Leasehold use limited. — A requirement in a lease that the space be used solely as an attorney's office cannot be considered merely an ancillary covenant but must be considered central to the contract. *Merren v. Plaza Towers Ltd. Partnership*, 161 Ga. App. 543, 287 S.E.2d 771 (1982).

Tuition contract stipulating no reduction in charges although payable periodically upon voluntary withdrawal not severable. — Where parties to contract for tuition contemplate that school contracts for services a year in advance and that places are limited, and where contract incorporates provision that charges will not be reduced upon voluntary withdrawal, contract is entire and not severable notwithstanding that payments are payable for separate periods of academic year. *Matthews v. Riverside Academy*, 45 Ga. App. 30, 163 S.E. 238 (1932).

Employment contract containing anticompetitive clause and pretermination notice requirement not severable. — Contract of employment containing restrictive provisions as to right of employee to work for competitor of employer in territory within one year after termination of employment and requiring one week's notice be-

fore employment can be terminated is an entire contract and the contract's provisions must stand or fall together. If employer discharges employee in violation of provision requiring one-week's notice, the employer is not entitled, in equity, to enjoin employee from working for competitor. *Felton Beauty Supply Co. v. Levy*, 198 Ga. 383, 31 S.E.2d 651 (1944).

Employment contracts. — It was a significant indication of the parties' intent that the employment agreement did not contain a severability clause; thus, the contract was obviously intended to be entire, and the defective provisions go to the essential elements of the contract: the duration of the contract and the employee's period of employment and salary were not subsidiary to the essential purpose of the contract. Therefore, the indefinite statements regarding the employee's duties, the term of the employee's employment, and the employee's salary made the contract unenforceable. *Key v. Naylor, Inc.*, 268 Ga. App. 419, 602 S.E.2d 192 (2004).

Contractor cannot recover on indivisible contract absent performance in accordance with contract's terms. — Contract to perform certain work on building which is entire and not divisible cannot be recovered upon by contractor until the contractor has performed work in accordance with terms of contract. *Barnes v. Goodner*, 77 Ga. App. 448, 49 S.E.2d 128 (1948).

Absent acceptance of part performance, contractor denied recovery on contract for labor or materials. — Absent acceptance of part performance, contractor failing to perform work in accordance with contract cannot recover on contract for labor performed or material furnished. *Hillhouse v. Adams*, 44 Ga. App. 315, 161 S.E. 274 (1931).

No recovery on indivisible employment contract by rightfully discharged employee for partial performance. — Where contract between employer and employee is an entire one, and employee is rightfully discharged, in suit by the employee on contract there can be no recovery for partial performance. *Parker v. Farlinger*, 122 Ga. 315, 50 S.E. 98 (1905).

No recovery on indivisible contract for part performance, although action in quantum meruit may be for accepted part performance. *Dolan v. Lifsey*, 19 Ga. App. 518, 91 S.E. 913 (1917).

Severable Contracts

Contract containing mutual, legal promises and illegal promises is severable and former are enforceable. — Where contract contains mutual, binding, legal promises independent of two allegedly illegal, void provisions, the contract is severable, and legal portions are not annulled by illegal ones and can be enforced. *Martell v. Atlanta Biltmore Hotel Corp.*, 114 Ga. App. 646, 152 S.E.2d 579 (1966).

Because the settlement agreement did not consist of a single promise based on a single consideration, but rather was founded on a legal consideration containing a promise to do several things or to refrain from doing several things and only the promise regarding college education payments was legally unenforceable, the remaining promises, that were not illegal, remained valid. *Charles v. Leavitt*, 264 Ga. 160, 442 S.E.2d 241 (1994).

Waiver of nonwaivable matter does not void whole contract if severable. — When loan agreement contains waiver of provision for notice of sale, which was nonwaivable under former Code 1933, § 20-305, unenforceable nature of this clause did not void entire contract if contract was severable. *Lowe v. Termplan, Inc.*, 144 Ga. App. 671, 242 S.E.2d 268 (1978).

A vehicle loaner agreement between a garage and the garage's customer could be severed to eliminate the waiver by the customer of the garage's liability insurance, which would violate both statute and public policy, and allow the remainder of the contract, which did not violate a statute or public policy, to remain enforceable. *Nolley v. Maryland Cas. Ins. Co.*, 222 Ga. App. 901, 476 S.E.2d 622 (1996).

Party free to accept performance of remaining part of severable contract although severed portion illegal. — Where contract is severable, even if there is partial failure of consideration because of illegality, one party to contract may not object if opposite party is willing to accept performance of remaining portions of contract. *Jones v. Clark*, 147 Ga. App. 657, 249 S.E.2d 619 (1978).

Mere statement of two accounts does not make defendant debtor of one party alone where account of each arose out of separate contract for defendant's services. *Oliver v. Hall County Mem. Hosp.*, 65 Ga. App. 59, 15 S.E.2d 257 (1941).

Statement containing doctor's and hospital's accounts does not necessarily render them indivisible. — Mere presentation by hospital to patient of single statement containing account of doctor and account of hospital does not necessarily merge account of doctor into indivisible part of account of hospital, and, upon failure of defendant to pay either or both accounts, doctor or hospital may subsequently sue in doctor's or hospital's own name for value of doctor's or hospital's services, and this is true even though in meantime either may have brought suit in their own name and recovered for their services only. *Oliver v. Hall County Mem. Hosp.*, 65 Ga. App. 59, 15 S.E.2d 257 (1941).

Option to purchase not severable from unenforceable contract. — A trial court erred in finding that a lease-purchase agreement was enforceable because, though it satisfied the statute of frauds, it was invalid for failure of consideration in that the lessee/proposed purchaser never paid the rent owed nor any of the property taxes, which not only invalidated the agreement but voided the purchase option under O.C.G.A. § 13-1-8(a). Further, the trial court erred in holding that the lessee/proposed purchaser was entitled to specific performance of the agreement based on repairs made since there was no legal authority to support the trial court's proposition that part performance of an otherwise unenforceable written agreement, as modified by subsequent oral agreements between the parties, transformed it into an enforceable parol contract. *Estate of Ryan v. Shuman*, 288 Ga. App. 868, 655 S.E.2d 644 (2007), cert. denied, 2008 Ga. LEXIS 482 (Ga. 2008).

On facts, contract divisible. *Bearden Mercantile Co. v. Madison Oil Co.*, 128 Ga. 695, 58 S.E. 200 (1907); *Atlantic Steel Co. v. R.O. Campbell Coal Co.*, 262 F. 555 (N.D. Ga. 1919).

Contract with multiple promises based upon multiple considerations severable. — Although an arbitration provision in an employment agreement was found to be unenforceable because the agreement was not initialed by all of the signatories, as required by O.C.G.A. § 9-9-2(c)(9), the remainder of the agreement was enforceable because the agreement was severable from the arbitration clause; it was found that the contract

Severable Contracts (Cont'd)

was severable under O.C.G.A. § 13-1-8(a) because the contract contained multiple promises based upon multiple consideration. *ISS Int'l Serv. Sys. v. Widmer*, 264 Ga. App. 55, 589 S.E.2d 820 (2003).

Causes of action accrue from time to time as services rendered under severable contract. — Where account grew out of implied undertakings that amounted to severable contract, it follows that rights of action accrued and statute of limitation began to run as services were rendered and charges were made from time to time on the account. *Yeargin v. Bramblett*, 115 Ga. App. 862, 156 S.E.2d 97 (1967).

Contract was severable and enforceable. — Option contract, in which potential buyers of hotel were given a 60-day option to obtain financing in return for \$10,000, was severable and enforceable; buyers were not allowed to escape contract obligations for lack of a specified interest rate in contract. *Bulloch S., Inc. v. Gosai*, 250 Ga. App. 170, 550 S.E.2d 750 (2001).

Under O.C.G.A. § 13-1-8(a), it was proper to sever an illegal limiting provision of arbitration clause and to then compel arbitration of discrimination claims because the employment agreement contained a severability clause and Georgia law provided that a valid part of a contract was not invalidated by a separate part that was unenforceable and it was the intent of the parties to allow severance. *Jackson v. Cintas Corp.*, 425 F.3d 1313 (11th Cir. 2005).

Running of limitation. — An action alleging that defendant company breached a sales representative agreement by removing areas from the representative's territory and by repeatedly reducing the commission rate below that provided in the agreement was not time barred as to sales within the six-year limitation period prior to the suit, even though the removal of territory and rate reduction occurred more than six years before the suit was brought, since the commissions were not due until sales were consummated. *Douglas & Lomason Co. v. Hall*, 212 Ga. App. 475, 441 S.E.2d 870 (1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 239 et seq., 315 et seq. 29 Am. Jur. 2d, Evidence, § 860.

C.J.S. — 17A C.J.S., Contracts, §§ 331 et seq., 458, 502, 511, 627.

ALR. — Right of beneficiary to enforce contract between third persons to provide for him by will, 2 ALR 1193; 33 ALR 739; 73 ALR 1395.

Failure to comply with statute of frauds as to a part of a contract within the statute as affecting the enforceability of another part not covered by the statute, 71 ALR 479.

Severability of invalid arbitration provisions of contract, 90 ALR 1305.

Validity of stipulation, in contract between attorney and client, prohibiting or restricting right of latter to compromise without former's consent, and effect of invalid stip-

ulation in regard upon rest of contract, 121 ALR 1122.

Entirety or divisibility of building construction contract for two or more separate buildings, 147 ALR 933.

Severability of provisions in collective bargaining labor contracts, 14 ALR2d 846.

Liabilities or risks of loss arising out of contract for repairs or additions to, or installations in, existing building which, without fault of either party, is destroyed pending performance, 28 ALR3d 788.

Construction of provision in real-estate mortgage, land contract, or other security instrument for release of separate parcels of land as payments are made, 41 ALR3d 7.

Limitation to quantum meruit recovery, where attorney employed under contingent fee contract is discharged without cause, 92 ALR3d 690.

13-1-9. Apportionment of entire contracts.

In some cases even an entire contract is apportionable, as where the price to be paid is not fixed, or is by the contract itself apportioned according to time; so, if the failure of one party to perform is caused by the act of the

other, the contract may still be apportioned. (Orig. Code 1863, § 2688; Code 1868, § 2684; Code 1873, § 2726; Code 1882, § 2726; Civil Code 1895, § 3644; Civil Code 1910, § 4229; Code 1933, § 20-113.)

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Section provides exceptions to general rule that entire contracts not apportionable.

— Generally an entire contract, from the contract's very nature, is not subject to apportionment. It is true that by the terms of this section, provision is made for certain exceptions to the general rule. *White v. Sailors*, 17 Ga. App. 550, 87 S.E. 831 (1916).

Employee abandoning employment contract with consent of employer's agent, entitled to apportionment. — Where employee abandons contract with consent of employ-

er's wife, acting as the employer's agent, which act was not repudiated by employer, employee entitled to apportionment of the contract. *Trawick v. Trussell*, 122 Ga. 320, 50 S.E. 86 (1905).

Cited in *Blun & Sterne v. Holitzer*, 53 Ga. 82 (1874); *Atlantic Coast Line R.R. v. Sweat*, 177 Ga. 698, 171 S.E. 123 (1933); *Union Camp Corp. v. Dyal*, 460 F.2d 678 (5th Cir. 1972); *Olivetti Leasing Corp. v. Metro-Plastics, Inc.*, 128 Ga. App. 401, 196 S.E.2d 686 (1973).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 96, 313, 315. 77 Am. Jur. 2d, Vendor and Purchaser, § 53, 521.

C.J.S. — 17A C.J.S., Contracts, § 502.

13-1-10. Licenses and contracts distinguished.

Where, in the exercise of the police power, a license is issued, the license is not a contract but only a permission to enjoy the privilege for the time specified, on the terms stated; and it may be abrogated. (Civil Code 1895, § 15; Civil Code 1910, § 15; Code 1933, § 20-117.)

History of Code section. — This Code section is derived from the decisions in *Brown v. State*, 82 Ga. 224, 7 S.E. 915 (1888),

and *Sprayberry v. City of Atlanta*, 87 Ga. 120, 13 S.E. 197 (1891).

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License granted by city to engage in business within city's boundaries is not a contract. *City of Thomson v. Davis*, 92 Ga. App. 216, 88 S.E.2d 300 (1955).

License or permit to establish cemetery on described lands is personal privilege and not assignable. — Though it be considered as a grant running with land, such license or permit does not attach if land is not dedicated to public use for burial purposes.

Arlington Cem. v. Bindig, 212 Ga. 698, 95 S.E.2d 378 (1956).

City not authorized to arbitrarily revoke business license. — Section has reference to licenses issued in exercise of police power, and city has no authority to arbitrarily revoke business license which city has granted to proprietor of restaurant or lunch counter. *Peginis v. City of Atlanta*, 132 Ga. 302, 63 S.E. 857, 35 L.R.A. (n.s.) 716 (1909).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Licenses and Permits, §§ 2 et seq., 29, 89.

C.J.S. — 17A C.J.S., Contracts, § 327.

ALR. — Willful or intentional variation by

contractor from terms of contract in regard to material or work as affecting measure of damages, 6 ALR 137.

13-1-11. Validity and enforcement of obligations to pay attorney's fees upon notes or other evidence of indebtedness.

(a) Obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, shall be valid and enforceable and collectable as a part of such debt if such note or other evidence of indebtedness is collected by or through an attorney after maturity, subject to the following provisions:

(1) If such note or other evidence of indebtedness provides for attorney's fees in some specific percent of the principal and interest owing thereon, such provision and obligation shall be valid and enforceable up to but not in excess of 15 percent of the principal and interest owing on said note or other evidence of indebtedness;

(2) If such note or other evidence of indebtedness provides for the payment of reasonable attorney's fees without specifying any specific percent, such provision shall be construed to mean 15 percent of the first \$500.00 of principal and interest owing on such note or other evidence of indebtedness and 10 percent of the amount of principal and interest owing thereon in excess of \$500.00; and

(3) The holder of the note or other evidence of indebtedness or his or her attorney at law shall, after maturity of the obligation, notify in writing the maker, endorser, or party sought to be held on said obligation that the provisions relative to payment of attorney's fees in addition to the principal and interest shall be enforced and that such maker, endorser, or party sought to be held on said obligation has ten days from the receipt of such notice to pay the principal and interest without the attorney's fees. If the maker, endorser, or party sought to be held on any such obligation shall pay the principal and interest in full before the expiration of such time, then the obligation to pay the attorney's fees shall be void and no court shall enforce the agreement. The refusal of a debtor to accept delivery of the notice specified in this paragraph shall be the equivalent of such notice.

(b) Obligations to pay attorney's fees contained in security deeds and bills of sale to secure debt shall be subject to this Code section where applicable. (Ga. L. 1890-91, p. 221, § 1; Civil Code 1895, § 3667; Ga. L. 1900, p. 53, § 1; Civil Code 1910, § 4252; Code 1933, § 20-506; Ga. L. 1946, p. 761, § 1; Ga. L. 1953, Jan.-Feb. Sess., p. 545, § 1; Ga. L. 1957, p. 264, § 1; Ga. L. 1968, p. 317, § 1; Ga. L. 2010, p. 878, § 13/HB 1387.)

The 2010 amendment, effective June 3, 2010, part of an Act to revise, modernize, and correct the Code, in subsection (a), in the introductory language, substituted “collectable” for “collectible”, added “and” at the end of paragraph (a)(2), and substituted “his or her attorney” for “his attorney” in the first sentence of paragraph (a)(3).

Cross references. — Liens for attorneys’ services generally, § 15-19-14.

Law reviews. — For article, “Attorney’s Fees for Secured Creditors in Bankruptcy Proceedings,” see 13 Ga. St. B.J. 126 (1976). For article discussing attorney’s fees as an obligation owed to the secured creditor in bankruptcy proceedings, see 13 Ga. St. B.J. 118 (1977). For article surveying recent ju-

dicial developments in commercial law, see 31 Mercer L. Rev. 13 (1979). For article on protecting the secured creditor in business bankruptcies, see 18 Ga. St. B.J. 62 (1981). For survey article on commercial law, see 34 Mercer L. Rev. 31 (1982). For survey article on real property, see 34 Mercer L. Rev. 255 (1982). For annual survey of commercial law, see 38 Mercer L. Rev. 85 (1986). For annual survey of law of real property, see 38 Mercer L. Rev. 319 (1986). For survey article on commercial law, see 44 Mercer L. Rev. 99 (1992). For article, “Commercial Law,” see 53 Mercer L. Rev. 153 (2001). For survey article on appellate practice and procedure, see 60 Mercer L. Rev. 21 (2008).

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General Consideration

Legislative intent behind the enactment of O.C.G.A. 13-1-11 has been fulfilled so long as a debtor has been informed that the debtor has 10 days from receipt of notice within which to pay principal and interest without incurring any liability for attorney fees. *Trust Assoc. v. Snead*, 253 Ga. App. 475, 559 S.E.2d 502 (2002).

Term “principal,” as used by the drafters of O.C.G.A. § 13-1-11, refers only to the principal amount owing on the note in question. *ITT Com. Fin. Corp. v. Fisher*, 690 F. Supp. 1021 (N.D. Ga. 1988).

Statute merely restricts right which common law recognized. — The statute is not origin of all right to recover attorney’s fees in this state; the statute does not give a right where none existed at common law; on the

other hand, the statute merely restricted a right which common law recognized. *Keating v. Woods-Young Co.*, 42 Ga. App. 63, 155 S.E. 206 (1930); *Global Indus., Inc. v. Harris*, 376 F. Supp. 1379 (N.D. Ga. 1974).

Statute to be strictly construed. — This statute being in derogation of common law and an abridgment of ordinary right of contract is to be strictly construed, and not to extend to case not clearly falling within its terms. *Oliver Typewriter Co. v. Fielder*, 7 Ga. App. 525, 67 S.E. 210 (1910) (see O.C.G.A. § 13-1-11).

Statute, being in derogation of common law, is strictly construed. *Ratliffe v. Hartsfield Co.*, 49 Ga. App. 598, 176 S.E. 151 (1934), rev’d on other grounds, 181 Ga. 663, 184 S.E. 324 (1935) (see O.C.G.A. § 13-1-11).

Section applies to all contracts. —

General Consideration (Cont'd)

O.C.G.A. § 13-1-11 by operation of law constitutes a part of all contracts incorporated in promissory notes, and all such instruments must be construed in the light of this particular section. *Anderson v. Hendrix*, 175 Ga. App. 720, 334 S.E.2d 697 (1985).

Section inapplicable in eminent domain proceeding. — O.C.G.A. § 13-1-11 was intended to apply only in default situations where an indebtedness is collected by or through an attorney after maturity, and the provision in a deed that a bank sought to enforce for reasonable attorney fees incurred as the result of an eminent domain proceeding in order to protect the bank's security interest in the condemned property was not contemplated by the statutory scheme. *Boddy Enters., Inc. v. City of Atlanta*, 171 Ga. App. 551, 320 S.E.2d 374 (1984).

Section inapplicable to exclusive listing contract. — Exclusive listing contract is not a "note or other evidence of indebtedness" within the meaning of subsection (a) of O.C.G.A. § 13-1-11. *O'Brien's Irish Pub, Inc. v. Gerlew Holdings, Inc.*, 175 Ga. App. 162, 332 S.E.2d 920 (1985).

O.C.G.A. § 13-1-11 is inapplicable to personal services contracts. See *Holcomb v. Evans*, 176 Ga. App. 654, 337 S.E.2d 435 (1985).

A lease was an "evidence of indebtedness" within the meaning of O.C.G.A. § 13-1-11. *Holmes v. Bogino*, 219 Ga. App. 858, 467 S.E.2d 197 (1996).

Phrase "evidence of indebtedness" in O.C.G.A. § 13-1-11 is construed broadly so as to encompass leases. *RadioShack Corp. v. Cascade Crossing II, LLC*, 282 Ga. 841, 653 S.E.2d 680 (2007).

Debtor afforded opportunity to avoid attorney fees by paying debt. — Law provides additional requirement that notice be given debtor in order that the debtor be afforded an opportunity to avoid attorney fees by paying the debt. *GECC v. Brooks*, 242 Ga. 109, 249 S.E.2d 596 (1978).

Section as part of contract providing for attorney's fees. — All contracts to pay attorney's fees incorporated in promissory notes or other evidences of indebtedness must be construed in light of the statute, which by operation of law constitutes a part of all such

contracts. *Hall v. Pratt*, 103 Ga. 255, 29 S.E. 764 (1898); *Stoner v. Pickett*, 115 Ga. 653, 42 S.E. 41 (1902); *Booth v. Rosier*, 124 Ga. 154, 52 S.E. 327 (1905).

A lessor was correct in asserting a right to recover reasonable attorney fees under the lessor's lease with its lessee as there was no special pleading requirement for the enforcement of such provision, and the lessor prevailed on the lessor's claim for reimbursement for insurance premiums paid over the life of the lease; thus, the case was remanded for further proceedings as to the amount of reasonable fees the lessor could recover. *Ranwal Props., LLC v. John H. Harland Co.*, 285 Ga. App. 532, 646 S.E.2d 730 (2007).

Fees awarded under paragraph (a)(2). — Attorneys' fees were awarded as designated by paragraph (a)(2) of O.C.G.A. § 13-1-11 where the guaranty agreement provided only for reasonable attorneys' fees without designating any specific percent and the creditor complied with the notice provisions of § 13-1-11 by way of the creditor's complaint. *Westinghouse Credit Corp. v. Hall*, 144 Bankr. 568 (S.D. Ga. 1992).

There is no law requiring that promise to pay attorney's fee shall be in writing in order to be enforceable. *Forsyth Mercantile Co. v. Williams*, 36 Ga. App. 130, 135 S.E. 755 (1926).

Attorney's fees are for benefit of note holder, not attorney. — Under O.C.G.A. § 13-1-11, contractual provisions for attorney's fees are not for the benefit of attorneys. The fees are in the nature of liquidated damages which inure to the benefit of the holder of the note. *Specialty Inv. Corp. v. Village Apt. Assocs.*, 9 Bankr. 211 (Bankr. N.D. Ga. 1981).

When attorney's fees actually incurred or paid, debtor bound to pay as provided by law. *National Acceptance Co. v. Zusmann*, 379 F.2d 351 (5th Cir.), cert. denied, 389 U.S. 975, 88 S. Ct. 478, 19 L. Ed. 2d 469 (1967).

Collection of debt through foreclosure proceedings. — A creditor is entitled to recover attorney fees pursuant to O.C.G.A. § 13-1-11 if the creditor's attorney collects the debt via a foreclosure proceeding. *Kenemer v. First Nat'l Bank*, 210 Ga. App. 389, 436 S.E.2d 96 (1993).

Curing of default on underlying obligation. — Statutory attorney's fees, as contem-

plated by O.C.G.A. § 13-1-11, do not become a lien against secured property where a default on an underlying obligation is cured and reinstated pursuant to the provisions of the Bankruptcy Code (11 U.S.C.), as where default in a Chapter 12 case is cured in the confirmed plan of reorganization. In re Davis, 77 Bankr. 313 (Bankr. M.D. Ga. 1987).

Summary judgment entitling one to attorney fees. — Plaintiff entitled to a summary judgment on a document establishing “evidence of indebtedness,” within the meaning of subsection (a) of O.C.G.A. § 13-1-11 is also entitled to a judgment for attorney fees thereon. Dalcour Mgt., Inc. v. Sewer Rooter, Inc., 205 Ga. App. 681, 423 S.E.2d 419 (1992).

Reasonable attorney fees awarded. — See Chemical Bank v. Grigsby’s World of Carpet, Inc. (In re WWG Indus., Inc.), 44 Bankr. 287 (N.D. Ga. 1984).

Attorney fee award held excessive. — In an action to recover on a promissory note with past due interest, and upon entering summary judgment in favor of the lender, the trial court erred in awarding the lender \$10,195.40 in attorney fees in a judgment in which the principal and interest amounted to only \$6,259.12; under the formula delineated under O.C.G.A. § 13-1-11, such amount was limited to \$650.91. Long v. Hogan, 289 Ga. App. 347, 656 S.E.2d 868 (2008), cert. denied, 2008 Ga. LEXIS 516 (Ga. 2008).

Cited in Goodrich v. Atlanta Bldg. & Loan Ass’n, 96 Ga. 803, 22 S.E. 585 (1895); Rimes v. Williams, 99 Ga. 281, 25 S.E. 685 (1896); Jones v. Harrel, 110 Ga. 373, 35 S.E. 690 (1900); DeLamater v. Martin, 117 Ga. 139, 43 S.E. 459 (1903); Holcomb v. Cable Co., 119 Ga. 466, 46 S.E. 671 (1904); Miller v. Ga. R.R. Bank, 120 Ga. 17, 47 S.E. 525 (1904); Booth v. Rosier, 124 Ga. 154, 52 S.E. 327 (1905); Horrigan v. Savannah Grocery Co., 126 Ga. 127, 54 S.E. 961 (1906); J. Everett & Son v. M. Ferst’s Sons & Co., 126 Ga. 662, 55 S.E. 916 (1906); Brooks v. Boyd, 1 Ga. App. 65, 57 S.E. 1093 (1907); Mount Vernon Bank v. Gibbs, 1 Ga. App. 662, 58 S.E. 269 (1907); Monroe v. Citizens Bank, 3 Ga. App. 296, 59 S.E. 844 (1907); Jester v. Bainbridge State Bank, 4 Ga. App. 476, 61 S.E. 929 (1908); Roth v. Donnelly Grocery Co., 8 Ga. App. 851, 70 S.E. 140 (1911); Holland v. Mutual

Fertilizer Co., 8 Ga. App. 714, 70 S.E. 151 (1911); Stone v. Marshall & Co., 137 Ga. 544, 73 S.E. 826 (1912); Davenport v. Richards, 138 Ga. 611, 75 S.E. 648 (1912); Johnson & Murphy v. Globe Dry Goods Co., 11 Ga. App. 485, 75 S.E. 822 (1912); In re Weiland, 197 F. 116 (N.D. Ga. 1912); Monk v. National Bank, 12 Ga. App. 253, 76 S.E. 278 (1913); Loftis v. Alexander, 139 Ga. 346, 77 S.E. 169, 1914B Ann. Cas. 718 (1913); Shaw v. Probasco, 139 Ga. 481, 77 S.E. 577 (1913); Turner v. Bank of Maysville, 13 Ga. App. 547, 79 S.E. 180 (1913); Strickland v. Lowry Nat’l Bank, 140 Ga. 653, 79 S.E. 539 (1913); Walker v. Wood, 14 Ga. App. 29, 79 S.E. 905 (1913); Langford v. Baekus, 14 Ga. App. 300, 80 S.E. 723 (1914); Valdosta, M. & W.R.R. v. Citizens Bank, 14 Ga. App. 329, 80 S.E. 913 (1914); Cowart v. Bush, 142 Ga. 48, 82 S.E. 441 (1914); Bennett v. Gilmer, 15 Ga. App. 650, 84 S.E. 151 (1915); Royal v. Edinburgh-American Land Mtg. Co., 143 Ga. 347, 85 S.E. 190 (1915); MacDonald v. Ware & Harper, 17 Ga. App. 450, 87 S.E. 679 (1916); Pendleton v. Valdosta Bank & Trust Co., 17 Ga. App. 711, 88 S.E. 211 (1916); Lewis v. Phillips-Boyd Publishing Co., 18 Ga. App. 181, 89 S.E. 177 (1916); Finch v. Cox, 18 Ga. App. 284, 89 S.E. 459 (1916); Glennville Bank v. Deal, 146 Ga. 217, 90 S.E. 958 (1916); Bacon v. Hanesley, 19 Ga. App. 69, 90 S.E. 1033 (1916); Wimberly v. Lumpkin Home Mixture Co., 19 Ga. App. 809, 92 S.E. 286 (1917); Laurens Cotton Co. v. American Trust & Banking Co., 20 Ga. App. 348, 93 S.E. 43 (1917); Millen Hotel Co. v. First Nat’l Bank, 20 Ga. App. 701, 93 S.E. 253 (1917); Wimberly v. Ocmulgee Guano Co., 21 Ga. App. 270, 94 S.E. 288 (1917); Marietta Fertilizer Co. v. Benton, 21 Ga. App. 466, 94 S.E. 657 (1917); F & M Bank v. Alford, 21 Ga. App. 546, 94 S.E. 818 (1918); Fisher v. Shands, 24 Ga. App. 743, 102 S.E. 190 (1920); Morrison v. Fidelity & Deposit Co., 150 Ga. 54, 102 S.E. 354 (1920); Lang v. Hall, 25 Ga. App. 118, 102 S.E. 877 (1920); Chamlee v. Austin, 150 Ga. 279, 103 S.E. 490 (1920); Simmons Lumber Co. v. Toccoa Furn. Co., 26 Ga. App. 758, 107 S.E. 340 (1921); Pannell v. Stark, 27 Ga. App. 104, 107 S.E. 496 (1921); Watters & Co. v. O’Neill, 151 Ga. 680, 108 S.E. 35 (1921); Turner v. Peacock, 153 Ga. 870, 113 S.E. 585 (1922); White v. Chambers, 29 Ga. App. 482, 116 S.E. 26 (1923); Southeast Ga. Land Co.

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v. Rogers, 157 Ga. 763, 122 S.E. 221 (1924); Perry v. John Hancock Mut. Life Ins. Co., 2 F.2d 250 (5th Cir. 1924); Russell v. Life Ins. Co., 34 Ga. App. 640, 130 S.E. 689 (1925); Bank of Lumpkin v. Farmers' State Bank, 35 Ga. App. 340, 133 S.E. 307 (1926); Equitable Life Assurance Soc'y v. Pattillo, 37 Ga. App. 398, 140 S.E. 403 (1927); Meyer v. Hiatt, 40 Ga. App. 583, 150 S.E. 567 (1929); Manry v. Phoenix Mut. Life Ins. Co., 42 Ga. App. 31, 156 S.E. 271 (1930); Kitchens v. Molton, 172 Ga. 690, 158 S.E. 570 (1931); Franklin Mtg. Co. v. McDuffie, 43 Ga. App. 604, 159 S.E. 599 (1931); Oliver v. Lane, 46 Ga. App. 136, 167 S.E. 116 (1932); Adams v. F & M Bank, 47 Ga. App. 420, 170 S.E. 704 (1933); Varner v. Darien Bank, 48 Ga. App. 298, 172 S.E. 651 (1934); Darden v. Federal Reserve Bank, 48 Ga. App. 685, 173 S.E. 227 (1934); Smith v. Bukofzer, 180 Ga. 209, 178 S.E. 641 (1935); Goldin v. Federal Intermediate Credit Bank, 50 Ga. App. 790, 179 S.E. 291 (1935); Nelson v. National Life & Accident Ins. Co., 51 Ga. App. 684, 181 S.E. 202 (1935); Jackson v. Massachusetts Mut. Life Ins. Co., 183 Ga. 659, 189 S.E. 243 (1936); Byrd v. Equitable Life Assurance Soc'y, 185 Ga. 628, 196 S.E. 63 (1938); Oliver v. Wayne, 58 Ga. App. 787, 199 S.E. 841 (1938); Millers Nat'l Ins. Co. v. Hatcher, 194 Ga. 449, 22 S.E.2d 99 (1942); Hill v. Mobley, 81 Ga. App. 522, 59 S.E.2d 263 (1950); Dupree v. Blankenship, 83 Ga. App. 664, 64 S.E.2d 457 (1951); Stone v. Colonial Credit Co., 93 Ga. App. 348, 91 S.E.2d 835 (1956); First Fed. Sav. & Loan Ass'n v. Norwood Realty Co., 212 Ga. 524, 93 S.E.2d 763 (1956); Great Am. Indem. Co. v. Beverly, 150 F. Supp. 134 (M.D. Ga. 1956); Moore v. Trailmobile, Inc., 94 Ga. App. 892, 96 S.E.2d 529 (1957); Holland v. Sterling, 214 Ga. 583, 105 S.E.2d 894 (1958); Young v. John Deere Plow Co., 102 Ga. App. 132, 115 S.E.2d 770 (1960); Howard v. Jones Motor Co., 104 Ga. App. 440, 121 S.E.2d 915 (1961); Hopkins v. West Publishing Co., 106 Ga. App. 596, 127 S.E.2d 849 (1962); Woods v. State, 109 Ga. App. 225, 136 S.E.2d 18 (1964); Cullens v. Sterling Disc't. Corp., 110 Ga. App. 372, 138 S.E.2d 623 (1964); Spivey v. Commercial Credit Equip. Corp., 112 Ga. App. 316, 145 S.E.2d 68 (1965); M.B. Dale, Inc. v. Dawson County Bank, 112 Ga. App. 560, 145 S.E.2d 619 (1965); Wood v. Noland

Credit Co., 113 Ga. App. 749, 149 S.E.2d 720 (1966); Palmer Tire Co. v. L & H Acceptance Corp., 114 Ga. App. 314, 151 S.E.2d 178 (1966); Glaze v. Fulton Nat'l Bank, 114 Ga. App. 291, 151 S.E.2d 478 (1966); Hartsfield Co. No. 3, Inc. v. Williams, 114 Ga. App. 547, 151 S.E.2d 908 (1966); Belt v. Georgia Bank & Trust Co., 115 Ga. App. 545, 154 S.E.2d 764 (1967); Hudgins v. Pure Oil Co., 115 Ga. App. 543, 154 S.E.2d 768 (1967); Camilla Loan Co. v. Sheffield, 116 Ga. App. 626, 158 S.E.2d 698 (1967); Free for All Missionary Baptist Church, Inc. v. Gresham, 116 Ga. App. 767, 159 S.E.2d 183 (1967); Pierce v. Culverson, 384 F.2d 368 (5th Cir. 1967); Godfrey v. Farm & Resort Realty Co., 117 Ga. App. 129, 159 S.E.2d 465 (1968); Sullivan Enters., Inc. v. Stockton, 224 Ga. 357, 162 S.E.2d 396 (1968); Sullivan Enters., Inc. v. Stockton, 118 Ga. App. 542, 164 S.E.2d 336 (1968); Franco v. Bank of Forest Park, 118 Ga. App. 700, 165 S.E.2d 593 (1968); Ghitler v. Edge, 118 Ga. App. 750, 165 S.E.2d 598 (1968); Complete AAA Mfg. Corp., v. Citizens & S. Nat'l Bank, 119 Ga. App. 450, 167 S.E.2d 734 (1969); Singleton v. Rary, 119 Ga. App. 559, 167 S.E.2d 740 (1969); Tankersley v. Security Nat'l Corp., 122 Ga. App. 129, 176 S.E.2d 274 (1970); Cohan v. Flanders, 315 F. Supp. 1046 (S.D. Ga. 1970); General Tire & Rubber Co. v. Solomon, 124 Ga. App. 308, 183 S.E.2d 573 (1971); Edgar v. Edgar Casket Co., 125 Ga. App. 389, 187 S.E.2d 925 (1972); Turner v. Bank of Zebulon, 128 Ga. App. 404, 196 S.E.2d 668 (1973); Twisdale v. Georgia R.R. Bank & Trust Co., 129 Ga. App. 18, 198 S.E.2d 396 (1973); Lanier v. Romm, 131 Ga. App. 531, 206 S.E.2d 588 (1974); King v. Paramount Enters., Inc., 131 Ga. App. 707, 206 S.E.2d 604 (1974); Carter v. Harrell, 132 Ga. App. 148, 207 S.E.2d 648 (1974); Doyal v. Ben O'Callaghan Co., 132 Ga. App. 336, 208 S.E.2d 136 (1974); Interstate Fin. Corp. v. Appel, 134 Ga. App. 407, 215 S.E.2d 19 (1975); Robinson-Shamburger, Inc. v. Tenney, 135 Ga. App. 131, 217 S.E.2d 184 (1975); Moore v. Wachovia Mtg. Co., 138 Ga. App. 646, 226 S.E.2d 812 (1976); Douglas v. Dixie Fin. Corp., 139 Ga. App. 251, 228 S.E.2d 144 (1976); Cel-Ko Bldrs. & Developers, Inc. v. BX Corp., 140 Ga. App. 501, 231 S.E.2d 361 (1976); Burgess v. Clermont Properties, Inc., 141 Ga. App. 112, 232 S.E.2d 627 (1977); New House Prods., Inc. v. Commercial Plas-

tics & Supply Corp., 141 Ga. App. 199, 233 S.E.2d 45 (1977); *Carter v. Jenkins*, 143 Ga. App. 42, 237 S.E.2d 440 (1977); *Bennett v. Adel Banking Co.*, 144 Ga. App. 282, 241 S.E.2d 23 (1977); *Bagwell v. Sportsman Camping Ctrs. of Am., Inc.*, 144 Ga. App. 486, 241 S.E.2d 602 (1978); *Alexander v. Askin Squire Corp.*, 144 Ga. App. 662, 242 S.E.2d 324 (1978); *Childs v. Liberty Loan Corp.*, 144 Ga. App. 715, 242 S.E.2d 354 (1978); *Parnell v. Etowah Bank*, 144 Ga. App. 794, 242 S.E.2d 487 (1978); *C & S Nat'l Bank v. Burden*, 145 Ga. App. 402, 244 S.E.2d 244 (1978); *Roddy Sturdivant Enters., Inc. v. National Adv. Co.*, 145 Ga. App. 706, 244 S.E.2d 648 (1978); *Crestlawn Mem. Park v. Scott*, 146 Ga. App. 715, 247 S.E.2d 175 (1978); *Spencer v. Taylor*, 147 Ga. App. 566, 249 S.E.2d 367 (1978); *Reese v. Robins Fed. Credit Union*, 150 Ga. App. 1, 256 S.E.2d 604 (1979); *Pippin v. Brigadier Indus. Corp.*, 150 Ga. App. 401, 258 S.E.2d 18 (1979); *Oliver v. Citizens DeKalb Bank*, 150 Ga. App. 437, 258 S.E.2d 204 (1979); *Buddy's Appliance Ctr., Inc. v. Amana Refrigeration, Inc.*, 151 Ga. App. 268, 259 S.E.2d 673 (1979); *Browning v. Rewis*, 152 Ga. App. 45, 262 S.E.2d 174 (1979); *Kennedy v. Brand Banking Co.*, 245 Ga. 496, 266 S.E.2d 154 (1980); *Brown v. Leasing Int'l, Inc.*, 154 Ga. App. 616, 269 S.E.2d 106 (1980); *Kennedy v. Gwinnett Com. Bank*, 155 Ga. App. 327, 270 S.E.2d 867 (1980); *Fife v. Anderson Realty Brokers, Inc.*, 155 Ga. App. 475, 271 S.E.2d 9 (1980); *United Rentals Sys. v. Safeco Ins. Co.*, 156 Ga. App. 63, 273 S.E.2d 868 (1980); *ITT Indus. Credit Corp. v. Scarboro*, 7 Bankr. 609 (Bankr. M.D. Ga. 1980); *Alewine v. City Council*, 505 F. Supp. 880 (S.D. Ga. 1981); *International Harvester Credit Corp. v. Clenny*, 505 F. Supp. 983 (M.D. Ga. 1981); *Horne v. Drachman*, 247 Ga. 802, 280 S.E.2d 338 (1981); *Vickers v. Chrysler Credit Corp.*, 158 Ga. App. 434, 280 S.E.2d 842 (1981); *Eiberger v. West*, 247 Ga. 767, 281 S.E.2d 148 (1981); *Willett Lincoln-Mercury, Inc. v. Larson*, 158 Ga. App. 540, 281 S.E.2d 297 (1981); *Charter Medical Mgt. Co. v. Ware Manor, Inc.*, 159 Ga. App. 378, 283 S.E.2d 330 (1981); *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981); *Morris v. Ivey*, 10 Bankr. 230 (Bankr. N.D. Ga. 1981); *ITT Indus. Credit Co. v. Scarboro*, 13 Bankr. 439 (M.D. Ga. 1981); *Merritt v. First State Bank*, 162 Ga. App. 15, 289 S.E.2d 547 (1982); *Thurmond v. Georgia R.R. Bank & Trust Co.*, 162 Ga. App. 245, 290 S.E.2d 126 (1982); *Sawyer v. Citizens & S. Nat'l Bank*, 164 Ga. App. 177, 296 S.E.2d 134 (1982); *Clements v. HFC*, 165 Ga. App. 220, 299 S.E.2d 916 (1983); *Bulman v. First Nat'l Bank*, 165 Ga. App. 843, 303 S.E.2d 29 (1983); *Crockett v. Shafer*, 166 Ga. App. 453, 304 S.E.2d 405 (1983); *Dozier v. Wallace*, 169 Ga. App. 126, 311 S.E.2d 839 (1983); *Leavell v. Bank of Commerce*, 169 Ga. App. 626, 314 S.E.2d 678 (1984); *Stinson v. Georgia Dep't of Human Resources Credit Union*, 171 Ga. App. 303, 319 S.E.2d 508 (1984); *Wood v. Chatham Eng'g & Constr. Co.*, 173 Ga. App. 289, 326 S.E.2d 8 (1985); *Eways v. Georgia R.R. Bank*, 806 F.2d 991 (11th Cir. 1986); *In re Royal*, 75 Bankr. 50 (Bankr. S.D. Ga. 1987); *In re Cunningham*, 79 Bankr. 92 (Bankr. N.D. Ga. 1987); *Bargas v. Rice*, 82 Bankr. 623 (Bankr. S.D. Ga. 1987); *Karr v. Ryback*, 186 Ga. App. 842, 368 S.E.2d 799 (1988); *In re Curtis*, 83 Bankr. 853 (Bankr. S.D. Ga. 1988); *Bruce v. Wal-Mart Stores, Inc.*, 699 F. Supp. 905 (N.D. Ga. 1988); *Security Pac. Bus. Fin., Inc. v. Lichirie Ventures-Godby Plaza, Ltd.*, 703 F. Supp. 936 (N.D. Ga. 1989); *Ewald v. Security Pac. Credit Corp.*, 190 Ga. App. 615, 379 S.E.2d 569 (1989); *Adams v. D & D Leasing Co.*, 191 Ga. App. 121, 381 S.E.2d 94 (1989); *Oviedo v. Connecticut Nat'l Bank*, 194 Ga. App. 626, 391 S.E.2d 417 (1990); *Resolution Trust Corp. v. Dismuke*, 746 F. Supp. 104 (N.D. Ga. 1990); *Hershiser v. Yorkshire Condominium Ass'n*, 201 Ga. App. 185, 410 S.E.2d 455 (1991); *Goodrum v. Ensign Bank*, 202 Ga. App. 53, 413 S.E.2d 230 (1991); *Cessna Fin. Corp. v. Wall*, 876 F. Supp. 273 (M.D. Ga. 1994); *Mullis v. Shaheen*, 217 Ga. App. 277, 456 S.E.2d 764 (1995); *Acuff v. Proctor*, 267 Ga. 85, 475 S.E.2d 616 (1996); *Welzel v. Advocate Realty Invs., LLC*, 275 F.3d 1308 (11th Cir. 2001); *AKA Mgmt. v. Branch Banking & Trust Co.*, 275 Ga. App. 615, 621 S.E.2d 576 (2005); *Citibank (South Dakota), N.A. v. Han (In re Han)*, No. 04-69046-MGD, 2005 Bankr. LEXIS 1922 (Bankr. N.D. Ga. Aug. 8, 2005); *SunTrust Bank v. Hightower*, 291 Ga. App. 62, 660 S.E.2d 745 (2008); *Liberty Lending Servs. v. Canada*, 293 Ga.

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App. 731, 668 S.E.2d 3 (2008).

Conditions Precedent to Recovery of Attorney's Fees

Failure to comply with law renders attorney fees provided for in note or contract uncollectable. *Dunlap v. Citizens & S. DeKalb Bank*, 134 Ga. App. 893, 216 S.E.2d 651 (1975).

Liability for attorney's fees contingent upon full compliance with conditions precedent stated in law. *Adair Realty & Loan Co. v. Williams Bros. Lumber Co.*, 112 Ga. App. 16, 143 S.E.2d 577 (1965); *Holt v. Rickett*, 143 Ga. App. 337, 238 S.E.2d 706 (1977); *Citizens & S. Nat'l Bank v. Bougas*, 149 Ga. App. 722, 256 S.E.2d 37 (1979); *Mills v. East Side Investors*, 7 Bankr. 515 (N.D. Ga. 1980), *aff'd*, 694 F.2d 242 (11th Cir. 1982), superseded by statute as stated in *Welzel v. Advocate Realty Invs., LLC (In re Welzel)*, 245 F.3d 1283 (11th Cir. Ga. 2001).

Section makes enforcement of provision for attorney's fees contingent on creditors giving written notice that debtor can avoid added expense of attorney's fees by paying principal and interest then due within ten days of receipt of notice. *United States v. Hattaway*, 488 F.2d 55 (5th Cir. 1974).

Contingency must be met prior to payment of attorney's fees. — Under contract to pay attorney's fees if note or other obligation is collected by or through attorney, only contingent liability is created for payment of attorney's fees, and no liability for payment of such fees can or will arise until such time as contingency which is condition precedent to collection of such fees has been fully complied with, and collection made by attorney at law. *Strickland v. Williams*, 215 Ga. 175, 109 S.E.2d 761 (1959).

If conditions of law complied with, attorney's fees treated as parts of principal debt rather than as penalty. *Morgan v. Kiser & Co.*, 105 Ga. 104, 31 S.E. 45 (1898); *Royal v. Edinburgh-American Land Mtg. Co.*, 143 Ga. 347, 85 S.E. 190 (1915).

Since a loan servicer did not comply with an O.C.G.A. § 13-1-11 requirement of giving notice of a borrower's (a Chapter 13 debtor) right to avoid attorney fees in mortgage foreclosure proceedings by paying the principal and interest of the loan in full within 10

days, the servicer could not recover attorney fees under 11 U.S.C. §§ 502 and 506(b). *Clark v. Wash. Mut. Home Loans (In re Clark)*, 299 B.R. 694 (Bankr. S.D. Ga. 2003).

Conditions precedent to collection of attorney's fees include notice to debtor that collection be made by attorney at law, that debt has matured, that contract included an obligation to pay attorney's fees, and that required ten-days notice has been given and period has expired without payment of principal and interest in full. *GECC v. Brooks*, 242 Ga. 109, 249 S.E.2d 596 (1978).

Conditions precedent to recovery of attorney's fees under paragraph (a)(3) are: that collection be made by an attorney at law, that debt has matured, that contract included obligation to pay attorney's fees and that required ten-days notice has been given and the ten-day period has expired without payment of principal and interest in full; there must be full compliance with these conditions before a creditor may collect attorney's fees. *Fidelity Nat'l Bank v. Walsey*, 7 Bankr. 779 (Bankr. N.D. Ga. 1980).

Under O.C.G.A. § 13-1-11, the conditions precedent to recovery of contractual attorney's fees are: (1) the contract must include an obligation to pay attorney's fees; (2) the debt must have matured; (3) notice must be given to the debtor informing the debtor that the debtor has ten days within receipt to pay the debt in order to avoid attorney's fees; (4) the ten-day period must expire without payment of principal and interest in full; and (5) the debt must be collected by or through an attorney-at-law. *Specialty Inv. Corp. v. Village Apt. Assocs.*, 9 Bankr. 211 (Bankr. N.D. Ga. 1981).

Notification and opportunity to tender the amount due seem to be the basic requirements contemplated by paragraph (a)(3) of O.C.G.A. § 13-1-11. *Carlos v. Murphy Whse. Co.*, 166 Ga. App. 406, 304 S.E.2d 439 (1983).

Contractual obligations for the payment of attorney fees representing 15 percent of the indebtedness owed are valid and enforceable where the contract contains such a provision, the debt has matured, notice was given the debtor that the debtor has 10 days to pay the debt, the 20-day period has expired, and the debt is collected by or through an attorney. *Dickens v. Calhoun First Nat'l Bank*, 197 Ga. App. 517, 398 S.E.2d 814 (1990).

Actual collection of debt is one condition precedent in paragraph (a)(3) to enforcement of contractual provisions for payment of attorney's fees. *Fidelity Nat'l Bank v. Walsey*, 7 Bankr. 779 (Bankr. N.D. Ga. 1980).

Before contractual attorney's fees may be recovered, the debt must be collected by or through an attorney-at-law. *Specialty Inv. Corp. v. Village Apt. Assocs.*, 9 Bankr. 211 (Bankr. N.D. Ga. 1981).

Actual collection of an indebtedness is not required. O.C.G.A. § 13-1-11 simply requires that the creditor place the matter in the hands of an attorney and that the attorney subsequently take action to enforce the debt. *Specialty Inv. Corp. v. Village Apt. Assocs.*, 9 Bankr. 211 (Bankr. N.D. Ga. 1981).

Attorney fees are only collectable where debt is collected by or through an attorney. *Citizens & S. Nat'l Bank v. Bougas*, 149 Ga. App. 722, 256 S.E.2d 37 (1979), rev'd in part on other grounds, 245 Ga. 412, 265 S.E.2d 562 (1980).

Collection by or through an attorney. — Notes were "collected by or through an attorney" within the meaning of O.C.G.A. § 13-1-11 so as to entitle creditors to attorney fees where debtors did not pay within the required ten days, a nonjudicial foreclosure proceeding was instituted and pursued by the creditors until the debtors' filing of bankruptcy, and a consent decree in a proceeding between the creditors and the debtors for the sequestration of rents provided for the full amount of the principal due as well as interest. *Mills v. East Side Investors*, 694 F.2d 242 (11th Cir. 1982), rehearing denied, 702 F.2d 214 (11th Cir. 1983), superseded by statute as stated in *Welzel v. Advocate Realty Invs., LLC* (In re *Welzel*), 245 F.3d 1283 (11th Cir. Ga. 2001).

Reduction in balance owing by sale is not "by and through an attorney after maturity". — Where the balance owing at the time of default is reduced by the sale of collateral, that reduction was not collected "by and through an attorney after maturity" within the meaning of O.C.G.A. § 13-1-11 and is not to be included in the amount of deficiency upon which the attorney fees are based. *David v. ITT Diversified Credit Corp.*, 174 Ga. App. 910, 332 S.E.2d 8 (1985).

Nonjudicial foreclosure stayed in bankruptcy meets collection requirement. — The initiation of a nonjudicial foreclosure which

is later stayed when the debtor files for bankruptcy satisfies the collection requirement. *Specialty Inv. Corp. v. Village Apt. Assocs.*, 9 Bankr. 211 (Bankr. N.D. Ga. 1981).

Both stipulation for attorney's fees and compliance with statutory requirements prerequisite to recovery. — Promise to pay attorney's fees may not of itself be sufficient to entitle plaintiff to a judgment therefor, but without such promise, fees could not be recovered in suit on note. With promise, fees may be collected upon compliance with statutory conditions. *Browne v. Edwards*, 122 Ga. 277, 50 S.E. 110 (1905).

Section inapplicable absent preexisting agreement to pay attorney's fees. — Like Ga. L. 1935, p. 381, § 2 (see O.C.G.A. § 44-14-162), regulating sales under powers in security deeds, former Code 1933, § 20-506 (see O.C.G.A. § 13-1-11) did not come into play in absence of preexisting agreement between parties to pay attorney's fees upon note or other evidence of indebtedness. *Global Indus., Inc. v. Harris*, 376 F. Supp. 1379 (N.D. Ga. 1974).

Promissory notes authorizing attorney fees when note is collected by and through attorney are valid, enforceable, and collectible. *Camacho v. First S. Homeowners Co.*, 160 Ga. App. 491, 287 S.E.2d 327 (1981).

Attorney fees recoverable where provided for in note and where proper notice given. — When note provides for payment of attorney's fees and proper notice of intention to sue is given as required by law, the attorney fees are recoverable. *Harrison v. Harrison*, 208 Ga. 70, 65 S.E.2d 173 (1951).

Demand letter not requesting attorney fees. — Trial court erred in awarding attorney fees because plaintiff's demand letter contained absolutely no reference to the attorney fees provision in the promissory note or to any claim for attorney fees. *Quintanilla v. Rathur*, 227 Ga. App. 788, 490 S.E.2d 471 (1997).

Proper demand notice had to be in writing, to the party sought to be held on the obligation, after maturity, to state that the provisions relative to payment of attorney fees in addition to principal and interest would be enforced, and to state that the party had 10 days from the receipt of such notice to pay the principal and interest without the attorney fees. *Trust Assoc. v. Snead*, 253 Ga. App. 475, 559 S.E.2d 502 (2002).

Conditions Precedent to Recovery of Attorney's Fees (Cont'd)

Contract for attorney's fees nullified by payment in full within ten days after notice is given; no provision is made as to when, with relation to bringing of suit, notice must be given to be effective. *Camilla Cotton Oil Co. v. Spencer Kellogg & Sons*, 257 F.2d 162 (5th Cir. 1958).

Tender necessary to avoid attorney's fees. — Tender means tender of principal, interest, and costs. Tender of principal and interest conditioned upon plaintiff paying costs is insufficient to avoid paying attorney's fees where plaintiff complies with law. *Donovan v. Hogan*, 8 Ga. App. 754, 70 S.E. 153 (1911).

Hearing not required when statutory formula used. — Where the amount of attorney fees to be awarded is subject to computation by using either without variance, or by substantially complying with, the unambiguous statutory formula of paragraph (a)(2) O.C.G.A. § 13-1-11, a hearing is not required merely to effect this computation. *Woods v. General Elec. Credit Auto Lease, Inc.*, 187 Ga. App. 57, 369 S.E.2d 334 (1988).

Award of fees in arbitration of promissory note not required. — Where it was undisputed that a party complied with the statutory conditions of O.C.G.A. § 13-1-11(a), the trial court's failure to award separate attorney fees in connection with arbitration of a promissory note did not constitute reversible error; in the absence of evidence to the contrary, the trial court deemed that the attorney fees awarded by the arbitration panel were sufficient to compensate the party for all issues pursued in the party's complaint. *Phillips v. TermNet of N.M., Inc.*, 260 Ga. App. 645, 580 S.E.2d 544 (2003).

Amount of judgment is determinative for direct appeal. — Appellate court properly dismissed an attorney's direct appeal in a case wherein the attorney sued a client for attorney fees as the judgment the attorney recovered was one for damages in an amount under \$10,000, and as such, it was subject to appeal as a matter of discretion under O.C.G.A. § 5-6-35(a)(6), rather than of right. The failure of the attorney to recover on the claims of prejudgment interest or attorney fees did not transform the judgment into a finding on liability adverse to the attorney so as to render appeal of the matter

outside the ambit of § 5-6-35(a)(6). *Cooney v. Burnham*, 283 Ga. 134, 657 S.E.2d 239 (2008).

Application

Applicable to obligation to pay attorney's fees embodied in mortgage. — Obligation to pay attorney's fees, embodied in mortgage is collectable in same manner as if the obligation were contained in note or other evidence of indebtedness. *Sheffield v. Bainbridge Oil Co.*, 3 Ga. App. 200, 59 S.E. 725 (1907).

When section complied with, obligation of deed to secure debt includes attorney's fees. — If holder complies with section's requirement, liability for attorney's fees becomes a part of indebtedness, and obligation of deed given to secure original debt extends to and includes attorney's fees. Consequently, one entitled to special lien for purchase money upon described real estate is entitled also to lien for amount of any attorney's fees to which debtor may be legally subject. *Guarantee Trust & Banking Co. v. American Nat'l Bank*, 15 Ga. App. 778, 84 S.E. 222 (1915).

If suit on note barred, claim for attorney fees also barred. — As recovery on a second promissory note was barred by the creditor's failure to seek judicial confirmation under O.C.G.A. § 44-14-161(a) of the foreclosure sale associated with the first note, the creditor was not entitled to attorney fees under O.C.G.A. § 13-1-11(a). *Iwan Renovations, Inc. v. N. Atlanta Nat'l Bank*, 296 Ga. App. 125, 673 S.E.2d 632 (2009).

Requirements of section applicable where collection sought by process of attachment. *Walton v. Hines*, 40 Ga. App. 757, 151 S.E. 558 (1930).

Endorsers are liable for attorney fees. *Riverside Milling & Power Co. v. Bank of Cartersville*, 141 Ga. 578, 81 S.E. 892 (1914).

Guaranty contracts are within scope of statute. *FDIC v. Willis*, 497 F. Supp. 272 (S.D. Ga. 1980).

National bank may recover attorney fees on note made to the bank. *Young v. First Nat'l Bank*, 22 Ga. App. 58, 95 S.E. 381 (1918).

Credit card processor's suit to collect losses. — Trial court improperly calculated attorney fees and expenses under O.C.G.A. § 13-1-11 since there was no evidence of a note or other indebtedness involved in the

credit card processor's suit to collect losses under an indemnity agreement with the bank's predecessor. *Colonial Bank v. Boulder Bankcard Processing, Inc.*, 254 Ga. App. 686, 563 S.E.2d 492 (2002).

Provision of lease agreement enforceable.

— A provision in a lease agreement providing for recovery of attorney fees in any action brought to enforce any term, covenant, or condition of the lease was enforceable under O.C.G.A. § 13-1-11. *Georgia Color Farms, Inc. v. K.K.L., Ltd. Partnership*, 234 Ga. App. 849, 507 S.E.2d 817 (1998).

Failure of landlord to give notice under O.C.G.A. § 13-1-11 did not preclude the grant of attorneys fees because the plain terms of the lease authorized the award of attorneys fees, expenses, and costs. *Insurance Indus. Consultants, Inc. v. Essex Invs., Inc.*, 249 Ga. App. 837, 549 S.E.2d 788 (2001).

O.C.G.A. § 13-1-11(a) did not apply in a lessor's suit against a lessee, and instead, the attorney's fee provisions of the lease applied; although the lessor sought to recover rent due, the lessor also sought a declaration as to the enforceability of an exclusivity clause in the lease, which would have allowed the lessee to terminate the lease or to pay a reduced rent if the lessee was not found to have waived the enforceability of the exclusivity clause. *Cascade Crossing II, LLC v. Radioshack Corp.*, 446 F. Supp. 2d 1348 (N.D. Ga. 2006).

In a lessor's action to enforce the provisions of a commercial lease pursuant to O.C.G.A. § 13-1-11, because a lessee's predecessor-in-interest failed to strictly comply with a cancellation option in the lease, and time was of the essence, the trial court erred in ruling otherwise, resulting in an expiration of the option due to the failure to timely exercise the option; thus, on remand the lessor was entitled to summary judgment on the lessor's possession claim and to the past rent due under the lease for the term sought. *Piedmont Ctr. 15, LLC v. Aquent, Inc.*, 286 Ga. App. 673, 649 S.E.2d 733 (2007), cert. denied, 2007 Ga. LEXIS 749 (Ga. 2007).

Applies to commercial lease. — O.C.G.A. § 13-1-11 applies to a commercial lease and limits the award of attorney's fees recoverable by the landlord where past due rent is recovered and the only other relief is declar-

atory and governs the future enforceability or amount of the tenant's rent obligation. *RadioShack Corp. v. Cascade Crossing II, LLC*, 282 Ga. 841, 653 S.E.2d 680 (2007).

Statutory cap on attorneys' fees in O.C.G.A. § 13-1-11 applied so as to cap a lessor's attorneys' fees in a suit seeking a declaration as to the enforceability of part of a commercial lease agreement and to recover back rent, and thus, the lessor, as the prevailing party, was not able to recover the larger sum of attorneys' fees that were provided for in the lease agreement. *Cascade Crossing II, LLC v. Radioshack Corp.*, 534 F.3d 1375 (11th Cir. 2008).

Executor empowered to borrow money may stipulate for payment of attorney's fees.

— Power of executor to borrow money implies power to secure the money by note, stipulating for payment of attorney fees. *Fletcher v. American Trust & Banking Co.*, 111 Ga. 300, 36 S.E. 767, 78 Am. St. R. 164 (1900).

Guaranty contract is evidence of indebtedness. *Goldstein v. Ipswich Hosiery Co.*, 104 Ga. App. 500, 122 S.E.2d 339 (1961).

It is immaterial that agreement to pay attorney's fees was in deed and not note; for the law applies to any obligation, in note or elsewhere, to pay upon note attorney's fees in addition to stipulated rate of interest. *Demere v. Germania Bank*, 116 Ga. 317, 42 S.E. 488 (1902).

Provision for attorney's fees in guaranty contract enforceable upon giving required notice. — When undertaking of guarantor is to pay for goods sold by creditor to debtor to extent of specified sum, and in addition to pay ten percent on indebtedness as attorney's fees in event of suit, amount stipulated as attorney's fees is recoverable from guarantor on giving statutory notice. *Sheppard v. Daniel Miller Co.*, 7 Ga. App. 760, 68 S.E. 451 (1910), later appeal, 11 Ga. App. 514, 75 S.E. 907 (1912).

When notice required by O.C.G.A. § 13-1-11 was given and the amount of attorney fees was calculated solely on the principal amount due on the note at the time of default and suit for collection against two guarantors, calculation of the attorney fees was unaffected by any subsequent payments made by one of the guarantors under a settlement agreement. *Groover v. Commercial Bancorp.*, 220 Ga. App. 13, 467 S.E.2d 355 (1996).

Application (Cont'd)

Decedent's estate liable for attorney's fees for collection of decedent's note where proper notice given. — When provision for payment of attorney's fees is included in note given by decedent, the decedent's estate may be made liable therefor in suit thereon against administrator in which such fees are claimed, after notice of claim has been served as is prescribed by statute. *Harris v. Powers*, 129 Ga. 74, 58 S.E. 1038, 12 Ann. Cas. 475 (1907); *Story v. Wolff*, 21 Ga. App. 727, 94 S.E. 899 (1918); *Penick Supply Co. v. Anderson*, 23 Ga. App. 244, 97 S.E. 889 (1919).

Liability for attorney's fees where property sold under power of sale. — See *Cochran v. Bank of Hancock County*, 118 Ga. App. 100, 162 S.E.2d 765 (1968).

Negotiability of note not affected by provision for recovery of attorney's fees. — Promissory note containing words of negotiability is negotiable notwithstanding agreement in note to pay all costs of collection including ten percent attorney's fees. *Stapleton v. Louisville Banking Co.*, 95 Ga. 802, 23 S.E. 81 (1895); *Jones v. Crawford*, 107 Ga. 318, 33 S.E. 51, 45 L.R.A. 105 (1899).

Defendants admitted unpaid notes, guaranty of payment, and notice of claimed attorney fees by reason of an unclaimed certified letter addressed to the maker of the notes at a post office box, the maker having admitted having received notice from the U.S. Postal Service that the maker had a certified letter to pick up. *Worth v. Alma Exch. Bank & Trust*, 171 Ga. App. 748, 320 S.E.2d 816 (1984).

Obligation mature upon exercise of right to accelerate. — Where a lease contains clause allowing for acceleration of rent upon lessee's default, lessee's obligation is matured within meaning of law when lessor demands full payment of all rents. *Kasum Communications, Inc. v. CPI N. Druid Co.*, 135 Ga. App. 314, 217 S.E.2d 492 (1975).

Creditor's waiver of right to recover attorney's fees. — As such attorney's fees as are recoverable are in nature of liquidated damages which inure to benefit of plaintiff, and not for benefit of plaintiff's attorney, plaintiff who has given required notice may waive right to recover fees by settling with defen-

dant in full, or by accepting payments thereon from defendant, under agreement or understanding not to insist on liability created by notice or by failing to plead such notice. *Rylee v. Bank of Statham*, 7 Ga. App. 489, 67 S.E. 383 (1910).

Debtor's insolvency under state law does not prohibit rendering of judgment for attorney's fees. *Security Mtg. Co. v. Powers*, 278 U.S. 149, 49 S. Ct. 84, 73 L. Ed. 236 (1928) (decided under prior bankruptcy law).

Recovery of attorney's fees not affected by appointment of receiver after notice to debtor. — Plaintiff's right to recover attorney's fees not affected by fact that, after service of notice, a court of equity appointed receivers who took possession of debtor's assets; nor is it necessary that receivers be thereafter served with statutory notice in order to fix liability for attorney's fees. *Guarantee Trust & Banking Co. v. American Nat'l Bank*, 15 Ga. App. 778, 84 S.E. 222 (1915).

Limitation on fees found in paragraph (a)(2) of O.C.G.A. § 13-1-11 is inapplicable to action enforcing condominium association's right to lien for assessments. *Wehunt v. Wren's Cross of Atlanta Condominium Ass'n*, 175 Ga. App. 70, 332 S.E.2d 368 (1985).

Record supported award of attorney's fees. See *Ale-8-One of Am., Inc. v. Graphicolor Servs., Inc.*, 166 Ga. App. 506, 305 S.E.2d 14 (1983).

Appellate court erred in denying creditor's request for attorney fees based on its speculation that an arbitration award for the creditor on its action to recover on a promissory note that the debtor had executed in the creditor's favor contained a sufficient amount to cover an attorney fee award. The creditor was entitled to recover attorney fees under O.C.G.A. § 13-1-11 because the creditor fulfilled all of the conditions for recovering attorney fees under that statute, and, thus, the courts did not have the discretion to not award those fees once the creditor had made a claim for the fees. *TermNet Merch. Servs. v. Phillips*, 277 Ga. 342, 588 S.E.2d 745 (2003).

Insurer's right to attorney fees in counterclaim to insured's suit. — Insurer, who pursuant to insurance policy purchased mortgage on land covered by policy, would not be entitled to attorney fees in counterclaim to

insured's suit to recover for fire loss if insurer's failure to pay insured's claim was wrongful. *State Farm Fire & Cas. Co. v. Jenkins*, 167 Ga. App. 4, 305 S.E.2d 801, cert. vacated, 251 Ga. 596, 310 S.E.2d 232 (1983).

Provisions held not in conflict. — Where a note provided for financing at 10½ percent interest per annum, “together with the Base Charge and with all costs of collection including 15 percent as attorneys fees if collected by law or through an attorney at law...,” and also provided for “enforcement of rights under any of the collateral, including reasonable attorney's fees and legal expenses,” the two provisions were not in conflict. In a suit not brought to enforce rights of collateral, but to collect the debt due on the note, the award of attorney fees equal to 15 percent of the amount owed was not erroneous. *Dedousis v. First Nat'l Bank*, 181 Ga. App. 425, 352 S.E.2d 577 (1986).

Where a guaranty contract provided that a guarantor pay reasonable attorney fees actually incurred, and also stipulated that 15% of the total amount due on the note and remaining unpaid was to be deemed the “reasonable attorney fees,” the two clauses were not ambiguous when construed together, and the recovery of attorney fees not in excess of 15% of the principal and interest owed on a note was properly granted. *Rodgers v. First Union Nat'l Bank*, 220 Ga. App. 821, 470 S.E.2d 246 (1996).

Section inapplicable since contract not note or evidence of indebtedness. — Trial court did not err in awarding attorney fees related to an attorney's collection efforts because, in the personal services contract at issue, the attorney agreed to perform services for a doctor and the doctor agreed to compensate the attorney for those services; however, the trial court's default judgment order erroneously awarded attorney fees pursuant to the provisions of O.C.G.A. § 13-1-11(a), and because the contract was not a note or other evidence of indebtedness, § 13-1-11 was inapplicable. *Vaughters v. Outlaw*, 293 Ga. App. 620, 668 S.E.2d 13 (2008).

Jury decisions. — Under O.C.G.A. § 13-1-11, a lender was entitled to attorney fees for redeeming the collateral securing a note; also, borrowers' testimony that the borrowers never received letters containing O.C.G.A. § 13-1-11 language, despite proffered evidence that such letters were mailed,

created a jury question, and the trial court erred in directing a verdict for the borrowers. *Lovell v. Thomas*, 279 Ga. App. 696, 632 S.E.2d 456 (2006).

Calculation of Attorney's Fees

Generally, attorney entitled to disbursements necessary in carrying out object of attorney's employment. *Tobler v. Yoder & Frey Auctioneers, Inc.*, 462 F. Supp. 788 (S.D. Ga. 1978), aff'd, 620 F.2d 508 (5th Cir. 1980).

If attorney's fees are not recoverable, neither are expenses of counsel. *Tobler v. Yoder & Frey Auctioneers, Inc.*, 462 F. Supp. 788 (S.D. Ga. 1978), aff'd, 620 F.2d 508 (5th Cir. 1980).

Attorney's fees not chargeable on theory that the fees are costs independent of 15 percent maximum attorney's fees allowed under note or security deed. *Tobler v. Yoder & Frey Auctioneers, Inc.*, 462 F. Supp. 788 (S.D. Ga. 1978), aff'd, 620 F.2d 508 (5th Cir. 1980).

Attorney's fees recoverable for obtaining judgment on note are incurred by time judgment is entered. *Claude A. Hinton, Jr., Inc. v. Institutional Investors Trust*, 133 Ga. App. 364, 211 S.E.2d 169 (1974).

Attorney's fees amount to stipulated percent on principal and interest of note. *Morgan v. Kiser & Co.*, 105 Ga. 104, 31 S.E. 45 (1898); *Hamilton v. Rogers*, 126 Ga. 27, 54 S.E. 926 (1906); *Underwood v. Savannah Chem. Co.*, 18 Ga. App. 194, 89 S.E. 154 (1916).

Valid unconditional continuous tender stops running of interest. *Bank of Early v. Broun*, 156 Ga. App. 445, 274 S.E.2d 802 (1980).

Absent unambiguous acceleration provision, attorney's fees are recoverable only with respect to past-due installments. — Where, at time of written notice of intention to collect attorney fees only five of 12 installments had fallen due, and where contract did not contain unambiguous acceleration provision, plaintiff was entitled to attorney fees only with respect to the five past due installments. *Considine Co. v. Turner Communications Corp.*, 155 Ga. App. 911, 273 S.E.2d 652 (1980).

Amount of attorney's fees recoverable based on sum actually recovered. — Plaintiff

Calculation of Attorney's Fees (Cont'd)

entitled to recover attorney's fees on amount recovered, notwithstanding such recovery may be less than amount claimed to be due in suit. *Harris v. Powers*, 129 Ga. 74, 58 S.E. 1038, 12 Ann. Cas. 475 (1907); *Livingston Bros. v. Salter*, 6 Ga. App. 377, 65 S.E. 60 (1909); *Smith v. Baker*, 137 Ga. 298, 72 S.E. 1093 (1911).

Contract for fees. — Trial court erred in awarding, in a claim based on a contract which provided for payment of attorney fees without specifying any percentage, \$14,349 for attorney fees on a total contract claim of \$102,833. *Ahmad v. Excell Petroleum, Inc.*, 276 Ga. App. 167, 623 S.E.2d 6 (2005).

Trial court did not err in granting a mortgagee summary judgment in an action following a foreclosure sale on the issue of attorney's fees because there were no genuine issues of material fact as to the amount of attorney fees owed; because the agreement to pay attorney fees of 15 percent of the principal and interest was enforceable, the amount to be awarded was only a matter of mathematical calculation. *Cnty. Marketplace Props., LLC v. Suntrust Bank*, No. A10A0595, 2010 Ga. App. LEXIS 367 (Apr. 5, 2010).

If contract provides for reasonable attorney's fees, amount to be calculated under statutory provisions. *Carter v. Whatley*, 97 Ga. App. 10, 101 S.E.2d 899 (1958).

Since a note provided for attorney's fees of 15 percent if the note were placed in the hands of an attorney for collection but also provided for "reasonable attorney's fees" if the note were not paid at maturity, the note would be construed to provide that attorney fees would be awarded in the amount of 15 percent of the principal and interest owed. *Davenport v. Nance*, 194 Ga. App. 313, 390 S.E.2d 281 (1990).

When agreement provides only for 15 percent ceiling on attorney's fees, paragraph (2) determines amount. — When attorney fees provision placed 15 percent limit on attorney fees, but did not provide for attorney's fees in some specific percent, attorney fees must be determined in accordance with paragraph (2) of this section. *Lakeview Memory Gardens, Inc. v. National Bank & Trust Co.*, 155 Ga. App. 478, 271 S.E.2d 219 (1980) (see O.C.G.A. § 13-1-11).

Hearing not required when statutory formula used. — Where the amount of attorney fees to be awarded is subject to computation by using either without variance, or by substantially complying with, the unambiguous statutory formula of paragraph (a)(2) of O.C.G.A. § 13-1-11, a hearing is not required merely to effect this computation. *Woods v. General Elec. Credit Auto Lease, Inc.*, 187 Ga. App. 57, 369 S.E.2d 334 (1988).

Debtor cannot lessen liability by showing actual attorney's fees were less than percent stipulated. — Where note provided for ten percent attorney's fees, defendant cannot lessen the defendant's liability by setting up fact that plaintiff actually contracted with the plaintiff's attorney for a less sum. *Bank of Lumpkin v. Farmers' State Bank*, 35 Ga. App. 340, 133 S.E. 307 (1926).

Improper calculation. — Because a trust, as holder of a promissory note and deed to secure a debt owed by a husband and a wife, presented uncontroverted evidence of the amount of interest accrued on the unpaid principal balance as of the day after the last payment made until the day before trial began, and the reasonable attorney fees awarded did not match the amount the trust was entitled to under O.C.G.A. § 13-1-11(a)(2), the amount the trial court awarded as to both were reversed. *Toombs v. Meyer M. Cardin Living Trust #2*, 279 Ga. App. 682, 632 S.E.2d 410 (2006).

Calculation proper. — Amount of attorney fees awarded to a business seller was permissible under O.C.G.A. § 13-1-11, which applied when a promissory note provided for reasonable attorney fees without giving a specific percentage. The trial court awarded attorney fees of \$13,259.75, which was 15 percent of \$500 plus 10 percent of \$131,847.54, the judgment plus prejudgment interest. *A & B Blind & Drapery Co. v. B & B Glass & Storefronts, Inc.*, 298 Ga. App. 210, 679 S.E.2d 782 (2009).

Bankruptcy Proceedings

Section 506(b) of Bankruptcy Code preempts O.C.G.A. § 13-1-11. — See First Fed. Sav. & Loan Ass'n v. Standard Bldg. Assocs., 85 Bankr. 644 (Bankr. N.D. Ga. 1988); *Welzel v. Advocate Realty Invs., LLC*, 255 F.3d 1266 (11th Cir. 2001).

Bankruptcy does not affect vested attorney fees. — The filing of a petition for

reorganization under Chapter XII (11 U.S.C. § 1201 et seq.) of the Bankruptcy Act does not diminish the debtor's obligation to pay attorney fees if vested when the petition is filed. *Mills v. East Side Investors*, 702 F.2d 214 (11th Cir. 1983).

Attorney's fees not lien where debt is cured and reinstated in bankruptcy. — Statutory attorney's fees, as contemplated by O.C.G.A. § 13-1-11, do not become a lien against secured property where a default on an underlying obligation is cured and reinstated pursuant to provisions of the Bankruptcy Code (11 U.S.C.). *Midland Mut. Life Ins. Co. v. Masnorth Corp.*, 28 Bankr. 892 (Bankr. N.D. Ga. 1983).

Where a mortgage debt is cured and reinstated, the debt is not mature within the meaning of O.C.G.A. § 13-1-11 and statutory attorney's fees do not attach as a lien against the subject property. *Midland Mut. Life Ins. Co. v. Masnorth Corp.*, 36 Bankr. 335 (Bankr. N.D. Ga. 1984).

Cure and reinstatement in a Chapter 11 (11 U.S.C. § 1201 et seq.) bankruptcy proceeding return the parties to a point in time prior to the default and acceleration and remove any claim for Georgia statutory attorney's fees on the accelerated debt. In *re Centre Court Apts.*, Ltd., 85 Bankr. 651 (Bankr. N.D. Ga. 1988).

Perfection of right to fees constitutes preference. — A creditor's act of perfecting the creditor's right to fees under O.C.G.A. § 13-1-11 constituted a preference subject to avoidance in bankruptcy under 11 U.S.C. § 547(b). *Homestead Partners, Ltd. v. Condon One, Inc.*, 200 Bankr. 274 (Bankr. N.D. Ga. 1996).

Applicability of section to Chapter 13 bankruptcy plan. — To allow attorney's fees sought by a creditor would effectively destroy success of debtor's Chapter 13 (11 U.S.C. § 1301 et seq.) bankruptcy plan resulting in denial of debtor's "fresh start." To allow such a windfall would also eliminate any possibility of payment of one hundred cents on the dollar under the plan to other creditors. Overriding equitable principles require that attorney's fees be denied in such circumstances, particularly in light of fact that such would amount to a windfall, would deny debtor a fresh start, and would be detrimental to other creditors. *Burns v. Home Fed. Sav. & Loan Ass'n*, 16 Bankr. 757

(Bankr. M.D. Ga. 1982).

Bankruptcy court deferred ruling on the creditor's request for attorney's fee because, although the cardholder agreement provided for payment of the creditor's attorney fees and costs, there was no evidence that the creditor complied with the requirements of O.C.G.A. § 13-1-11(a)(3). *Fleet Credit Card Servs., L.P. v. Kendrick* (In re Kendrick), 314 B.R. 468 (Bankr. N.D. Ga. 2004).

Failure to show right to attorney's fees. — In bankruptcy proceedings, creditor failed to show at trial that the ten-day letter giving notice of intent to enforce the attorney's fees provision in loan documents was sent and therefore failed to show that the creditor's right to attorney's fees was vested when the bankruptcy case was filed. *Chrysler Credit Corp. v. Smith*, 143 Bankr. 284 (Bankr. M.D. Ga. 1992).

When a creditor was granted summary judgment on the creditor's complaint to determine dischargeability of a debt owed by a debtor who had filed for bankruptcy, yet there was no evidence that the creditor had complied with O.C.G.A. § 13-1-11(a)(3), the creditor was given 30 days to file proof of the creditor's compliance; failure to file such proof would result in denial of the creditor's request for attorney's fees and costs. *Fleet Credit Card Servs., L.P. v. Kendrick* (In re Kendrick), 314 B.R. 468 (Bankr. N.D. Ga. 2004).

In an action in which a creditor successfully brought an action of nondischargeability of certain credit card debt against a Chapter 7 debtor, the creditor was not entitled to attorney fees under the terms of the cardholder agreement unless it provided evidence that it had complied with the terms of O.C.G.A. § 13-1-11(a)(3), which required 10 days written notice to debtor of the amount due and creditor's intent to enforce the contractual attorney fee provision. *FDS Nat'l Bank v. Alam* (In re Alam), No. A03-96116-PWB, 2005 Bankr. LEXIS 788 (Bankr. N.D. Ga. Feb. 28, 2005).

Because an over-secured creditor's claim for attorney's fees was unenforceable against the debtor under O.C.G.A. § 13-1-11, as the creditor did not satisfy the notice requirements, then its claim for attorney's fees was not allowed under 11 U.S.C. § 502(b)(1) and could not be part of its secured claim

Bankruptcy Proceedings (Cont'd)

under 11 U.S.C. § 506(b). In light of the disallowance under 11 U.S.C. § 502(b)(1), it was unnecessary to determine whether the fees were reasonable, and it was unnecessary to decide whether the “hanging paragraph” of 11 U.S.C. § 1325(a) precluded an over-secured creditor from recovering attorney’s fees under 11 U.S.C. § 506(b). *South-eastern Bank v. McCarty* (In re McCarty), No. 06-50998, 2007 Bankr. LEXIS 4741 (Bankr. S.D. Ga. Sept. 20, 2007).

Attorney’s fees award despite failing to comply with notice. — Oversecured creditor was entitled to an award of post-petition attorney fees under 11 U.S.C. § 506(b) even when the creditor failed to comply with the notice requirements of O.C.G.A. § 13-1-11 because the contractually set attorney’s fees did not have to pass through the two-step inquiry of 11 U.S.C. §§ 502 and 506. *JP Morgan Chase Bank v. ELL 11, LLC*, 414 B.R. 881 (M.D. Ga. 2008).

Over-secured creditor whose claim had been allowed under 11 U.S.C. § 502 could recover reasonable attorney’s fees incurred post-petition to protect and enforce the creditor’s claim, pursuant to 11 U.S.C. § 506(b), because the fees were provided for in an underlying security agreement and the 10-day notice requirement of O.C.G.A. § 13-1-11 did not apply to a claim for fees under 11 U.S.C. § 506 of the United States Bankruptcy Code. In re *Amron Techs., Inc.*, 376 B.R. 49 (Bankr. M.D. Ga. 2007).

Creditor’s mailing of a ten-day letter pursuant to O.C.G.A. § 13-1-11 constituted a preferential transfer under the Bankruptcy Code. *Condor One, Inc. v. Homestead Partners, Ltd.*, 201 Bankr. 1014 (Bankr. N.D. Ga. 1996).

Notice**1. In General**

Purpose of notice requirement. — One purpose of legislature, in providing that debtor should have ten days’ notice of creditor’s intention to sue the debtor, was to give debtor opportunity of paying note, and thus relieving the debtor of attorney’s fees and costs. *Edenfield v. Bank of Millen*, 7 Ga. App. 645, 67 S.E. 896 (1910).

Legislative purpose of notice required by

paragraph (a)(3) is that before obligation for attorney’s fees, somewhat in nature of a penalty, can be enforced, defendant must be given notice that the defendant is about to be sued, so that the defendant might avoid both expense of attorney’s fees and trouble, inconvenience, and costs of litigation itself. Such purpose could not be served by giving of notice after resort to legal proceeding has already been taken, and costs accrued. *Walton v. Hines*, 40 Ga. App. 757, 151 S.E. 558 (1930).

Purpose of notice requirement of paragraph (a)(3) of this section is to allow debtor to pay principal and interest on contract within ten days from receipt of notice and relieve the debtor of liability to pay attorney’s fees. *Dixie Constr. Co. v. Griffin*, 104 Ga. App. 457, 121 S.E.2d 926 (1961); *Gresham v. Rogers*, 147 Ga. App. 189, 248 S.E.2d 225 (1978) (see O.C.G.A. § 13-1-11).

Paragraph (a)(3) of this section is clearly intended to require creditor to give debtor opportunity to meet the debtor’s obligation without incurring additional expense in form of attorney fees. *New House Prods., Inc. v. Commercial Plastics & Supply Corp.*, 141 Ga. App. 199, 233 S.E.2d 45 (1977); *General Elec. Credit Corp. v. Brooks*, 242 Ga. 109, 249 S.E.2d 596 (1978) (see O.C.G.A. § 13-1-11).

Purpose of provision that refusal to accept notice is equivalent to notice. — Provision providing that refusal to accept notice shall be equivalent of such notice was intended to limit ability of debtor to thwart by avoidance creditor’s attempt to enforce the creditor’s lawful remedies. *New House Prods., Inc. v. Commercial Plastics & Supply Corp.*, 141 Ga. App. 199, 233 S.E.2d 45 (1977).

Obligation regarding attorney’s fees is perfected at the expiration of ten days from service of the notice under O.C.G.A. § 13-1-11. *Bulman v. First Nat’l Bank*, 165 Ga. App. 843, 303 S.E.2d 29 (1983).

Notice applies only to attorney fees and collection of principal, interest and cost upon debt is in no way conditioned upon it. *Donovan v. Hogan*, 8 Ga. App. 754, 70 S.E. 153 (1911).

Attaching note or evidence of indebtedness to pleading. — A creditor may comply with the notice requirements of paragraph (a)(3) of O.C.G.A. § 13-1-11 by attaching a copy of the note or evidence of indebtedness

to the pleading. *Third Century, Inc. v. Morgan*, 187 Ga. App. 718, 371 S.E.2d 262 (1988).

Required statutory notice cannot be waived. *Miller v. Jackson*, 49 Ga. App. 309, 175 S.E. 409 (1934).

Attempt to waive notice of no effect. — Where promissory note contains obligation to pay attorney's fees, statutory notice which plaintiff is required to give to defendant as condition precedent to plaintiff's right to recover attorney's fees cannot be waived in notice, and an attempt to waive notice is unenforceable and of no effect. *Miller v. Roberts*, 9 Ga. App. 511, 71 S.E. 927 (1911).

If plaintiff fails to give proper notice, recovery of attorney's fees is unauthorized. *Walton v. Johnson*, 213 Ga. 108, 97 S.E.2d 310 (1957).

Deficiencies should be challenged at trial level. — It is incumbent on defendant to challenge any deficiencies in the letter sent in ostensible compliance with O.C.G.A. § 13-1-11 on the trial level. *Dedousis v. First Nat'l Bank*, 181 Ga. App. 425, 352 S.E.2d 577 (1986).

Lien for attorney's fees not valid until notice and opportunity to pay have been provided. *Security Nat'l Bank v. Cotton*, 513 F.2d 546 (5th Cir. 1975).

One seeking attorney's fees must prove compliance with notice requirement. — Attorney's fees, for which provision is made in promissory note, are not collectable unless it is alleged and proved that after maturity holder of note notified person sought to be bound thereon that the person had ten days from receipt of such notice to pay principal and interest without attorney's fees. *Harrison v. Arrendale*, 113 Ga. App. 118, 147 S.E.2d 356 (1966).

Assuming notice set out in pleadings was proper, where appellant made no attempt to introduce notice into evidence, there was no proof of notice, and therefore, no valid claim for attorney fees. *Union Commerce Leasing Corp. v. Beef 'N Burgundy, Inc.*, 155 Ga. App. 257, 270 S.E.2d 696 (1980).

Burden is on entity seeking to collect attorney fees on note in default to prove that all conditions of section have been met. *Citizens & S. Nat'l Bank v. Bougas*, 149 Ga. App. 722, 256 S.E.2d 37 (1979), rev'd in part on other grounds, 245 Ga. 412, 265 S.E.2d 562 (1980).

Claimant's right to collect attorney's fees did not vest and the debtor was not entitled to an administrative expense priority under 11 U.S.C. § 503(b)(1)(A) because the claimant did not give the debtor ten days notice that the claimant intended to enforce a provision for attorney's fees in an assumed lease, as required under O.C.G.A. § 13-1-11. *In re Sanjeev & Rajeev, Inc.*, 411 B.R. 480 (Bankr. S.D. Ga. 2008).

Judicial notice. — Court could take judicial notice that the exhibit purported to be a notice of intent to seek attorney fees under paragraph (a)(3) of O.C.G.A. § 13-1-11 and was filed on a particular date; however, judicial notice could not be taken that the attached notice was, in fact, what it purported to be, notice given in compliance with paragraph (a)(3). *NationsBank v. Tucker*, 231 Ga. App. 622, 500 S.E.2d 378 (1998).

2. Who May Give and Receive Notice

Under paragraph (a)(3) of this section, notice may be given by creditor or the creditor's attorney. *Citizens & S. Nat'l Bank v. Bougas*, 149 Ga. App. 722, 256 S.E.2d 37 (1979), rev'd in part on other grounds, *Citizens & S. Nat'l Bank v. Bougas*, 245 Ga. 412, 265 S.E.2d 562 (1980) (see O.C.G.A. § 13-1-11).

Notice under paragraph (a)(3) of O.C.G.A. § 13-1-11 may be given to debtor's attorney of record. — Ten-day notice requirement necessary to enforcement of provisions for payment of attorney fees in addition to principal and interest in notes and other instruments may be complied with by proper statutory notice to debtor's attorney of record. *Farnan v. National Bank*, 142 Ga. App. 777, 236 S.E.2d 923 (1977).

Notice to obligor's authorized attorney is equivalent of notice to obligor. *Dunlap v. Citizens & S. DeKalb Bank*, 134 Ga. App. 893, 216 S.E.2d 651 (1975).

Bank becomes holder upon assignment of note. — Where promissory note was assigned by holder to a bank as security for a loan, the bank was "holder" under O.C.G.A. § 13-1-11 and notice to the debtor from the original holder was insufficient to fulfill the requirements of paragraph (a)(3). *Krapf v. Wiles*, 252 Ga. 452, 314 S.E.2d 656 (1984).

Notice (Cont'd)

3. Persons Entitled to Notice

Notice requirement inapplicable where third party independently assumes obligation to pay attorney's fees. — Notice does not apply when the creditor, not having taken from principal debtor any obligation to pay attorney's fees, makes distinct and separate contract with third person, that if the creditor will extend credit to the debtor, and if the creditor has to expend any sum in collecting the indebtedness, the third person will repay to creditor amount so expended. *Oliver Typewriter Co. v. Fielder*, 7 Ga. App. 525, 67 S.E. 210 (1910) (decided under prior law).

Guarantors who endorse note entitled to required notice. — Notwithstanding technical distinctions between guarantors and sureties, where guarantors of note did endorse the note, the law requires that the guarantors be given notice that attorney fees will be assessed if principal and interest are not paid within statutory ten-day period. *Broun v. Bank of Early*, 243 Ga. 319, 253 S.E.2d 755 (1979).

Notice to maker not prerequisite to recovery from endorser who were given notice. — Fact that maker of note payable to and endorsed by maker was not given notice or sued with other endorser was no reason why judgment for attorney's fees should not be rendered against those endorser who were served with such notice and sued. *Crawford v. Citizens & S. Bank*, 20 Ga. App. 576, 93 S.E. 173 (1917).

Notice of default and intention to collect attorney's fees puts trustee on notice. *National Acceptance Co. v. Zusmann*, 379 F.2d 351 (5th Cir.), cert. denied, 389 U.S. 975, 88 S. Ct. 478, 19 L. Ed. 2d 469 (1967).

Notice required to enforce attorney's fee provision in deed to secure debt. — Such obligation in deed to secure debt is unenforceable, unless notice required by section is given, and suit is brought to enforce debt secured. *Moultrie Banking Co. v. Mobley*, 170 Ga. 402, 152 S.E. 903 (1930).

Provision in security deed in respect to collection of attorney's fees does not dispense with the notice required by paragraph (a)(3) to collect such fees. *Tobler v. Yoder & Frey Auctioneers, Inc.*, 462 F. Supp. 788

(S.D. Ga. 1978), aff'd, 620 F.2d 508 (5th Cir. 1980).

Later grantee. — Where later grantee was neither the maker nor an endorser of the promissory note originally executed and there was no evidence that the grantee or any other party ever assumed the obligation to complete the payments due under the terms of the note or was otherwise liable on the underlying obligation, grantee was not a party sought to be held liable on the note to whom notice of creditor's intention to seek attorney's fees on default of note should have been sent. *Pendergrast v. Ewing*, 158 Ga. App. 5, 279 S.E.2d 233 (1981).

Proper notice not rendered ineffective by amending suit to change plaintiff. — Notice is sufficient which names owner of equitable interest as holder even though suit is later amended and owner of legal title is made plaintiff. *Gelders v. Kennedy*, 9 Ga. App. 389, 71 S.E. 503 (1911).

Where notice indicates that suit is to be brought by holder, it is not rendered ineffectual by amendment naming assignor as plaintiff, suing for use of holder. *Toole v. Cook*, 15 Ga. App. 133, 82 S.E. 772 (1914).

All claimants to fund should stand on parity as to defect in notice of intent to collect attorney's fees. *Tobler v. Yoder & Frey Auctioneers, Inc.*, 462 F. Supp. 788 (S.D. Ga. 1978), aff'd, 620 F.2d 508 (5th Cir. 1980).

Expenses of claims under surety bonds. — Claim by surety against indemnitors of surety bonds issued by surety for attorney fees which related to expenses incurred as a result of claims under surety bonds, rather than attorney fees relating to enforcement of an indemnity agreement, did not fall within the notice requirements of O.C.G.A. § 13-1-11. *Rhodes v. Amwest Sur. Ins. Co.*, 207 Ga. App. 441, 428 S.E.2d 581 (1993).

4. Timing of Notice

Section affords maker ten days to pay before suit may be filed. — Law requires that notice give opportunity to maker to pay amount due during period of ten days before expiration of which suit may not be filed. *Murdock Acceptance Corp. v. Wagnon*, 587 F.2d 764 (5th Cir. 1979).

Ga. L. 1967, p. 226, §§ 5 and 6 (see O.C.G.A. 9-11-6(e)) was inapplicable to computations of time periods under former Code 1933, § 20-506 (see O.C.G.A.

§ 13-1-11). Ten-day period required was to be counted from day of receipt. *Calvert Fire Ins. Co. v. Environs Dev. Corp.*, 601 F.2d 851 (5th Cir. 1979).

Failure to give notice before commencement of action does not preclude recovery of attorneys' fees. *One In All Corp. v. Fulton Nat'l Bank*, 108 Ga. App. 142, 132 S.E.2d 116 (1963); *McInvale v. Walter E. Heller & Co.*, 116 Ga. App. 71, 156 S.E.2d 371 (1967).

Notice may be given after filing suit, but at least ten days before judgment. — Whether attorney fees are claimed in suit originally, or by amendment, notice may be given after filing of suit so long as defendant is given ten days within which to pay and avoid fees prior to taking of any judgment therefor. *Candler v. Orkin*, 129 Ga. App. 721, 200 S.E.2d 909 (1973).

Notice of right to pay principal and interest within ten days to avoid obligation of attorney's fees may be given after filing of suit so long as defendant is given ten days within which to pay and avoid fees prior to taking of judgment for those fees. *Swindell v. Georgia State Dep't of Educ.*, 138 Ga. App. 57, 225 S.E.2d 503 (1976).

Notice of intent to enforce the attorney's fee provisions in a promissory note does not comply with O.C.G.A. § 13-1-11 when the notice is sent after the entry of judgment in the suit on the note. *Kauka Farms, Inc. v. Scott*, 256 Ga. 642, 352 S.E.2d 373 (1987).

Effect of stay in bankruptcy on sending of demand letter. — In event that automatic stay prevents creditor from sending demand letter to debtor as required by paragraph (a)(3) of O.C.G.A. § 13-1-11, attorney's fees are not perfected, and therefore do not become part of a creditor's secured claim. *Anderson v. First Nat'l Bank*, 28 Bankr. 231 (Bankr. N.D. Ga. 1983).

5. Content and Form of Notice

Notice must disclose holder. — Statutory notice given for purpose of fixing liability for attorney's fees must disclose holder of note in whose behalf payment is demanded. Notice which does not expressly state or otherwise disclose who is holder of note upon which attorney's fees are sought to be recovered is insufficient to be basis of judgment for attorney's fees. *Edenfield v. Bank of Millen*, 7 Ga. App. 645, 67 S.E. 896 (1910); *Gelders v. Kennedy*, 9 Ga. App. 389, 71 S.E.

503 (1911); *Elders v. Kennedy*, 17 Ga. App. 463, 87 S.E. 701 (1916).

Failure to state name of holder in notice not an amendable defect. *Baskins v. Valdosta Bank & Trust Co.*, 5 Ga. App. 600, 63 S.E. 648 (1909); *Gelders v. Kennedy*, 9 Ga. App. 389, 71 S.E. 503 (1911); *Carey v. Wyatt*, 17 Ga. App. 517, 87 S.E. 770 (1916).

One whose name is signed to notice is presumptively holder of note; and if suit thereafter be brought in that person's name, collection of attorney's fees cannot be defeated merely because notice did not expressly name holder of note. It is otherwise if suit be brought in name of one neither expressly nor impliedly named in notice as holder of note. *Aycock v. Tillman*, 14 Ga. App. 80, 80 S.E. 301 (1913); *Reeves v. Lasseter*, 29 Ga. App. 490, 115 S.E. 925 (1923).

Notice must be made in holder's name by holder, agent, or attorney. *Reeves v. Lasseter*, 29 Ga. App. 490, 115 S.E. 925 (1923).

Notice sufficiently indicating holder. — Notice signed by S. as attorney for B., in whose behalf suit was subsequently brought sufficiently indicated holder of note. *Phelps v. Belle Isle*, 29 Ga. App. 571, 116 S.E. 217 (1923).

Notice must state contract upon which it is based. *Rylee v. Bank of Statham*, 7 Ga. App. 489, 67 S.E. 383 (1910).

Notice by letter may suffice. — Notice by letter of claim for attorney fees is sufficient, if letter conveys such notice as is required by law and is timely received by defendant. *Cook v. Hightower & Co.*, 13 Ga. App. 309, 79 S.E. 165 (1913).

Notice may be signed with typewriter. *Blackwell v. Persons*, 30 Ga. App. 52, 116 S.E. 554 (1923).

Difference between amount demanded and that found due. — The notice was sufficient to satisfy the requirements of paragraph (a)(3) of O.C.G.A. § 13-1-11 even though the evidence ultimately established that the amount demanded was less than the exact amount determined to be due by the jury. *Carlos v. Murphy Whse. Co.*, 166 Ga. App. 406, 304 S.E.2d 439 (1983).

Commercial account due and payable. — In a case brought under the Perishable Agricultural Commodities Act, 1930 (PACA), 7 U.S.C. § 499(a) et seq., in which: (1) a produce company's president had de-

Notice (Cont'd)**5. Content and Form of Notice (Cont'd)**

falcated within the meaning of the law on the president's trust duties; (2) the president was personally liable to a produce wholesaler in the amount of the company's PACA trust for the president's failures as trustee; (3) the wholesaler's invoices provided for interest on unpaid accounts at the rate of one and one-half percent per month; and (4) the invoices provided that the customer must pay the attorney fees and costs incurred in the collection of all past due invoices, in its grant of summary judgment in favor of the wholesaler, the district court awarded the wholesaler the principal amount that was owed; in addition, pursuant to O.C.G.A. § 13-1-11, the wholesaler was entitled to attorney fees and under O.C.G.A. § 7-4-16 it was entitled to interest payments at the rate stated on the invoices. *Cee Bee Produce, Inc. v. Tucker*, No. 5:06-CV-181 (WDO), 2007 U.S. Dist. LEXIS 67339 (M.D. Ga. Sept. 12, 2007).

Paragraph (a)(3) of O.C.G.A. § 13-1-11 does not require disclosure of the amount of principal and interest the debtor must pay to avoid the assessment of attorney fees. *Associates Com. Corp. v. Storey*, 192 Ga. App. 199, 384 S.E.2d 265 (1989).

Notice alleging note's face value plus interest, but not exact amount owing, is valid. — Where notice of attorney's fees alleges face value of note in question plus interest, fact that exact amount owing is not also stated does not invalidate the notice. *Shier v. Price*, 152 Ga. App. 593, 263 S.E.2d 466 (1979); *Rohm & Haas Co. v. Gainesville Paint & Supply Co.*, 225 Ga. App. 441, 483 S.E.2d 888 (1997).

Notice effective although providing for 15 percent, while contract provides for ten percent attorney's fees. — Fact that notice states that contract provides for 15 percent attorney's fees instead of ten percent as actually provided for in contract does not destroy efficacy of notice for simple reason that only amount provided in contract under 15 percent could be recovered and compliance with notice by debtor would absolve debtor of obligation to pay fees whatever percentage was. *Dixie Constr. Co. v. Griffin*, 104 Ga. App. 457, 121 S.E.2d 926 (1961).

Notice not stating date of note not defective where receipt admitted and debtor not

misled. — Notice was not defective for failure to set forth date of note where receipt of notice was admitted and where there was only one note or instrument executed and where recipient could not possibly have been misled or prejudiced because date of note was not stated, since in response to notice recipient tendered amount recipient claimed to be due within ten-day period from notice's receipt. *Aultman v. T.F. Taylor Fertilizer Works, Inc.*, 125 Ga. App. 398, 188 S.E.2d 157 (1972).

A notice allowing more than ten days from receipt of the notice certainly complies with the intended meaning of paragraph (a)(3) of O.C.G.A. § 13-1-11. *Talmadge v. Respass*, 224 Ga. App. 768, 482 S.E.2d 709 (1997).

6. Substantial Compliance

Substantial compliance with notice requirement is condition precedent to collection of attorney fees. *Kennedy v. Brand Banking Co.*, 152 Ga. App. 47, 262 S.E.2d 177 (1979), aff'd and modified on other grounds, 245 Ga. 496, 266 S.E.2d 154 (1980).

Substantial compliance with section is all that is required. *GECC v. Brooks*, 242 Ga. 109, 249 S.E.2d 596 (1978); *Gorlin v. First Nat'l Bank*, 150 Ga. App. 637, 258 S.E.2d 290 (1979); *Shier v. Price*, 152 Ga. App. 593, 263 S.E.2d 466 (1979); *Williams v. First Bank & Trust Co.*, 154 Ga. App. 879, 269 S.E.2d 923 (1980).

When there is actual compliance as to all matters of substance, mere technicalities of form or variations in mode of expression should not be given stature of noncompliance. *GECC v. Brooks*, 242 Ga. 109, 249 S.E.2d 596 (1978); *Gorlin v. First Nat'l Bank*, 150 Ga. App. 637, 258 S.E.2d 290 (1979).

Substantial compliance with the notice provisions of O.C.G.A. § 13-1-11 is sufficient to fulfill the notice requirement. *Specialty Inv. Corp. v. Village Apt. Assocs.*, 9 Bankr. 211 (Bankr. N.D. Ga. 1981).

A literal compliance with the language of paragraph (a)(3) of O.C.G.A. § 13-1-11 is not required; only a substantial compliance is demanded. *Carlos v. Murphy Whse. Co.*, 166 Ga. App. 406, 304 S.E.2d 439 (1983); *Palace Indus., Inc. v. Craig*, 177 Ga. App. 338, 339 S.E.2d 313 (1985); *Upshaw v. Southern Whsle. Flooring Co.*, 197 Ga. App. 511, 398 S.E.2d 749 (1990).

Failure to meet exact requirements of law will result in disallowance of attorney fees.

Farnan v. National Bank, 142 Ga. App. 777, 236 S.E.2d 923 (1977), disapproved, *GECC v. Brooks*, 242 Ga. 109, 249 S.E.2d 596 (1978).

Failure to comply exactly with notice provisions of law requires disallowance of attorney's fees. *Tobler v. Yoder & Frey Auctioneers, Inc.*, 462 F. Supp. 788 (S.D. Ga. 1978), *aff'd*, 620 F.2d 508 (5th Cir. 1980).

Notice of intent and further demand for attorney's fees in petition substantially complied with section. — Where debtor is given notice of intention to collect attorney, and further demand for attorney fees is incorporated in petition, notice substantially meets requirements of law. *GECC v. Brooks*, 242 Ga. 109, 249 S.E.2d 596 (1978).

Construction of phraseology. — Although phraseology of pleading may have given rise to construction that no attorney fees would be sought if payment of note was delayed for at least ten days, such an interpretation was patently absurd, and was clearly due to a typographical error which could not reasonably have misled anyone; consequently, the notice constituted a sufficient compliance with the requirements of paragraph (a)(3) of O.C.G.A. § 13-1-11. *Turner Adv. Co. v. Prakas*, 164 Ga. App. 788, 298 S.E.2d 553 (1982).

Notice requiring payment within ten days of date of notice materially varies from requirements. — Notice that in order to avoid attorney fees, principal and interest must be paid within ten days from date of letter rather than within ten days from date of receipt thereof, is a material variance from statutory requirements and does not constitute substantial compliance with statutory provisions. *Gorlin v. First Nat'l Bank*, 150 Ga. App. 637, 258 S.E.2d 290 (1979).

Notice stating only intent to file suit and demand attorney's fees insufficient. — When debtor is not advised that the debtor may avoid attorney fees by paying principal and interest within ten days of receipt of notice, and is merely advised of creditor's intention to file suit and demand attorney fees, notice is insufficient. *GECC v. Brooks*, 242 Ga. 109, 249 S.E.2d 596 (1978).

Summons with copy of note attached not notice under section. — When plaintiff in suit on note serves maker with summons which has copy of note providing for attor-

ney fees attached, such summons does not constitute notice under the statutes and fees sued for are not part of principal amount in ascertaining jurisdictional amount for justice court. *Godfree & Dellinger v. Brooks*, 126 Ga. 627, 55 S.E. 938 (1906).

Landlord's complaint against tenants. — When recovery of attorney fees was provided for in a lease, but nothing in the landlord's complaint warned the tenants that the tenants had 10 days from receipt of notice to pay the sum owed and avoid attorney fees, a directed verdict for the tenants on the issue of attorney's fees was mandated. *Derbyshire v. United Bldrs. Supplies, Inc.*, 194 Ga. App. 840, 392 S.E.2d 37 (1990).

Landlord's correspondence and pleadings did not substantially comply with the requirement of O.C.G.A. § 13-1-11(a)(3) that it give the tenant it was suing notice the tenant could pay the principal and interest claimed within 10 days from the notice without being liable for attorney fees; thus, the landlord was not entitled to attorney fees from the tenant. *Logistics Int'l, Inc. v. RACO/Melaver, LLC*, 257 Ga. App. 879, 572 S.E.2d 388 (2002).

Sufficient notice given. — Trial court did not err in determining that a creditor gave a debtor and guarantors sufficient notice of the creditor's intention to seek the attorney fees provided by a promissory note and security deed if the creditor used an attorney to collect the indebtedness because the notice sent to the debtor and guarantors referenced O.C.G.A. § 13-1-11, provided notice that the creditor intended to conduct a foreclosure sale, and stated that proceeds of the foreclosure sale would be applied to the creditor's attorney fees as provided in the note and security deed; the notice also explicitly stated that the debtor had ten days from the debtor's receipt of the notice within which to pay principal and interest without incurring any liability for attorney fees. *Cnty. Marketplace Props., LLC v. Suntrust Bank*, No. A10A0595, 2010 Ga. App. LEXIS 367 (Apr. 5, 2010).

Illustration of notice adequately meeting requirements of paragraph (a)(3). — See *Gresham v. Rogers*, 147 Ga. App. 189, 248 S.E.2d 225 (1978); *Albany Prod. Credit Ass'n v. Sizemore*, 175 Ga. App. 826, 334 S.E.2d 872 (1985); *Clark v. GMAC*, 185 Ga. App. 130, 363 S.E.2d 813 (1987); *Dalcor Mgt., Inc.*

Notice (Cont'd)**6. Substantial Compliance (Cont'd)**

v. Sewer Rooter, Inc., 205 Ga. App. 681, 423 S.E.2d 419 (1992); S & A Indus., Inc. v. Bank Atlanta, 247 Ga. App. 377, 543 S.E.2d 743 (2000).

Illustration of notice inadequate under section. — See Adair Realty & Loan Co. v. Williams Bros. Lumber Co., 112 Ga. App. 16, 143 S.E.2d 577 (1965); Turk's Memory Chapel, Inc. v. Toccoa Casket Co., 134 Ga. App. 71, 213 S.E.2d 174 (1975); Sockwell v. Pettus, 139 Ga. App. 311, 228 S.E.2d 343 (1976); Professional Cleaners v. Phenix Supply Co., 201 Ga. App. 634, 411 S.E.2d 781 (1991).

7. Pleadings

Stipulation in note for attorney's fees must be alleged. — Where from the petition in a suit on a note it does not appear that it contained any provision relative to the collection of attorney's fees, attorney's fees cannot be recovered, although plaintiff served defendant with notice of plaintiff's intention to bring suit upon note. Browder-Manget Co. v. West End Bank, 143 Ga. 736, 85 S.E. 881 (1915).

One seeking recovery of attorney fees must allege and prove proper notice. — By terms of section, attorney's fees, for which provision is made in promissory note, are not collectible unless it be alleged and proved that after maturity, holder of note notified person sought to be bound thereon that the person had ten days from receipt of such notice to pay principal and interest without attorney's fees. Walton v. Johnson, 213 Ga. 108, 97 S.E.2d 310 (1957).

Attorney's fee lien filed after commencement of bankruptcy proceedings does not give debtor opportunity to pay, and enforcement would frustrate and be inconsistent with bankruptcy reorganization proceedings. Security Nat'l Bank v. Cotton, 513 F.2d 546 (5th Cir. 1975).

One seeking recovery of attorney's fees must allege giving of notice after maturity. — Where suit upon contract seeking to recover attorney's fees does not affirmatively allege that notice of attorney's fees was given after maturity, recovery of attorney's fees is

authorized. Dailey v. First Nat'l Bank, 114 Ga. App. 248, 150 S.E.2d 847 (1966).

Giving of notice must be alleged, and if denied, proved at trial. — Before attorney's fees can be recovered on note it must be alleged in pleadings that statutory notice has been given; and such allegation, if denied, must be proved on trial. Heard v. Tappan & Merritt, 116 Ga. 930, 43 S.E. 375 (1903); Pritchard v. McCrary, 122 Ga. 606, 50 S.E. 366 (1905).

Before attorney's fees can be recovered on promissory note, it must be alleged in petition that statutory notice to claim attorney's fees has been given to maker, and such allegation, if denied, must be proved at trial. Jones v. Lawman, 56 Ga. App. 764, 194 S.E. 416 (1937).

Suit not treated as for attorney fees where petition silent as to notice of intent to sue, though the petition prays for recovery of such fees. McDonald v. Ware & Harper, 17 Ga. App. 450, 87 S.E. 679 (1916).

It is unnecessary to aver how notice served. — Where it is averred that notice required by law in order to bind defendant with liability for attorney's fees has been served, it is not necessary that it should appear how it was served. Proof must disclose this. Cook v. Hightower & Co., 13 Ga. App. 309, 79 S.E. 165 (1913).

It is not necessary that copy of notice be attached to petition. Youmans v. Moore, 13 Ga. App. 119, 78 S.E. 862 (1913); Reeves v. Gower, 14 Ga. App. 293, 80 S.E. 699 (1914); McNatt v. Citizens & S. Bank, 20 Ga. App. 755, 93 S.E. 271 (1917).

Plea denying liability for attorney's fees is good though not under oath, since contract is to that extent conditional. O'Kelly v. Welch, 18 Ga. App. 157, 89 S.E. 76 (1916).

Unsworn answer by defendant, denying that statutory notice was given, is sufficient as to attorney's fees claimed. Walker v. Wood, 14 Ga. App. 29, 79 S.E. 905 (1913).

If answer admits receipt of notice, plaintiff need not introduce proof of notice. — When defendant's answer admits receipt of notice required by law in normal course of mail, it is not necessary that plaintiff introduce evidence on trial to prove that alleged notice was in fact given. Newby v. Armour Agrl. Chem. Co., 119 Ga. App. 650, 168 S.E.2d 652 (1969).

Failure to deny notice equivalent to admission of notice. — Defendant's statement in plea that defendant had no recollection of notice alleged by plaintiff to have been given is an admission of notice. *Branch v. Johnson*, 9 Ga. App. 699, 71 S.E. 1123 (1911).

When petition alleges giving of required notice, defendant's failure to answer is implied admission. — When petition recites giving of statutory notice for collection of attorney's fees, and case is in default, judge may, without further proof than admission implied by failure of defendant to answer, direct a verdict in favor of plaintiff for amount sued for. *Ivey v. Payne*, 8 Ga. App. 760, 70 S.E. 140 (1911); *Valdosta, M. & W.R.R. v. Citizens Bank*, 14 Ga. App. 329, 80 S.E. 913 (1914); *Sirmans v. Flosom & Tillman Hdwe. Co.*, 18 Ga. App. 586, 89 S.E. 1103 (1916); *Anderson v. King*, 19 Ga. App. 471, 91 S.E. 788 (1917).

One seeking recovery of attorney's fees bears burden of showing valid notice. — Burden is on plaintiff to show valid notice to defendant that attorney's fees as provided by note would be claimed. *Walton v. Johnson*, 213 Ga. 108, 97 S.E.2d 310 (1957).

8. Evidentiary Issues

Burden is on plaintiff to prove notice was sent in compliance with paragraph (a)(3). *Murdock Acceptance Corp. v. Wagnon*, 587 F.2d 764 (5th Cir. 1979).

Testimony that notices were sent and acknowledged, without showing as to contents, inadmissible. — Mere general testimony of attorney of plaintiff that the attorney made out and mailed notices to all parties, and several of the parties acknowledged receiving the notices, without any showing as to contents of notices, or how the notices were directed or that the notices were stamped, was inadmissible. *Shaw v. Probasco*, 139 Ga. 481, 77 S.E. 577 (1913).

Admissibility of parol evidence in connection with notice. — It is error to allow parol evidence as to contents of written notice of claim for attorney's fees, or to refuse, upon proper motion, to exclude such parol evidence, where defendant has not been served with notice to produce, nor any other at-

tempt been made to show loss or destruction of original notice. *Sheffield v. Bainbridge Oil Co.*, 3 Ga. App. 200, 59 S.E. 725 (1907); *Lightfoot v. Head & Cain*, 27 Ga. App. 148, 107 S.E. 609 (1921).

Role of jury and judge. — Verdict of jury or finding of fact by judge sitting as jury is necessary before plaintiff is entitled to judgment for attorney's fees. *Valdosta, M. & W.R.R. v. Citizens Bank*, 14 Ga. App. 329, 80 S.E. 913 (1914).

When no jury has been demanded judgment should be couched in such language as to indicate that judge, sitting as jury, has found that written notice of suit has been given as required by law. *Valdosta, M. & W.R.R. v. Citizens Bank*, 14 Ga. App. 329, 80 S.E. 913 (1914); *Elders v. Kennedy*, 17 Ga. App. 463, 87 S.E. 701 (1916).

Default judgment for attorney's fees must rest upon proof or implied admission of notice. — Where suit is in default, it is error to enter judgment for attorney's fees unless judge sitting as jury relies either upon testimony introduced on trial, or by admission implied by failure of defendant to answer, for proof of service of notice. *Turner v. Bank of Maysville*, 13 Ga. App. 547, 79 S.E. 180 (1913).

Admission, by default, of plaintiff's averment of proper notice, is sufficient proof of notice. *State Mut. Life Ins. Co. v. Jacobs*, 36 Ga. App. 731, 137 S.E. 905 (1927).

Calling upon defendant to produce original, alleged notice at trial is proper proof. — Where holder set forth copy of notice alleged to have been mailed to defendant, and called upon defendant to produce original notice, and it was admitted by defendant's counsel in open court that notice was received, objection to this proof of service was without merit. *Hudson v. James*, 150 Ga. 337, 103 S.E. 816 (1920).

Production of notice for attorney's fees in response to notice to produce is a circumstance which, when taken in connection with other testimony, is sufficient to authorize inference that defendant received statutory notice for attorney's fees required by law. *Edenfield v. Youmans*, 38 Ga. App. 584, 144 S.E. 671 (1928).

ADVISORY OPINIONS OF THE STATE BAR

Fee sharing with lay organizations. — Fee sharing between a lawyer and a lay organization is not prohibited where the lay organi-

zation is the client. Adv. Op. No. 88-2 (Nov. 10, 1988).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Actions, §§ 12, 14, 20. 17 Am. Jur. 2d, Contracts, §§ 308 et seq., 313, 317, 318.

Am. Jur. Proof of Facts. — Reasonableness of Contingent Fee in Personal Injury Actions, 30 POF2d 197.

C.J.S. — 17 C.J.S., Contracts, §§ 1, 12, 76, 81, 112, 114. 17A C.J.S., Contracts, §§ 519, 520, 530.

ALR. — Liability of infant for attorney's services in personal-injury actions, 7 ALR 1011.

Agreement for contingent fee as assignment of interest in judgment, 19 ALR 399.

Agreement that attorney shall receive part of land involved in litigation as within statute of frauds, 21 ALR 352.

Lien of attorney on public fund or property, 24 ALR 933.

Amount or basis of recovery by attorney who takes case on contingent fee, where client discontinues, settles, or compromises, 40 ALR 1529.

Interest on claim for legal services, 52 ALR 197.

Validity of statutory provision for attorneys' fees, 90 ALR 530.

Means of enforcing or making effective attorney's retaining lien, 111 ALR 487.

Expenses incurred by attorney as affecting amount of his compensation under contingent fee contract, 116 ALR 1244.

Right of attorney to set off claim for unrelated services against client's claim for money collected, 173 ALR 429.

Validity of provision in promissory note or other evidence of indebtedness for payment, as attorneys' fees, expenses, and costs of collection, of specified percentage of note, 17 ALR2d 288.

Recovery of attorneys' fees provided for in bill, note, or similar evidence of indebted-

ness, as affected by opposing party's recovery, 41 ALR2d 677.

Contractual provision for attorney's fees as including allowance for services rendered upon appellate review, 52 ALR2d 863.

Measure or basis of attorney's recovery on express contract fixing noncontingent fees, where he is discharged without cause or fault on his part, 54 ALR2d 604.

What constitutes acceptance or ratification of, or acquiescence in, services rendered by attorney so as to raise implied promise to pay reasonable value thereof, 78 ALR2d 318.

What constitutes "trial," "final trial," or "final hearing" under statute authorizing allowance of attorneys' fees as costs on such proceeding, 100 ALR2d 397.

Necessity of introducing evidence to show reasonableness of attorney's fees where promissory note provides for such fees, 18 ALR3d 733.

Time from which interest begins to run on fee or disbursements owed by client to attorney, 29 ALR3d 824.

Allowance of attorneys' fees in shipper's action against carrier for loss of, or damage to, interstate shipment, 37 ALR3d 1125.

Amount of attorneys' compensation in matters involving real estate, 58 ALR3d 201.

Validity, construction, and effect of contract providing for contingent fee to defendant's attorney, 9 ALR4th 191.

Validity of statute establishing contingent fee scale for attorneys representing parties in medical malpractice actions, 12 ALR4th 23.

Excessiveness or adequacy of attorneys' fees in matters involving real estate — modern cases, 10 ALR5th 448.

Excessiveness or inadequacy of attorney's fees in matters involving commercial and general business activities, 23 ALR5th 241.

13-1-12. Requirement of proof of endorsement or assignment of bill, bond, or note in action by endorsee.

When an action is brought by an endorsee, an endorsement or assignment of any bill, bond, or note need not be proved unless denied under oath. (Laws 1810, Cobb's 1851 Digest, p. 271; Code 1863, § 2796; Code 1868, § 2804; Code 1873, § 2855; Code 1882, § 2855; Civil Code 1895, § 3705; Civil Code 1910, § 4299; Code 1933, § 20-805.)

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Section applies to cases where formal plea of non est factum filed as to endorsement.

When note containing endorsement or transfer is introduced in evidence, its factum appears with legal sufficiency. *Gray v. Oglesby*, 9 Ga. App. 356, 71 S.E. 605 (1911); *Wheeler v. Salinger*, 33 Ga. App. 300, 125 S.E. 888 (1924).

When endorsement is denied on oath, there must be proof of genuineness of endorsement. — Existence of genuine endorsement is essential to plaintiff's case and burden will ordinarily be upon plaintiff as to this issue. *Ruby v. Boyett*, 19 Ga. App. 516, 91 S.E. 939 (1917).

When defendant denies genuineness of endorsement, burden on plaintiff to prove otherwise. — When defendant has, in defendant's plea, denied genuineness of signature of payee transferring check to plaintiff, and alleged that this signature was a forgery, burden is placed on plaintiff to prove genuineness of signature. *Buena Vista Loan & Sav. Bank v. Stockdale*, 59 Ga. App. 798, 2 S.E.2d 158 (1939).

Section applicable although endorser's name signed by agent and action is against maker, not endorser. — Rule applies though name of endorser purports to have been signed not by endorser but by endorser's agent or attorney in fact, and though action be not against endorser but against maker. Plea which seems to admit endorsement is not a denial of the endorsement. *Habersham v. Lehman*, 63 Ga. 380 (1879).

Refusal to admit or deny for lack of information not a plea of general issue. — Where fact is peculiarly within knowledge of opposite party, pleader may refuse to admit or deny for lack of information and demand proof of such allegation. Such an answer is not subject to demurrer (now motion to

dismiss), nor does it amount to a plea of general issue. *Byrom v. Ringe*, 83 Ga. App. 234, 63 S.E.2d 235 (1951).

Although not specifically alleged, plaintiff presumed holder in due course absent denial by defendant. — Where no endorsement of note sued on by original payee appears in pleadings, nor is it alleged in petition that plaintiff acquired note in due course; but defendants do not question plaintiff's title to instrument and do not deny that plaintiff became holder thereof in due course, it will be presumed that plaintiff was holder in due course by endorsement of payee. *Holland v. Citizens' & S. Nat'l Bank*, 50 Ga. App. 471, 178 S.E. 413 (1935).

Denial that one is holder in due course not denial of endorsement's validity under section. — Denial that plaintiff is holder in due course of note is not denial of validity of endorsement, nor does it deny authority of endorser to act in endorsing note as attorney in fact of payee or transferor. *Griffin v. Blackshear Bank*, 66 Ga. App. 821, 19 S.E.2d 325 (1942).

Though signature does not purport to be authorized, failure to deny authenticity is admission. — Although signature, not purporting to be made by any particular agent authorized to act for corporation and not being accompanied by corporate seal, does not import its own authenticity, defendant, by not denying endorsement under oath, conclusively admits its genuineness. *Sheffield v. Johnson County Sav. Bank*, 2 Ga. App. 221, 58 S.E. 386 (1907).

Mere general statement is answer that defendant denies detailed allegation of assignment insufficient as denial of alleged execution or of authority of officer executing assignment, and does not put plaintiff on proof of such averments. *Odell v.*

Wessinger, 54 Ga. App. 838, 189 S.E. 367 (1936).

General denial of general allegation suffices as to subsequent amendment of petition. — Mere general denial, in a plea sworn to by a defendant, of paragraph in plaintiff's petition in which plaintiff alleges merely that plaintiff is owner of choses in action sued on, suffices as denial of subsequent amendment to petition which alleges assignment. *Georgia Fertilizer Co. v. Foster*, 40 Ga. App. 436, 149 S.E. 812 (1929).

Denial sufficient to put plaintiff on proof of endorsements. — See *Bruce v. Neal Bank*, 134 Ga. 364, 67 S.E. 819 (1910); *Federal Dist. Co. v. J.H. Carter & Co.*, 14 Ga. App. 645, 82 S.E. 51 (1914).

Cited in *Tyson v. Bray*, 117 Ga. 689, 45 S.E.

74 (1903); *Harper v. Peeples*, 11 Ga. App. 161, 74 S.E. 1008 (1912); *Kirby v. Johnson County Sav. Bank*, 12 Ga. App. 157, 76 S.E. 996 (1913); *Citizens Bank v. Ware*, 12 Ga. App. 512, 77 S.E. 589 (1913); *Butler v. First Nat'l Bank*, 13 Ga. App. 35, 78 S.E. 772 (1913); *Lightfoot v. Head & Cain*, 27 Ga. App. 148, 107 S.E. 609 (1921); *Edwards v. Camp*, 29 Ga. App. 556, 116 S.E. 210 (1923); *Pape v. Woolford Realty Co.*, 35 Ga. App. 284, 134 S.E. 174 (1926); *Massell v. Fourth Nat'l Bank*, 38 Ga. App. 631, 144 S.E. 806 (1928); *Lancaster v. Ralston*, 58 Ga. App. 404, 198 S.E. 839 (1938); *Austell Bank v. National Bondholders Corp.*, 188 Ga. 757, 4 S.E.2d 913 (1939); *Home Fin. Co. v. United Motor Sales*, 91 Ga. App. 679, 86 S.E.2d 659 (1955).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Assignments, § 9 et seq. 77 Am. Jur. 2d, Vendor and Purchaser, § 334.

C.J.S. — 17 C.J.S., Contracts, §§ 81, 87.

ALR. — Assignability of contract to furnish all of buyer's requirement or to take all of seller's output, 39 ALR 1192.

13-1-13. Recovery of voluntary payments.

Payments of claims made through ignorance of the law or where all the facts are known and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other party are deemed voluntary and cannot be recovered unless made under an urgent and immediate necessity therefor or to release person or property from detention or to prevent an immediate seizure of person or property. Filing a protest at the time of payment does not change the rule prescribed in this Code section. (Civil Code 1895, § 3723; Civil Code 1910, § 4317; Code 1933, § 20-1007.)

History of Code section. — This Code section is derived from the decisions in *Camps v. Phillips*, 49 Ga. 455 (1873); *Arnold & DuBose v. Georgia R.R. & Banking Co.*, 50 Ga. 304 (1873); *First Nat'l Bank v. Mayor of Americus*, 68 Ga. 119 (1881).

Law reviews. — For annual survey of local government law, see 56 *Mercer L. Rev.* 351 (2004).

For note on the voluntary-payment doctrine in Georgia, see 16 *Ga. L. Rev.* 893 (1982).

For comment, "Refocusing Liquidated Damages Law for Real Estate Contracts: Returning to the Historical Roots of the Penalty Doctrine," see 39 *Emory L.J.* 267 (1990).

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Section not unconstitutional for reason that it violates due process clauses of state and federal Constitutions. *Strachan Shipping Co. v. Mayor of Savannah*, 168 Ga. 309, 147 S.E. 555 (1929) (see O.C.G.A. § 13-1-13).

Statute has been strictly construed by Georgia courts as against one making payments. *Atlanta Milling Co. v. Norris Grain Co.*, 271 F.2d 453 (5th Cir. 1959) (see O.C.G.A. § 13-1-13).

O.C.G.A. § 13-1-13 did not apply to an equitable action by a bank to reform a note which had been mistakenly marked "paid in full." *Decatur Fed. Savs. & Loan v. Gibson*, 268 Ga. 362, 489 S.E.2d 820 (1997).

Voluntary payment doctrine not a defense to Natural Gas Act consumer claim. — Trial court erred in dismissing natural gas customers' class action based on the voluntary payment doctrine. O.C.G.A. § 46-4-160.5, which specifically authorized a private right of action for damages against a provider for intentionally and deceptively over charging the customers, prevailed over O.C.G.A. § 13-1-13, the general statute setting forth the voluntary payment doctrine. *Southstar Energy Servs., LLC v. Ellison*, 286 Ga. 709, 691 S.E.2d 203 (2010).

General presumption that money paid is due and payment voluntary. — General presumption is that when one pays money to another, money is due and payee is entitled thereto, and the payment is voluntarily made by payer, and in action to recover the money back, burden is on payer to show that payment was not due and that money was not paid by payer voluntarily; this rule applies to payment of insurance premiums by insured to insurer. *New York Life Ins. Co. v. Williamson*, 53 Ga. App. 28, 184 S.E. 755 (1936).

Burden is on plaintiff to establish that payments were not voluntary. *City of Norcross v. Taylor*, 153 Ga. App. 836, 267 S.E.2d 255 (1980).

While money voluntarily paid may not ordinarily be recovered, this rule is not

without exception. *Greene v. McIntyre*, 119 Ga. App. 296, 167 S.E.2d 203 (1969).

Burden on plaintiff to establish exception to voluntary payment rule. — Georgia law requires a plaintiff in an overpayment case to prove that the plaintiff was unaware of the true facts at the time the overpayment was made, or fit within an exception to the "voluntary payment" rule. *Kleiner v. First Nat'l Bank*, 581 F. Supp. 955 (N.D. Ga. 1984).

Construction with equitable principles. — Although an action for money had and received is governed by O.C.G.A. § 13-1-13, Georgia courts have construed that section and its predecessors, and interpreted the action itself, in conjunction with the equitable principles set forth in the Code, including O.C.G.A. § 23-2-32 and its predecessors. *Gulf Life Ins. Co. v. Folsom*, 256 Ga. 400, 349 S.E.2d 368 (1986).

Equities to be considered by the jury in the case of a claim for money had and received are: (1) the degree of negligence on the plaintiff's part in erroneously paying over the money; (2) the level of good faith with which the defendant acted in receiving and retaining the money; and (3) prejudice, i.e., whether the defendant's position has so changed that it would be unfair to require the defendant to pay the money back. *Gulf Life Ins. Co. v. Folsom*, 907 F.2d 1115 (11th Cir. 1990).

In an action for money had and received, where the plaintiff was negligent, the plaintiff is entitled to get the plaintiff's money back—unless the jury decides that he doesn't deserve it back or that the defendant deserves to keep it. *Gulf Life Ins. Co. v. Folsom*, 907 F.2d 1115 (11th Cir. 1990).

Application of O.C.G.A. § 23-2-22. — O.C.G.A. § 23-2-22 was inapplicable to a company's counterclaim to recover payments under a purchase agreement as § 23-2-22 offered relief following a mistake of law; the company made the payments in ignorance of the law and O.C.G.A. § 13-1-13 prohibited recovery of the payments voluntarily made in ignorance of the law. *Wallis v. B & A Construction Co.*, 273 Ga. App. 68,

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614 S.E.2d 193 (2005).

Effect of detrimental reliance by recipient. — The court did not err in ruling that a recipient of Medicaid reimbursement funds had so changed its position in reliance on its hospital-based classification that it would be unjust to require it to refund the monies in question. *Department of Medical Assistance v. Presbyterian Home, Inc.*, 200 Ga. App. 885, 409 S.E.2d 881 (1991), cert. denied, 1992 Ga. LEXIS 357 (1992).

"Where all the facts are known." — O.C.G.A. § 13-1-13 by its terms applies "where all the facts are known." This has been construed to include constructive, as well as actual knowledge, under such equitable principles as those in O.C.G.A. § 23-2-29. *Gulf Life Ins. Co. v. Folsom*, 256 Ga. 400, 349 S.E.2d 368 (1986).

Client may recover from attorney where proprieties of relationship demand return of portion of fee paid. *Greene v. McIntyre*, 119 Ga. App. 296, 167 S.E.2d 203 (1969).

Where purpose for payment fails of accomplishment, money paid cannot be retained. — Where purpose for which plaintiff parted with the plaintiff's money failed of accomplishment, defendants cannot in good conscience retain money, and plaintiff is entitled to have the money returned to the plaintiff. *Broome v. Cavanaugh*, 102 Ga. App. 563, 116 S.E.2d 881 (1960).

Accepting employment in confidential relationship without disclosing lack of qualification warrants recovery of money paid. — One who accepts employment in confidential relationship of attorney and client and fee for such services to be performed, without disclosing lack of qualification and authorization under law to perform services desired, has practiced fraud upon the principal which warrants recovery by principal of fee paid, where services which may have been rendered do not appear to have been of any material benefit to principal. *Lowe v. Presley*, 86 Ga. App. 328, 71 S.E.2d 730 (1952).

Payments made without duress or fraud, with knowledge of all facts, are voluntary and unrecoverable. — Payments not made under duress, and made with knowledge of all facts, without fraud or deception on part of person to whom payment is made, though

in ignorance of legal rights of party paying, are voluntary, and cannot be recovered. *Commerce Fin. Co. v. Perry*, 67 Ga. App. 491, 21 S.E.2d 123 (1942).

Trial court erred in not granting a mortgage company's motion for summary judgment on the company's defense under the "voluntary payment rule" codified in O.C.G.A. § 13-1-13 because there was no evidence of artifice, deception, or fraud on the part of the company as the company informed the homeowners more than six months prior to the closing on the sale of the home that the disputed fees were being charged; by their own admission, the homeowners were aware of the fees. *Regions Mortg., Inc. v. Jackson*, 294 Ga. App. 525, 669 S.E.2d 411 (2008).

Voluntary payments of claims cannot be recovered although contract itself is void and unenforceable. *Couch v. Blackwell & Assoc.*, 150 Ga. App. 739, 258 S.E.2d 552 (1979).

Doctrine did not bar payment made before contract breached. — The voluntary payment doctrine of O.C.G.A. § 13-1-13 did not preclude a buyer of parts from recovering a partial payment made to the seller. After the buyer made an interim payment the buyer was not required to make, the seller breached the contract by not allowing the buyer to inspect a shipment of parts and by abandoning performance of the contract. *Energy & Process Corp. v. Jim Dally & Assocs.*, 291 Ga. App. 772, 662 S.E.2d 835 (2008).

Recovery of interest payments on null and void contract, unlike payments toward principal, are recoverable. — Recovery of payments made by borrower towards repayment of principal under null and void loan contract is barred if payments were made voluntarily, but repayment of sums constituting interest on such an invalid loan are recoverable by borrower, since lender's claim to principal stands on different equitable footing than lender's claim to interest on principal sum of loans. *Sanders v. Liberty Loan Corp.*, 153 Ga. App. 859, 267 S.E.2d 286 (1980), aff'd within direction, 246 Ga. 292, 271 S.E.2d 218 (1980).

Payment of illegal demand not recoverable unless within exceptions provided by law. — Where party pays illegal demand with full knowledge of all facts which render such

demand illegal, without immediate and urgent necessity therefor, or unless to release the party's person or property from detention, or to prevent an immediate seizure of the party's person or property, such payment must be deemed voluntary, and cannot be recovered back. *McCarty v. Mobley*, 14 Ga. App. 225, 80 S.E. 523 (1914); *Dennison Mfg. Co. v. Wright*, 156 Ga. 789, 120 S.E. 120 (1923).

Section inapplicable where payment induced by misplaced confidence, artifice, deception or fraud of party paid. — While money voluntarily paid may not ordinarily be recovered back, nevertheless this rule has no application where payment is induced by misplaced confidence, artifice, deception, or fraudulent practice on part of person to whom money is paid. *Lowe v. Presley*, 86 Ga. App. 328, 71 S.E.2d 730 (1952).

Section applicable to insurance premiums voluntarily paid by one entitled to waiver thereof. — Premiums voluntarily paid by insured, where the insured is entitled to waiver thereof under provisions of policies of insurance sued on, cannot be recovered back by insured except where it is alleged and proved by the insured that the payments were paid under a mistake of facts or because of fraud or artifice practiced upon insured. *New York Life Ins. Co. v. Williamson*, 53 Ga. App. 28, 184 S.E. 755 (1936).

One cannot avoid legal consequences of one's acts by protesting, at time one does the acts, that one does not intend to subject oneself to such consequences. *Lewis v. Colquitt County*, 71 Ga. App. 304, 30 S.E.2d 801 (1944).

Section inapplicable to three-cornered transaction resulting in tort claim. — O.C.G.A. § 13-1-13 does not apply to a three-cornered transaction culminating in a tort claim for damages. *Read v. Benedict*, 200 Ga. App. 4, 406 S.E.2d 488 (1991).

Section no bar to recovery of premiums not made to satisfy claim. — In a suit on a contract terminating a business relationship and requiring the defendant to select one of two options regarding an insurance policy, the plaintiff's recovery of insurance premiums the plaintiff paid was not barred by the voluntary payment doctrine of O.C.G.A. § 13-1-13; the plaintiff made premium payments not to satisfy a claim but to keep the

policy in effect, and allowing the premium to go unpaid would have defeated the purpose of the parties' agreement. *Hibbard v. McMillan*, 284 Ga. App. 753, 645 S.E.2d 356 (2007).

Proof required of party seeking recovery. — Party seeking recovery must prove that the payment was not voluntarily made because certain material facts were not known at the time of payment or a valid reason existed for failure to determine the truth. *Rod's Auto Fin., Inc. v. Finance Co.*, 211 Ga. App. 63, 438 S.E.2d 175 (1993).

Cited in *Hoke v. City of Atlanta*, 107 Ga. 416, 33 S.E. 412 (1899); *Williams v. Stewart*, 115 Ga. 864, 42 S.E. 256 (1902); *Everett v. Tabor*, 127 Ga. 103, 56 S.E. 123, 119 Am. St. R. 324 (1906); *Georgia R.R. & Banking Co. v. Crossley & Co.*, 128 Ga. 35, 57 S.E. 97 (1907); *McDonald v. Sowell*, 129 Ga. 242, 58 S.E. 860, 12 Ann. Cas. 701 (1907); *Fenwick Shipping Co. v. Clarke Bros.*, 133 Ga. 43, 65 S.E. 140 (1909); *Harris v. Neil*, 144 Ga. 519, 87 S.E. 661 (1916); *Finch v. Cox Co.*, 19 Ga. App. 256, 91 S.E. 281 (1917); *Burell v. Pirkle*, 156 Ga. 398, 119 S.E. 529 (1923); *Dennison Mfg. Co. v. Wright*, 156 Ga. 789, 120 S.E. 120 (1923); *Stern v. Howell*, 33 Ga. App. 693, 127 S.E. 775 (1925); *Morris v. Scott*, 33 Ga. App. 787, 127 S.E. 823 (1925); *Mayor of Savannah v. Southern Stevedoring Co.*, 36 Ga. App. 526, 137 S.E. 123 (1927); *Daniel Bros. Co. v. Richardson*, 39 Ga. App. 121, 146 S.E. 505 (1929); *Wardlaw v. Withers*, 39 Ga. App. 600, 148 S.E. 16 (1929); *Darby v. City of Vidalia*, 168 Ga. 842, 149 S.E. 223 (1929); *Trust Co. v. Mobley*, 40 Ga. App. 468, 150 S.E. 169 (1929); *Davidson v. Citizens' Bank*, 171 Ga. 81, 154 S.E. 775 (1930); *Morgan v. Shepherd*, 171 Ga. 33, 154 S.E. 780 (1930); *Davison-Paxon Co. v. Walker*, 174 Ga. 532, 163 S.E. 212 (1932); *Morris v. Floyd County*, 46 Ga. App. 150, 167 S.E. 127 (1932); *American Mills Co. v. Doyal*, 46 Ga. App. 236, 167 S.E. 312 (1933); *Eibel v. Royal Indem. Co.*, 50 Ga. App. 206, 177 S.E. 350 (1934); *M.C. Kiser & Co. v. Doyal*, 51 Ga. App. 30, 179 S.E. 578 (1935); *Nash Loan Co. v. Dixon*, 181 Ga. 297, 182 S.E. 23 (1935); *State Revenue Comm'n v. Alexander*, 54 Ga. App. 295, 187 S.E. 707 (1936); *New York Life Ins. Co. v. Bradford*, 55 Ga. App. 248, 189 S.E. 914 (1937); *Mayor of Fort Valley v. Levin*, 183 Ga. 837, 190 S.E. 14 (1937); *Atlanta Coach Co. v. Simmons*, 55 Ga. App. 532, 190 S.E. 610

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(1937); *Crisler v. Bank of Canton*, 58 Ga. App. 485, 199 S.E. 252 (1938); *Bowers v. Dolen*, 187 Ga. 653, 1 S.E.2d 734 (1939); *Goodwin v. MacNeill*, 188 Ga. 182, 3 S.E.2d 675 (1939); *American Sur. Co. v. Groover*, 64 Ga. App. 865, 14 S.E.2d 149 (1941); *Walker v. Bituminous Cas. Corp.*, 74 Ga. App. 517, 40 S.E.2d 228 (1946); *Hurt & Quinn, Inc. v. Keen*, 89 Ga. App. 4, 78 S.E.2d 345 (1953); *Rose v. Mayor of Thunderbolt*, 89 Ga. App. 599, 80 S.E.2d 725 (1954); *Denton v. City of Carrollton*, 235 F.2d 481 (5th Cir. 1956); *Stein Steel & Supply Co. v. K. & L. Enters., Inc.*, 97 Ga. App. 71, 102 S.E.2d 99 (1958); *Macon Coca-Cola Bottling Co. v. Evans*, 214 Ga. 1, 102 S.E.2d 547 (1958); *Coleman v. Aronson*, 103 Ga. App. 469, 119 S.E.2d 599 (1961); *Howell v. Muscogee County*, 105 Ga. App. 515, 125 S.E.2d 139 (1962); *Oxford v. Shuman*, 106 Ga. App. 73, 126 S.E.2d 522 (1962); *Seaboard Air Line R.R. v. Richmond Lumber, Inc.*, 109 Ga. App. 328, 136 S.E.2d 144 (1964); *Gulf Am. Fire & Cas. Co. v. Harper*, 117 Ga. App. 356, 160 S.E.2d 663 (1968); *Hawes v. Smith*, 120 Ga. App. 158, 169 S.E.2d 823 (1969); *Byers v. Lieberman*, 126 Ga. App. 582, 191 S.E.2d 470 (1972); *United States Lines v. United States*, 470 F.2d 487 (5th Cir. 1972); *Blackmon v. Ewing*, 231 Ga. 239, 201 S.E.2d 138 (1973); *Flanders v. Columbia Nitrogen Corp.*, 135 Ga. App. 21, 217 S.E.2d 363 (1975); *Town of Lyerly v. Short*, 234 Ga. 877, 218 S.E.2d 588 (1975); *Deevers v. Associated Distribs., Inc.*, 138 Ga. App. 751, 227 S.E.2d 485 (1976); *Yeargin v. Farmers Mut. Ins. Ass'n*, 142 Ga. App. 76, 234 S.E.2d 856 (1977); *Cooper v. Public Fin. Corp.*, 144 Ga. App. 572, 241 S.E.2d 839 (1978); *Grizzard v. Petkas*, 146 Ga. App. 318, 246 S.E.2d 375 (1978); *Cooper v. Public Fin. Corp.*, 146 Ga. App. 250, 246 S.E.2d 684 (1978); *Jones v. Howard*, 153 Ga. App. 137, 264 S.E.2d 587 (1980); *Blanton v. Blanton*, 154 Ga. App. 646, 269 S.E.2d 505 (1980); *City of Norcross v. Taylor*, 157 Ga. App. 335, 277 S.E.2d 327 (1981); *Kay Solar Sys. v. Rome Printing Co.*, 160 Ga. App. 825, 287 S.E.2d 675 (1982); *Georgia Power Co. v. Foster Wheeler Corp.*, 161 Ga. App. 641, 288 S.E.2d 720 (1982); *United States v. DeKalb County*, 729 F.2d 738 (11th Cir. 1984); *Head v. Hook*, 254 Ga. 293, 329 S.E.2d 145 (1985); *Levinson v. American Thermex, Inc.*, 196

Ga. App. 291, 396 S.E.2d 252 (1990); *Nix v. Crews*, 200 Ga. App. 58, 406 S.E.2d 566 (1991); *Watts v. Promina Gwinnett Health Sys.*, 242 Ga. App. 377, 530 S.E.2d 14 (2000); *Liberty Nat'l Life Ins. Co. v. Radiotherapy of Ga., P.C.*, 252 Ga. App. 543, 557 S.E.2d 59 (2001).

Voluntary Payments

Payment in response to threat to levy execution if not paid promptly not involuntary. — Payment of judgment alleged to be void, where facts are all known by defendant, and there is no misplaced confidence, and no artifice, deception, or fraudulent practice used by other party, is voluntary payment, and cannot be recovered, unless made under urgent and immediate necessity therefor, or to release person or property, although such payment is made under protest. Mere threat to levy execution if not paid promptly or at once does not render payment involuntary. *West v. Brown*, 165 Ga. 187, 140 S.E. 500 (1927), citing *Williams v. Stewart*, 115 Ga. 864, 42 S.E. 256 (1902).

Mere apprehension or threats of civil proceeding to enforce claim do not render claim involuntary. — Mere apprehension or threats of civil proceeding to enforce claim, unaccompanied by any act of hardship or of oppression, does not render payment in response thereto involuntary. *Strachan Shipping Co. v. Mayor of Savannah*, 168 Ga. 309, 147 S.E. 555 (1929).

Threatened levy upon land not seizure as would render payment involuntary. — Threatened levy upon land is neither an immediate seizure of one's goods or arrest of one's person such as would make payment in lieu of levy less than voluntary. *Dunton v. Norton*, 42 Ga. App. 310, 155 S.E. 775 (1930).

Voluntary expenditures made by intervenor in partition suit not recoverable. — Expenditures voluntarily made by intervenor in partition suit while living with his wife and mother, (plaintiff and defendant) and in providing home for himself, his wife, and his mother, not recoverable by him. *Mills v. Williams*, 208 Ga. 425, 67 S.E.2d 212 (1951).

Application of doctrine to mistaken duplicate payment. — The voluntary payment doctrine did not bar a city's unjust enrichment and conversion claims filed against a construction contractor as the contractor

failed to show that: (1) a genuine issue of material fact remained over whether the city was negligent in ascertaining the true facts; and (2) any prejudice would result if the mistaken duplicate payment the city made to the contractor were returned to the city. *D & H Constr. Co. v. City of Woodstock*, 284 Ga. App. 314, 643 S.E.2d 826 (2007).

Overpayment in posting of bail bonds. — Family's suit to recover an overpayment the family made to two bail bondspersons to post bail bonds was not barred by O.C.G.A. § 13-1-13 even though the payments to the bondspersons were voluntarily made as the family paid the money to release a family member from detention. *Borison v. Christian*, 257 Ga. App. 257, 570 S.E.2d 696 (2002).

Recovery of overpayments from energy company. — Trial court erred by dismissing a class action complaint under O.C.G.A. § 9-11-12(b)(6) for failure to state a cause of action in a suit brought by customers against an energy company seeking recovery of overpayments as the voluntary payment doctrine did not apply to bar the action. *Ellison v. Southstar Energy Servs., LLC*, 298 Ga. App. 170, 679 S.E.2d 750 (2009), *aff'd*, 286 Ga. 709, 691 S.E.2d 203 (2010).

Money paid under apprehension or threat of criminal prosecution where no immediate danger not involuntary. — Money paid under apprehension or threat of criminal prosecution, when no warrant has been issued or proceeding begun, and there is no urgent and immediate danger, does not constitute duress so as to make payment compulsory. *Strachan Shipping Co. v. Mayor of Savannah*, 168 Ga. 309, 147 S.E. 555 (1929).

Payments resulting from threats by one clothed with governmental authority to execute threats, generally recoverable. — To above rule there is this exception: Where there are demands and threats by persons clothed with governmental authority to carry the threats into execution by arrest and prosecution, case stands on a different footing from demands and threats of private individuals, and money paid as a result may generally be recovered. *Strachan Shipping Co. v. Mayor of Savannah*, 168 Ga. 309, 147 S.E. 555 (1929).

Partial insurance settlement. — Acceptance of a partial settlement of an insurance claim in exchange for a general release

because of ignorance of rights which would have allowed full payment was a voluntary action under O.C.G.A. § 13-1-13. *Hawkins v. Travelers Ins. Co.*, 162 Ga. App. 231, 290 S.E.2d 348 (1982).

Settlement for amount in excess of liability limit. — Insurance company which settled a lawsuit for \$600,000, prior to a declaratory judgment holding that the limit of liability was \$500,000, could not recover the \$100,000 overpayment, which constituted a voluntary payment. *Insurance Co. of N. Am. v. Kyla, Inc.*, 193 Ga. App. 555, 388 S.E.2d 530 (1989).

Contribution by employer to tort settlement voluntary. — Where a "statutory employer," within the meaning of the workers' compensation law, enjoyed tort immunity at the time it contributed to a tort settlement, its payment constituted a voluntary payment, and the employer was not entitled to credit for funds it contributed to the settlement. *Travelers Ins. Co. v. McNabb*, 201 Ga. App. 297, 410 S.E.2d 788, *cert. denied*, 201 Ga. App. 904, 410 S.E.2d 748 (1991), *overruled on other grounds*, *Yoho v. Ringier of Am., Inc.*, 263 Ga. 338, 434 S.E.2d 57 (1993).

Retirement benefits. — Summary judgment for a retirement system was reversed as there were fact issues as to voluntary payment under O.C.G.A. § 13-1-13, and equitable estoppel under O.C.G.A. § 23-2-32, as a son claimed that his mother told him that her benefits would continue to be paid after her death; details of how the retirement system discovered the mother's death were needed to resolve the possibility that the son retained and spent the money in good faith. *Applebury v. Teachers' Ret. Sys.*, 275 Ga. App. 194, 620 S.E.2d 452 (2005).

Recovery of payments by county. — In an action by a county to recover payments the county made to a company in connection with road improvement projects, the county could not raise the argument that the provisions of O.C.G.A. § 36-10-1, regarding requirements for county contracts, were not followed when the county paid the amounts and then waited more than two years to file suit to recover the monies paid. *Twiggs County v. Oconee Elec. Membership Corp.*, 245 Ga. App. 231, 536 S.E.2d 553 (2000).

County was not entitled to recover voluntary payments made to the county tax commissioner in the form of commissions the

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commissioner received in the commissioner's capacity as tag fee agent, even though it was later determined that the commissioner was not entitled to receive a portion of tag fees as compensation, as the parties were operating under the mistaken belief that the law permitted the commissioner to be paid the commissions, both parties knew that the commissioner was being paid a commission from the fees collected, and there was no deception or fraud on the commissioner's part regarding the fact that the commissioner was receiving the commissions. *Montgomery County v. Sharpe*, 261 Ga. App. 389, 582 S.E.2d 545 (2003).

Payment of late charges. — The voluntary payment doctrine barred claims for recovery of late fees paid by cable television subscribers under a service agreement with the cable company which stated that a late fee would be charged to a customer's account if payment was not received by the due date. *Telescripps Cable Co. v. Welsh*, 247 Ga. App. 282, 542 S.E.2d 640 (2000).

On facts, payment voluntary. — *J.A. Jones Constr. Co. v. Greenbriar Shopping Ctr.*, 332 F. Supp. 1336 (N.D. Ga. 1971), *aff'd*, 461 F.2d 1269 (5th Cir. 1972); *Rod's Auto Fin., Inc. v. Finance Co.*, 211 Ga. App. 63, 438 S.E.2d 175 (1993); *Chemin v. State Farm Mut. Auto. Ins. Co.*, 226 Ga. App. 702, 487 S.E.2d 638 (1997).

Payment not accepted. — Evidence showed that plaintiff who was awarded judgment did not accept payment of \$43,166 which defendant made in an attempt to satisfy the judgment prior to appeal, and the appellate court held that plaintiff was not entitled to take advantage of defendant by arguing that the check was a voluntary payment under O.C.G.A. § 13-1-13 and did not have to be returned, but that plaintiff was required to return the money to comply with the appellate court's judgment reversing the trial court's judgment in plaintiff's favor. *Blanton v. Bank of Am.*, 263 Ga. App. 284, 587 S.E.2d 411 (2003).

Subrogee's claim barred. — Voluntary payment doctrine in O.C.G.A. § 13-1-13 barred a subrogee/insurer's claim for contractual indemnification against a subcontractor for damage done to a roadway during a construction project managed by the in-

sured, a general contractor, because the subrogee's commercial general liability policy only covered damages caused by an unforeseen "accident" or "occurrence" to a third party. *Mass. Bay Ins. Co. v. Sunbelt Directional Drilling, Inc.*, No. 1:07-CV-0408-JOF, 2008 U.S. Dist. LEXIS 20066 (N.D. Ga. Feb. 14, 2008).

Legal fees paid by spouse who killed other spouse. — In an estate administrator's conversion suit against a law firm, the trial court properly granted the law firm summary judgment with regard to the administrator attempting to recover \$125,000 in legal fees the decedent's spouse had paid to the law firm as the law firm accepted the fees from the decedent's spouse in good faith since it was not determined until sometime later that the spouse had killed the decedent after the spouse pled guilty to the homicide. Further, there was no evidence that the spouse did not have title to the money when the money was paid. *Levenson v. Word*, 294 Ga. App. 104, 668 S.E.2d 763 (2008), *aff'd*, 286 Ga. 114, 686 S.E.2d 236 (2009).

Wages voluntarily paid could not be recovered. — Under an employment contract, a business consultant was granted back wages as a matter of law because the company failed to show that the consultant misled the company about the hours the consultant actually worked and had paid the consultant wages up until the date of termination as a form of severance package, even though the company had concerns that the consultant might not have put in full work weeks; because the company chose not to act on the company's concerns, the company was barred from recovering wages paid by the voluntary payment doctrine codified at O.C.G.A. § 13-1-13. *Tura v. White Oak Group, Inc.*, No. 1:07-CV-0379-JOF, 2008 U.S. Dist. LEXIS 77958 (N.D. Ga. Sept. 15, 2008).

Misplaced confidence doctrine applied to payment made after installation. — Voluntary payment doctrine in O.C.G.A. § 13-1-13 did not bar a customer's claims alleging that a home improvement store improperly installed the customer's dryer; although the customer had constructive notice of the installation conditions and the manufacturer's specifications at the time of payment, the store's guarantee of a quality, reliable, and professional installation of each dryer

that the store sold provided material facts supporting the misplaced confidence exception to the voluntary payment doctrine thereby precluding judgment as a matter of law. *Goldstein v. Home Depot U.S.A., Inc.*, 609 F. Supp. 2d 1340 (N.D. Ga. 2009).

Involuntary Payments

Failure to disclose salient facts. — When the breach of duty on which recovery is based is failure to disclose salient facts to the plaintiff, the payments cannot be deemed voluntary within the language of O.C.G.A. § 13-1-13. *City of Commerce v. Duncan & Godfrey, Inc.*, 157 Ga. App. 337, 277 S.E.2d 266 (1981).

Payment of earnest money under real estate sale contract was not voluntary payment. *Williams v. Gottlieb*, 90 Ga. App. 438, 83 S.E.2d 245 (1954).

Fact that there is pending litigation regarding a party's obligation to pay money does not render payments made during the litigation involuntary unless the payments come within an exception specified in O.C.G.A. § 13-1-13. *Yeazel v. Burger King Corp.*, 241 Ga. App. 90, 526 S.E.2d 112 (1999).

No evidence of immediate threat. — Although the tenant of a commercial lease may have feared that the landlord would take action if the tenant failed to make the payments in the amount demanded, there was no evidence that the payments were made to counter an immediate threat to person or property so as to come within an exception to O.C.G.A. § 13-1-13. *Yeazel v. Burger King Corp.*, 241 Ga. App. 90, 526 S.E.2d 112 (1999).

Payment to recover possession of personalty wrongfully detained not voluntary. — Voluntary payments, though illegally demanded, cannot be recovered back. But a payment made for purpose of recovering possession of personal property wrongfully detained is not voluntary, and may be recovered back. This is true when owner does not know who has possession of property, but makes payment to third person to be used in securing release of goods. *DuVall v. Norris*, 119 Ga. 947, 47 S.E. 212 (1904).

Overcharge of freight paid under protest in order to obtain goods is recoverable. — Carrier is liable to suit by shipper for recovery of overcharge of freight paid under protest in order to obtain the shipper's

goods and which carrier refused to repay on demand. *Southern Ry. v. Schlittler*, 1 Ga. App. 20, 58 S.E. 59 (1907).

Payment to prevent detention resulting from conviction unsupported by valid ordinance, not voluntary. — Where one has been convicted in recorder's court, and no valid ordinance authorizes such conviction, payment of fine to prevent immediate seizure of person is not voluntary payment, and may be recovered back. *Rose v. Mayor of Thunderbolt*, 89 Ga. App. 599, 80 S.E.2d 725 (1954).

Premiums paid to prevent insurer from treating policy as lapsed not voluntary. — Premiums paid after furnishing proof of disability and required in order to prevent insurer from treating policy as lapsed are recoverable as payments made under urgent and immediate necessity, and are not voluntary. *Metropolitan Life Ins. Co. v. Saul*, 182 Ga. 284, 185 S.E. 266 (1936).

Payment on condition that difference in amount due to be adjusted later not voluntary. — Where county commissioners proposed to settle for \$1,200.00 all of amount that auditors claimed was due county by clerk of superior and city courts, and clerk on the clerk's part, to avoid delay, agreed to deposit \$1,200.00, on condition that difference as to amount due should be adjusted later, and at same time county commissioners on their part agreed that, if on investigation amount proved to be incorrect, matter would be adjusted by refunding to clerk amount incorrectly charged to the clerk, this was not a voluntary payment, and hence whatever part of \$1,200.00 that was incorrectly charged to plaintiff clerk could be recovered as money had and received. *Lewis v. Colquitt County*, 71 Ga. App. 304, 30 S.E.2d 801 (1944).

Shareholder's payment to avoid seizure of corporate property not involuntary. — Shareholder's payment of \$70,000 for stock was not considered "involuntary" so as to fall outside the ambit of O.C.G.A. § 13-1-13, merely because it was made under what the shareholder perceived to be an "urgent and immediate necessity" of preventing another's "eventual and imminent seizure" of the corporation's property. *Graham v. Cook*, 179 Ga. App. 603, 347 S.E.2d 623 (1986).

On facts, payment involuntary. — See *Speed Oil Co. v. Aycok*, 188 Ga. 46, 2 S.E.2d 666 (1939).

Mistake

Application to one paying money by mistake, without valid reason for ascertaining truth. — One paying money by mistake without valid reason for failing to ascertain truth cannot recover payment. *Barker v. Federated Life Ins. Co.*, 111 Ga. App. 171, 141 S.E.2d 206 (1965).

Section applies not only when one pays money with knowledge of all facts but also when one pays by mistake without valid reason for failing to ascertain truth. *Bohannon v. Manhattan Life Ins. Co.*, 555 F.2d 1205 (5th Cir. 1977); *Insurance Co. of N. Am. v. Kyla, Inc.*, 193 Ga. App. 555, 388 S.E.2d 530 (1989).

Money paid under mistake or in ignorance of fact recoverable in appropriate circumstances. — Even where money is paid under mistake of fact, or in ignorance of facts, the money cannot be recovered, unless circumstances are such that party receiving the money ought not, in equity and good conscience, to be allowed to retain the money. In equity and good conscience refers only to acts and intentions of person receiving money as affecting other party to transaction. If one has acted in good faith and in good conscience with person paying money, one is entitled to retain the money, even if one's actions and intentions may not have been in good faith and in good conscience as regards other persons not connected with transaction. *Bryant v. Guaranty Life Ins. Co.*, 40 Ga. App. 573, 150 S.E. 596 (1929).

While money paid under mistake of fact or in ignorance of facts may be recovered back if circumstances are such that party receiving ought not in equity and good conscience retain the money, to entitle a party to recover back money which the party has paid on ground that the money was paid to defendant through mistake or ignorance of facts, which one sets up as showing there was no legal liability on the party to pay, plaintiff should allege and show on trial that at time of payment plaintiff was mistaken as to such facts or ignorant of their existence. *New York Life Ins. Co. v. Williamson*, 53 Ga. App. 28, 184 S.E. 755 (1936).

In an action for money had and received, the plaintiff generally can recover a payment mistakenly made when that mistake was caused by the plaintiff's lack of diligence or the plaintiff's negligence in ascertaining the

true facts and the other party would not be prejudiced by refunding the payment, subject to a weighing of the equities between the parties by the trier of fact. *Gulf Life Ins. Co. v. Folsom*, 256 Ga. 400, 349 S.E.2d 368 (1986); *Graham v. Hogan*, 185 Ga. App. 842, 366 S.E.2d 219 (1988); *Landers v. Heritage Bank*, 188 Ga. App. 785, 374 S.E.2d 353 (1988).

Where both parties to a construction contract labored under a mutual mistake of fact that there was a valid contract and since plaintiff made the deposit with the defendants in belief that such was required under the contract, then O.C.G.A. § 13-1-13 has no application because the money was not due and payable under a void contract. *Cochran v. Ogletree*, 244 Ga. App. 537, 536 S.E.2d 194 (2000).

Reliance on computer records. — A jury issue exists as to whether the plaintiff was negligent in relying solely on the plaintiff's computer, considering the facts of the current widespread use of computers for the purpose of keeping business records, and that, although the computer here, though negligently programmed by the plaintiff's subsidiary, may not have been known to be inaccurate. *Gulf Life Ins. Co. v. Folsom*, 256 Ga. 400, 349 S.E.2d 368 (1986).

There is distinction between mistake and ignorance of law and section applicable only to latter. — There is a distinction between ignorance and mistake of law. Ignorance implies passiveness; mistake implies action. Ignorance does not pretend to knowledge, but mistakes assumes to know. Ignorance may be result of laches, but mistake argues diligence. Mere ignorance is no mistake, but mistake involves more than ignorance. Hence, the statute does not apply to money paid under mistake of law. *Whitehurst v. Mason*, 140 Ga. 148, 78 S.E. 938 (1913).

Money paid under mistaken apprehension of liability not recoverable. — There can be no recovery of money paid by lodge as funeral expenses for member when the amounts were paid out under mistaken apprehension as to lodge's liability for amount of that benefit. *Chapman v. Ellis*, 58 Ga. App. 614, 199 S.E. 650 (1938).

Affidavit that insurance paid without knowledge of payment by another not proving lack of knowledge. — Affidavit by insurer which stated that claim was paid without

knowledge of any other policy or that payments had been made under any other policy was not sufficient to prove lack of knowledge. *Aetna Life Ins. Co. v. Cash*, 121 Ga. App. 8, 172 S.E.2d 629 (1970).

Mistake of law. — While money voluntarily paid may not ordinarily be recovered, this rule is not without exception. If payment was made in ignorance of law, recovery is barred; if in mistake of law, recovery is permitted. *Emond v. State Farm Mut. Auto. Ins. Co.*, 175 Ga. App. 548, 333 S.E.2d 656 (1985).

Duress

In order for payment to be involuntary it must be paid under duress, and if payment is made under urgent and immediate necessity therefor or to prevent an immediate seizure of person or property, it is made under duress. *Taranto v. Richardson*, 50 Ga. App. 851, 179 S.E. 202 (1935).

Disadvantage and unequal bargaining power not grounds of duress. — One may

not void a contract on grounds of duress merely because one entered into the contract with reluctance, the contract was very disadvantageous to the party, the bargaining power of the parties was unequal or there was some unfairness in the negotiations preceding the agreement. *Graham v. Cook*, 179 Ga. App. 603, 347 S.E.2d 623 (1986).

Threat of prosecution not necessarily duress. — Mere threats of prosecution of one who has committed no crime, or by one who has apparently made no moves toward carrying out of such threats, do not amount to duress in law. *Taranto v. Richardson*, 50 Ga. App. 851, 179 S.E. 202 (1935).

Claim for rescission of a settlement agreement was meritless where, at the time of the settlement, plaintiff was acting on a court order with full knowledge of all the extant facts and was not under immediate threat of seizure of property. *Sellers Bros., Inc. v. Imperial Flowers, Inc.*, 232 Ga. App. 687, 503 S.E.2d 573 (1998).

OPINIONS OF THE ATTORNEY GENERAL

Payment of liquor license by licensee who subsequently sells business not recoverable. — Payment of retail liquor license by owner of store, which the owner shortly thereafter sold to another, is not recoverable where voluntarily made. 1948-49 Op. Att'y Gen. p. 593.

Occupational tax not refundable to car

dealer prohibited from using dealer tags. — One who has paid occupational tax as used car dealer but who is prohibited from receiving and using dealer tags because one did not register under Used Car Dealers Registration Act is not entitled to refund of occupational tax. 1969 Op. Att'y Gen. No. 69-167.

RESEARCH REFERENCES

C.J.S. — 70 C.J.S., Payment, §§ 132 et seq., 155, 156, 160.

ALR. — Right to restitution of one paying, or advancing money upon the same security to pay, debt secured by supposedly valid lien where the lien proves invalid, 159 ALR 487.

Partial payment on private building or construction contract as waiver of defects, 66 ALR2d 570.

When statute of limitations begins to run against action to recover money paid by mistake, 79 ALR3d 754.

Right of insurer under health or hospitalization policy to restitution of payments made under mistake, 79 ALR3d 1113.

CHAPTER 2

CONSTRUCTION

Sec.		Sec.	
13-2-1.	Construction of contracts by courts generally; findings of fact by juries.	13-2-4.	Ascertainment of intention of parties where meaning placed on contract by one party known to other.
13-2-2.	Rules for interpretation of contracts generally.		
13-2-3.	Ascertainment and enforcement of intention of parties generally.		

Cross references. — Formation and construction of sales contracts, §§ 11-2-201 et seq. and 11-2-301 et seq.

JUDICIAL DECISIONS

Cited in *Burks v. Board of Trustees of Firemen's Pension Fund*, 214 Ga. 251, 104 S.E.2d 225 (1958); *Farrendon Corp. v. Genesco, Inc.*, 822 F. Supp. 1576 (N.D. Ga. 1992).

RESEARCH REFERENCES

ALR. — Construction and effect of guaranty of circulation in advertising contract, 1 ALR 153.

Divisibility of contract for the sale of an outfit, plant, or machinery, 4 ALR 1442.

Admissibility of parole evidence to vary or explain the contract implied from the regular endorsement of a bill or note, 22 ALR 527; 35 ALR 1120; 54 ALR 999; 92 ALR 721.

Payment or tender of unpaid purchase money as condition precedent to the right of a purchaser of land to rescind on the ground of defects in or want of title, 40 ALR 693.

Promise to furnish separate instrument of guaranty or title as a dependent or an independent covenant, 48 ALR 371.

Validity and construction of contract or option on purchase of corporate stock by employee for resale thereof to original seller on termination of employment, 48 ALR 625; 66 ALR 1182.

Validity and construction, as regards buildings not on right of way, of contract relieving railroad from liability for destruction of buildings, 48 ALR 1003; 51 ALR 638.

Who must bear loss from destruction of or damage to building during performance of

building contract, without fault of either party, 53 ALR 103.

Effect on contract of sale of subsequent agreement to exchange, 53 ALR 207.

Validity and construction of contract or option, on purchase of corporation stock by employee, for resale thereof to original seller on termination of employment, 66 ALR 1182.

Construction and effect of provision excusing performance of contract in case of crop failure, 67 ALR 1432.

Validity and enforceability of provision for renewal of lease at rental not determined, 68 ALR 157; 166 ALR 1237.

Pursuit of remedies against third persons as condition of liability under bond conditioned against losses due to dishonesty or other misconduct of officer or employee, 74 ALR 284.

Agreement, before death of third person, between his prospective heirs, devisees, or legatees as to their respective shares in the estate, 74 ALR 441.

Validity, construction, applicability, and effect of provision in real estate mortgage

regarding payment of taxes or assessments by mortgagee, 74 ALR 506.

Sublease as breach of covenant against assignment, 74 ALR 1018.

Effect of value limitation clause in bill of lading or shipping receipt for goods misdescribed therein or not received by carrier, 74 ALR 1382.

Effect of recitals or provisions of bond to secure performance of contract as an interpretation of the terms of the contract, 76 ALR 941.

Validity of provisions of construction contract referring questions to architect, where latter is under guaranty to keep contract below certain sum, 77 ALR 1130.

Liability of sureties on bond of guardian, executor, administrator, or trustee for default or deficit occurring before bond was given, 82 ALR 585.

Liability of accident insurer as affected by insured's failure to take precautions to avoid effects of accident, 82 ALR 694.

Death or injury while engaged in an athletic game or contest (baseball, basketball, bowling, boxing, fencing, football, golf, tennis, wrestling, automobile racing, bicycle racing, horse racing, steeplechase riding, etc.) as within coverage of life or accident insurance policy, 82 ALR 732.

Time to be considered in determining whether a case is within the earlier or later provisions of the workmen's compensation act, as regards compensation recoverable, 82 ALR 1244.

Rights under gas or oil lease or grant, or operating agreement, in respect of wet or casing-head gas or gasoline recovered therefrom, 82 ALR 1304.

Restrictive covenants against conducting business or practicing profession as covering dealings or attempts to deal outside the restricted district with persons residing within the district, 87 ALR 329.

Instrument for purchase of land as a contract or an option, 87 ALR 563.

Validity, construction, and effect of provision in real estate mortgage as to rents and profits, 87 ALR 625; 91 ALR 1217.

Liability of lessee's assignee to lessor for rent accruing after assignment by him, in the absence of assumption of covenants of lease, 89 ALR 433; 148 ALR 196.

Admissibility of parol or extrinsic evidence on question whether time was of essence of written contract, 89 ALR 920.

Admissibility of extrinsic evidence of custom or usage to show that words employed in a contract unambiguous on their face have a special trade significance, 89 ALR 1228.

Agreement by lessee with third person permitting use of the property as violation of covenant in lease against assigning or subletting, 89 ALR 1325.

Validity of agreement to make loans or advances as affected by objection of uncertainty or indefiniteness, 89 ALR 1364.

Death of insured after default in payment of premiums within the period allowed for exercise of option as to benefits without having exercised option, 89 ALR 1465.

Construction and application of statute or ordinance relating to wages of persons employed on public work, 93 ALR 1249.

Construction and effect of promise to pay when promisor is able, 94 ALR 721.

Criterion of health for purposes of warranty or condition in insurance contract, 100 ALR 362.

Specification in employment contract of grounds or causes of discharge as exclusive of other grounds or causes, 100 ALR 507.

Question whether express contract was made as one for court or jury when not evidenced by formal instrument but in whole or part by informal writings, 100 ALR 969.

Construction and effect of bond or other agreement to protect mortgagee against prior tax or other liens, or failure to make or complete improvements or repairs, and measure of damages for breach thereof, 103 ALR 1395.

Municipal ordinance as within rule that every contract is made with reference to existing law, 110 ALR 1048.

Admissibility of oral or extrinsic evidence on question of liability on bill of exchange, promissory note, or other contract where signature is followed by word or abbreviation which may be either descriptive or indicative of contracting character, 113 ALR 1364.

Who is dependent of insured within contract of fraternal or benevolent society, 113 ALR 1518.

Rights in respect of proceeds of life insurance under policy naming creditor as beneficiary, 115 ALR 741.

Construction, scope, and application of words descriptive of property in statute relat-

ing to liability of innkeeper to guest for loss or damage to property, 115 ALR 1088.

Depreciation of value of insured building because of age at time of loss as a factor in determining the amount of a partial loss under insurance policy, 115 ALR 1169.

Provision of lease authorizing its termination by lessor in event of insolvency, bankruptcy, or receivership of lessee, 115 ALR 1189; 168 ALR 504.

Indemnity provisions of accident policy, or life policy with accident or disability features, in respect of insured's disability, death, etc., as alternative or cumulative, 115 ALR 1221.

Validity of option provisions in life insurance policy which vary from (or add to, or exclude) statutory provisions, 115 ALR 1389.

Waiver of arbitration provision in contract, 117 ALR 301; 161 ALR 1426.

Passing of title to personal property under contract of sale, as affected by fact that contract covers both real and personal property, 117 ALR 395.

Validity and effect of contract or deed which purports to cover or convey an undivided interest in land without specifying the amount of the interest, 123 ALR 912.

Validity, construction, and application of insecurity clause in chattel mortgage, 125 ALR 313.

Sufficiency of bookkeeping to satisfy condition of insurance policy, 125 ALR 350.

Traffic violation as violation of law within provision of life or accident insurance policy or certificate excepting death or injury due to violation of law, 125 ALR 1104.

Construction and effect of "strike clause" of contract, 125 ALR 1304.

Scope and application of provisions of accident policy, or accident feature of life policy, relating to accident in connection with automobile or other motor vehicle, 138 ALR 404; 78 ALR2d 1044.

Rights and remedies as to premium where insured was under mistaken belief regarding value, nature, or existence of property subject of insurance, 138 ALR 924.

Notice from insurer to effect that employment of agency of third person is unnecessary in collecting insurance, 138 ALR 1374.

Validity and enforceability of agreement, between insurer and beneficiary of insurance electing to leave proceeds in insurer's hands, as to ultimate disposition of proceeds, 138 ALR 1483.

Burn as an accident or caused by accidental means within coverage of life or accident insurance policy, 138 ALR 1514.

Enlistment or mustering of minors into military service, 153 ALR 1420; 155 ALR 1451; 157 ALR 1449.

Validity, construction, and effect of statutory or contractual provision in, government construction contract referring to Secretary of Labor questions respecting wage rates or classification of employees of contractor, 163 ALR 1300.

Formal or written instrument as essential to completed contract where the making of such instrument is contemplated by parties to verbal or informal agreement, 165 ALR 756.

Meaning of term "duration" or "end of war" employed in contract, 168 ALR 173.

Right of contingent beneficiary to proceeds of life policy upon death of direct or primary beneficiary after death of insured, 172 ALR 642.

Extrinsic evidence regarding character and size of trees contemplated by written timber contract or lease, 173 ALR 518.

Title to unknown valuables secreted in articles sold, 4 ALR2d 318.

Tax liabilities as within agreement for assumption or payment of another's obligations, 4 ALR2d 1314.

Granting to lessee of "first" privilege or right to release or to renewal or extension of tenancy period as conditioned upon lessor's willingness to release, 6 ALR2d 820.

Insurance of bank against larceny and false pretenses, 15 ALR2d 1006.

Risks and losses covered by lightning insurance, 15 ALR2d 1017; 47 ALR4th 772.

What constitutes a "sale" of real property within purview of clause in lease making renewal clause inoperative in event of such contingency, 15 ALR2d 1040.

Question, as one of law for court or of fact for jury, whether oral promise was an original one or was a collateral promise to answer for the debt, default, or miscarriage of another, 20 ALR2d 246.

Width of way created by express grant, reservation, or exception not specifying width, 28 ALR2d 253.

Construction and effect of clause in liability policy voiding policy while insured vehicles are being used more than a specified distance from principal garage, 29 ALR2d 514.

Time within which insurer must make election to rebuild, repair, or replace insured property, 29 ALR2d 720.

Animal or livestock insurance: risks and losses covered, 29 ALR2d 790; 47 ALR4th 772.

When is one confined to house within meaning of health or accident insurance policy, 29 ALR2d 1408.

Construction and effect of severance or dismissal pay provisions of employment contract or collective labor agreement, 40 ALR2d 1044.

Rights and liabilities as between employer and employee with respect to general pension or retirement plan, 42 ALR2d 461; 46 ALR3d 464.

Validity, construction, and effect of limited liability or stipulated damages clause in fire or burglar alarm service contract, 42 ALR2d 591.

Construction and effect of clause in burglary policy requiring alarm system, 42 ALR2d 733.

Coverage, construction, and effect of medical payments and funeral expense clauses of liability policy, 42 ALR2d 983.

Validity, construction and effect of contract, option, or provision for repurchase by vendor, 44 ALR2d 342.

Construction and effect of provision in private building and construction contract that work must be done to satisfaction of owner, 44 ALR2d 1114.

What constitutes reservation of right to terminate, rescind, or modify contract, as against third party beneficiary, 44 ALR2d 1270.

Sufficiency, under the statute of frauds, of description or designation of land in contract or memorandum of sale which gives right to select the tract to be conveyed, 46 ALR2d 894.

Liability of one cutting and removing timber under deed or contract for failure to remove or dispose of debris, trimmings, or tops, 56 ALR2d 400.

Mortgage, lien, or other encumbrance as constituting increase of hazard so as to avoid fire or other property insurance policy, 56 ALR2d 422.

Discharge or retirement of employee because of age or physical disability as within provision of collective bargaining contract limiting employer's right to discharge employees, 56 ALR2d 991.

Subletting or renting party of premises as violation of lease provision as to subletting, 56 ALR2d 1002.

Effect of failure to contract for sale or exchange of real estate to specify time for giving of possession, 56 ALR2d 1272.

Construction and effect of contract for sale of commodity or goods wherein quantity is described as "about" or "more or less" than an amount specified, 58 ALR2d 377.

Construction and effect of agreement relating to salary of partners, 66 ALR2d 1023.

Duration of liability to pay royalty under agreement for publication of material subject to copyright, not limited as to time, 69 ALR2d 1317.

Construction and effect of lease provision relating to attorneys' fees, 77 ALR2d 735.

Duty of lessee or assignee of mineral lease other than lease for oil and gas, as regards marketing or delivery for marketing of mineral products, 77 ALR2d 1058.

Scope and application of provisions of accident policy, or accident feature of life policy, relating to accident in connection with automobile or other motor vehicle, 78 ALR2d 1044.

Right of lessor to cancel oil or gas lease for breach of implied obligation to explore and develop further after initial discovery of oil or gas, in absence of showing reasonable expectation of profit to lessee from further drilling, 79 ALR2d 792.

Applicability of iron safe clause where business is temporarily closed or unattended, 79 ALR2d 877.

False statements favorable to defense, made and persisted in by insured, as breach of cooperation clause, 79 ALR2d 1040.

Broker's right to commission on renewal, extension, or renegotiation of lease, 79 ALR2d 1063.

Construction of standing timber contract providing that trees to be cut and order of cutting shall be as selected by seller, 79 ALR2d 1243.

Rights and liabilities under "uninsured motorist" coverage, 79 ALR2d 1252.

Provision of accident or health insurance policy that insured shall be under care of physician or surgeon, 84 ALR2d 375.

Liability as between lessor and lessee, where lease does not specify, for taxes and assessments, 86 ALR2d 670.

Water well-drilling contracts, 90 ALR2d 1346.

What is included within term "mine" as used in written instrument, 92 ALR2d 868.

Builder's risk insurance policies, 94 ALR2d 221; 97 ALR3d 1270; 22 ALR4th 701.

Agister's liability for injury, weight loss, or death of pastured animals, 94 ALR2d 319.

Person who signs contract but is not named in body thereof as party to contract and liable thereunder, 94 ALR2d 691.

Liability of employer for agreed advances of drawing account which exceed commissions or share of profits earned, 95 ALR2d 504.

Validity, construction, and effect of lessor's covenant against use of his other property in competition with the lessee-covenantee, 97 ALR2d 4.

Duty of construction contractor to indemnify contractee held liable for injury to third person, in absence of express contract for indemnity, 97 ALR2d 616.

Construction and effect of provision in contract for sale of realty by which purchaser agrees to take property "as is" or in the condition in which it is, 97 ALR2d 849.

Construction of term "result from" or "as a result of" pregnancy, used in life, accident, health, or hospitalization policy, 97 ALR2d 1068.

Right to reward of furnisher of information leading to arrest and conviction of offenders, 100 ALR2d 573.

Contractor's liability for alleged breach of contract for construction of swimming pool, 1 ALR3d 870.

Effect of stipulation, in public building or construction contract, that alterations or extras must be ordered in writing, 1 ALR3d 1273.

Choice of law in construction of insurance policy originally governed by law of one state as affected by modification, renewal, exchange, replacement, or reinstatement in different state, 3 ALR3d 646.

Contract, provision thereof, or stipulation waiving wife's right to counsel fees in event of divorce or separation action, 3 ALR3d 716.

Extent and reasonableness of use of private way in exercise of easement granted in general terms, 3 ALR3d 1256.

Insurance: construction of "sane or insane" provision of suicide exclusion, 9 ALR3d 1015.

Construction, as to coverage, of insurance

policy provision specifically covering loss or damage from smoke, smudge, or soot, 11 ALR3d 901.

Oil and gas: "dry hole" as "well" within undertaking to drill well, 15 ALR3d 450.

Disability insurance or provision: clause requiring notice of claim within specified time or as soon as reasonably possible, or the like, 17 ALR3d 530.

Insurer's statements as to amount of dividends, accumulations, surplus, or the like as binding on insurer or merely illustrative, 17 ALR3d 777.

Loss by heat, smoke, or soot without external ignition as within standard fire insurance policy, 17 ALR3d 1155.

What are "fixtures" within provision of property insurance policy expressly extending coverage to fixtures, 17 ALR3d 1381.

Effect on compensation of architect or building contractor of express provision in private building contract limiting the cost of the building, 20 ALR3d 778.

Construction and effect of affirmative provision in contract of sale by which purchaser agrees to take article "as is," in the condition in which it is, or equivalent term, 24 ALR3d 465.

Validity, construction, and enforcement of business opportunities or "finder's fee" contract, 24 ALR3d 1160.

Validity and construction of liability policy provision requiring insured to reimburse insurer for payments under policy, 29 ALR3d 291.

Breach or repudiation of collective labor contract as subject to, or as affecting right to enforce, arbitration provision in contract, 29 ALR3d 688.

What constitutes improvements, alterations, or additions within provisions of lease permitting or prohibiting tenant's removal thereof at termination of lease, 30 ALR3d 998.

Trivial nature of personal injury as excusing compliance with liability insurance policy provision requiring notice to insurer, 39 ALR3d 593.

Validity and construction of accident insurance policy provision making benefits conditional on disability occurring immediately, or at once, or within specified time of accident, 39 ALR3d 1026.

Validity and construction of provision in accident insurance policy limiting coverage

for death or loss of member to death or loss occurring within specified period after accident, 39 ALR3d 1311.

Who is "executive officer" of insured within coverage of liability insurance policy, 39 ALR3d 1434.

Construction of provision in real-estate mortgage, land contract, or other security instrument for release of separate parcels of land as payments are made, 41 ALR3d 7.

Private pension plan: construction of provision authorizing employer to terminate or modify plan, 46 ALR3d 464.

Landlord and tenant: tenant's rights under provision giving him pre-emptive right to purchase on terms offered by third person, where third person's offer is withdrawn before tenant exercises pre-emptive right, 46 ALR3d 1377.

Validity and construction of restrictive covenant controlling architectural style of buildings to be erected on property, 47 ALR3d 1232.

Landlord and tenant: construction of provision of lease providing for escalation of rental in event of tax increases, 48 ALR3d 287.

Validity, construction, and application of entirety clause in oil or gas lease, 48 ALR3d 706.

What constitutes "actual trial" under policy provision conditioning liability insurer's obligation upon determination of insured's liability by judgment after actual trial, 48 ALR3d 1082.

Property insurance on aircraft; risks and losses covered, 48 ALR3d 1120.

Private pension plans: statements in literature distributed to employees as controlling over provisions of general plan, 50 ALR3d 1270.

Construction of contract for installation of vending machine on another's premises, 53 ALR3d 471.

Calculation of rental under commercial percentage lease, 58 ALR3d 384.

Validity and enforceability of provisions for renewal of lease at rental to be fixed by subsequent agreement of parties, 58 ALR3d 500.

Validity, construction, and effect of clause in franchise contract prohibiting transfer of franchise or contract, 59 ALR3d 244.

Construction and operation of fee payment provisions of employment agency contract, 61 ALR3d 375.

What conditions constitute "disease" within terms of life, accident, disability, or hospitalization policy, 61 ALR3d 822.

What constitutes "one accident" or "one sickness" or related conditions or recurrences within provisions of health, accident, and disability insurance, 61 ALR3d 884.

Grant, lease, exception, or reservation of oil and/or gas rights as including oil shale, 61 ALR3d 1109.

What constitutes "trailer" within coverage or exclusion provision of automobile liability policy, 65 ALR3d 804.

"Vehicle" or "land vehicle" within meaning of insurance policy provision defining risks covered or excepted, 65 ALR3d 824.

Coverage and exclusions under hospital professional liability or indemnity policy, 65 ALR3d 969.

What constitutes "direct loss" under wind-storm insurance coverage, 65 ALR3d 1128.

Validity and construction of contract exempting agricultural fair or similar bailee from liability for articles delivered for exhibition, 69 ALR3d 1025.

Construction of agreement between real estate agents to share commissions, 71 ALR3d 586.

Construction of provision, in compromise and settlement agreement, for payment of costs as part of settlement, 71 ALR3d 909.

What constitutes "collapse" of a building within coverage of property insurance policy, 71 ALR3d 1072.

Necessity for payment or tender of purchase money within option period in order to exercise option, in absence of specific time requirement for payment, 71 ALR3d 1201.

Conflict of laws: what law governs validity and construction of written guaranty, 72 ALR3d 1180.

Validity and construction of "no damage" clause with respect to delay in building or construction contract, 74 ALR3d 187.

Construction and application of automatic sprinkler provision in fire insurance policy, 79 ALR3d 539.

Construction and application of liability or indemnity policy on civil engineer, architect, or the like, 83 ALR3d 539; 14 ALR5th 695.

Requirements as to certainty and completeness of terms of lease in agreement to lease, 85 ALR3d 414.

Excess of payment for one period as applicable to subsequent period under contract of mortgage providing for periodic payments, 89 ALR3d 947.

Right of architect to compensation under contractual provision that fee is to be paid from construction loan funds, 92 ALR3d 509.

Modern status as to duration of employment where contract specifies no term but fixes daily or longer compensation, 93 ALR3d 659.

Increase in tuition as actionable in suit by student against college or university, 99 ALR3d 885.

Heart attack following exertion or exercise as within terms of accident provision of insurance policy, 1 ALR4th 1319.

Debts included in provision of mortgage purporting to cover all future and existing debts (Dragnet Clause) — modern status, 3 ALR4th 690.

Division of opinion among judges on same court or among other courts or jurisdictions considering same question, as evidence that particular clause of insurance policy is ambiguous, 4 ALR4th 1253.

Scope of clause excluding from contractor's or similar liability policy damage to property in care, or control of insured, 8 ALR4th 563.

Insured's duties respecting care of injured or ill animal covered by animal or livestock policy, 22 ALR4th 1053.

Liability of person furnishing, installing, or servicing burglary or fire alarm system for burglary or fire loss, 37 ALR4th 47.

Livestock or animal insurance: risks and losses, 47 ALR4th 772.

Who is "executive officer" of insured within liability insurance policy, 1 ALR5th 132.

What entities or projects are "public" for purposes of state statutes requiring payment of prevailing wages on public works projects, 5 ALR5th 470.

Construction and application of "business pursuits" exclusion provision in general liability policy, 35 ALR5th 375.

Validity, construction, and application of provision in automobile liability policy excluding from coverage injury to, or death of, employee of insured, 43 ALR5th 149.

Who is "employee," "workman," or the like, of contractor subject to state statute requiring payment of prevailing wages on public works projects, 5 ALR5th 513.

International Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co., 5 ALR5th 1106.

What are "prevailing wages," or the like, for purposes of state statute requiring payment of prevailing wages on public works projects, 7 ALR5th 400.

Construction and effect of provision in contract for sale of realty by which purchaser agrees to take property "as is" or in its existing condition, 8 ALR5th 312.

What projects involve work subject to state statutes requiring payment of prevailing wages on public projects, 10 ALR5th 337.

Employees' private right of action to enforce state statute requiring payment of prevailing wages on public works projects, 10 ALR5th 360.

Liability of contractor who abandons building project before completion for liquidated damages for delay, 15 ALR5th 376.

13-2-1. Construction of contracts by courts generally; findings of fact by juries.

The construction of a contract is a question of law for the court. Where any matter of fact is involved, the jury should find the fact. (Orig. Code 1863, § 2718; Code 1868, § 2712; Code 1873, § 2754; Code 1882, § 2754; Civil Code 1895, § 3672; Civil Code 1910, § 4265; Code 1933, § 20-701.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
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ADMISSIBILITY OF PAROL EVIDENCE APPLICATION

General Consideration

Court's role generally. — When parties disagree only as to the legal meaning of their agreement, the court's role is well-defined. When the language of the agreement is clear, then it is controlling, and the court need look no further. This principle is the obverse of the broad freedom of contract the law grants the parties. *Smith v. Seaboard Coast Line R.R.*, 639 F.2d 1235 (5th Cir. 1981).

Existence or nonexistence of ambiguity in a contract is a question of law for the court. *Salvatori Corp. v. Rubin*, 159 Ga. App. 369, 283 S.E.2d 326 (1981).

Under state law whether a contract is ambiguous is to be determined by the court. *Kaiser Aluminum & Chem. Corp. v. Ingersoll-Rand Co.*, 519 F. Supp. 60 (S.D. Ga. 1981).

No construction where language plain, unambiguous, and capable of only one meaning. — No construction is required or even permissible when the language employed by the parties in the contract is plain, unambiguous, and capable of only one reasonable interpretation. *Franchise Enters., Inc. v. Ridgeway*, 157 Ga. App. 458, 278 S.E.2d 33 (1981); *Crooks v. Crim*, 159 Ga. App. 745, 285 S.E.2d 84 (1981).

Construction and interpretation subject to disposition by summary judgment. — Construction and interpretation of a written contract is matter of law for the court and, therefore, is properly subject to disposition by summary judgment. *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), *aff'd*, 667 F.2d 30 (11th Cir. 1982).

Where no matter of fact is involved, the construction of a plain and definite contract, if needed, is a matter of law for the court. *Crooks v. Crim*, 159 Ga. App. 745, 285 S.E.2d 84 (1981).

Construction must be fair and reasonable. — In construing a contract, the court must put a fair and reasonable construction thereon. *Smiths' Properties, Inc. v. RTM Enters., Inc.*, 160 Ga. App. 102, 286 S.E.2d 334 (1981).

If terms of contract are plain and unambiguous, construction is for court rather

than jury. *Gulbenkian v. Patcraft Mills, Inc.*, 104 Ga. App. 102, 121 S.E.2d 179 (1961); *Gilreath v. Argo*, 135 Ga. App. 849, 219 S.E.2d 461 (1975).

If contract is plain and unambiguous, it is duty of trial court to construe the contract. *Paulk v. Ellis St. Realty Corp.*, 79 Ga. App. 36, 52 S.E.2d 625 (1949).

Construction of unambiguous contract is question of law for court. *Mutual Life Ins. Co. v. Davis*, 79 Ga. App. 336, 53 S.E.2d 571 (1949); *Early v. Kent*, 215 Ga. 49, 108 S.E.2d 708 (1959).

In the absence of ambiguities, construction of contract is question of law for court. *Suggs v. Brotherhood of Locomotive Firemen & Enginemen*, 106 Ga. App. 563, 127 S.E.2d 827 (1962); *International Indus., Inc. v. Dantone*, 147 Ga. App. 247, 248 S.E.2d 530 (1978).

The construction of a contract is a question of law for the court. If the contract is unambiguous, it is the duty of the court to construe the contract. *Smiths' Properties, Inc. v. RTM Enters., Inc.*, 160 Ga. App. 102, 286 S.E.2d 334 (1981).

Construction of contracts is a question of law for court and where judge sits as trier of fact the judge's findings shall not be set aside unless clearly erroneous. *Nodvin v. Krabe*, 160 Ga. App. 310, 287 S.E.2d 236 (1981).

In view of the clear and unambiguous language of the contract, it was the duty and within the authority of the trial court to construe the contract. *Long v. City of Midway*, 169 Ga. App. 72, 311 S.E.2d 508 (1983).

Where the language of a lease is clear, unambiguous, and capable of only one reasonable interpretation, no construction is necessary or even permissible. *Reahard v. Ivester*, 188 Ga. App. 17, 371 S.E.2d 905 (1988).

Contractual interpretation is question of law for court. *B.L. Ivey Constr. Co. v. Pilot Fire & Cas. Co.*, 295 F. Supp. 840 (N.D. Ga. 1968).

Unless there are ambiguous expressions in a contract, a contract's construction is for a court. *Merrill Lynch, Pierce, Fenner & Smith v. Stidham*, 506 F. Supp. 1182 (M.D. Ga.), *aff'd in part, vacated in part on other grounds*, 658 F.2d 1098 (5th Cir. 1981), *aff'd*

General Consideration (Cont'd)

in part, vacated in part on other grounds, 658 F.2d 1098 (5th Cir. 1981).

Construction of unambiguous contracts is for court, but it is province of jury to construe ambiguous contracts. *Trippe v. Crescent Farms, Inc.*, 58 Ga. App. 1, 197 S.E. 330 (1938).

Ordinarily the construction of a contract is a question of law for the court, but where the terms of a written instrument are ambiguous, the contract's meaning should be left to the jury. *Salvatori Corp. v. Rubin*, 159 Ga. App. 369, 283 S.E.2d 326 (1981).

Adjudication by summary judgment. — The construction of a contract is a matter of law for the court under O.C.G.A. § 13-2-1, particularly where the terms are unambiguous. It is thus a matter peculiarly well suited for adjudication by summary judgment. *Castellana v. Conyers Toyota, Inc.*, 200 Ga. App. 161, 407 S.E.2d 64 (1991).

Summary judgment was properly granted to a hospital pursuant to O.C.G.A. § 9-11-56 in the hospital's action against a doctor, seeking recovery of moneys loaned to the doctor that were not repaid, where it was found that the doctor breached the agreement within six years of the time that the action was commenced and accordingly, the action was not time-barred under O.C.G.A. § 9-3-24; the court noted that where the parties had indicated in the contract that they "expected" that the amount would be completely repaid within one year of when the repayments were commenced, such was merely a hope and not a binding condition that, when the year expired, started the running of the six-year limitations period, based on contract interpretation laws and the inapplicability of parole evidence under O.C.G.A. § 13-2-1(1). *Walker v. Gwinnett Hosp. Sys.*, 263 Ga. App. 554, 588 S.E.2d 441 (2003).

In an examinee's suit alleging that a testing service breached the parties' contract by failing to release the examinee's test results on the ground that the examinee did not present valid identification at the time of the test, because the terms of the contract requiring the examinee to present valid photo identification at the test site were plain and unambiguous, construction of the contract was a question of law that a district court

resolved on summary judgment in accordance with O.C.G.A. § 13-2-1. *Sims v. Taylor*, No. 07-13974, 2008 U.S. App. LEXIS 6770 (11th Cir. Mar. 26, 2008) (Unpublished).

Jury question presented where rules of construction fail to resolve ambiguity. — Even ambiguous contracts may be construed by the courts, and a jury question is presented only when the application of the rules of construction fails to resolve the ambiguity. *Andrews v. Skinner*, 158 Ga. App. 229, 279 S.E.2d 523 (1981).

If an ambiguity remains after application of all applicable rules of construction, then a jury question is presented. *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), *aff'd*, 667 F.2d 30 (11th Cir. 1982).

Construction of written contracts, even if they are ambiguous, is a matter for the court and no jury question arises unless after application of applicable rules of construction the ambiguity remains. *Interstate Fire Ins. Co. v. National Indem. Co.*, 157 Ga. App. 516, 277 S.E.2d 802 (1981).

Once a contract is signed, the contract's provisions define the full measure of rights accorded each party. Whether the language of an agreement is clear or ambiguous, then, is a question of law for the court. Only if ambiguity remains after the court applies the pertinent rules of construction does this become a question of fact. *Smith v. Seaboard Coast Line R.R.*, 639 F.2d 1235 (5th Cir. 1981).

Courts not at liberty to revise contracts while construing contracts. — If provisions of contract are unambiguous, the contract's interpretation is question of law for trial court. However, courts are not at liberty to revise contracts while professing to construe the contracts. *Brigadier Indus. Corp. v. Pip-pin*, 148 Ga. App. 145, 251 S.E.2d 114 (1978).

If the provisions of a contract are unambiguous, and interpretation is made by the court, still this does [not] give the trial court liberty to revise the contract while professing to construe the contract. *Crooks v. Crim*, 159 Ga. App. 745, 285 S.E.2d 84 (1981).

Not court's province to pass on wisdom of particular agreement, even though the agreement's terms may have been accepted by one party as the result of oversight or poor cerebration. *Smith v. Seaboard Coast*

Line R.R., 639 F.2d 1235 (5th Cir. 1981).

Mistake or ignorance of party. — Absent special circumstances, the court cannot correct for the mistake or ignorance of one party when that party had the responsibility and opportunity to protect oneself. *Smith v. Seaboard Coast Line R.R.*, 639 F.2d 1235 (5th Cir. 1981).

Whether or not a writing is an enforceable contract under the securities statute of frauds is a legal question. *Turner v. MCI Telecommunications Corp.*, 203 Ga. App. 71, 416 S.E.2d 370 (1992).

Contract existence was question of fact for a jury. — Summary judgment was improperly granted to an insurance broker in a contract dispute because there was conflicting testimony regarding the course of dealings between the party relating to whether or not a contract existed under O.C.G.A. §§ 13-3-1 and 13-3-2; the question of fact should have been decided by a jury instead. *Terry Hunt Constr., Inc. v. AON Risk Servs.*, 272 Ga. App. 547, 613 S.E.2d 165 (2005).

Cited in *Atlanta S.R.R. v. City of Atlanta*, 66 Ga. 104 (1880); *Hardy v. GMAC*, 38 Ga. App. 463, 144 S.E. 327 (1928); *Rome Ry. & Light Co. v. Southern Ry.*, 42 Ga. App. 786, 157 S.E. 527 (1931); *Jones v. Knightstown Body Co.*, 52 Ga. App. 667, 184 S.E. 427 (1936); *Loftis Plumbing & Heating Co. v. American Sur. Co.*, 74 Ga. App. 590, 40 S.E.2d 667 (1946); *Blair v. Smith*, 201 Ga. 747, 41 S.E.2d 133 (1947); *American Cas. Co. v. Callaway*, 75 Ga. App. 799, 44 S.E.2d 400 (1947); *Dorsey v. Clements*, 202 Ga. 820, 44 S.E.2d 783 (1947); *Union Bag & Paper Corp. v. Mitchell*, 177 F.2d 909 (5th Cir. 1949); *Touchstone v. Louis Friedlander & Sons*, 81 Ga. App. 489, 59 S.E.2d 281 (1950); *Plaza Hotel Co. v. Fine Prods. Corp.*, 87 Ga. App. 460, 74 S.E.2d 372 (1953); *Barrow v. State*, 87 Ga. App. 572, 74 S.E.2d 467 (1953); *Bradley v. Swift & Co.*, 93 Ga. App. 842, 93 S.E.2d 364 (1956); *B.L. Montague Co. v. Somers*, 94 Ga. App. 860, 96 S.E.2d 629 (1957); *Superior Pine Prods. Co. v. Williams*, 214 Ga. 485, 106 S.E.2d 6 (1958); *Habif v. Maslia*, 214 Ga. 654, 106 S.E.2d 905 (1959); *Nikas v. Hindley*, 99 Ga. App. 194, 108 S.E.2d 98 (1959); *Deal v. Chemical Constr. Co.*, 99 Ga. App. 413, 108 S.E.2d 746 (1959); *Georgia, S. & Fla. Ry. v. United States Cas. Co.*, 177 F. Supp. 751 (M.D. Ga. 1959); *California Ins. Co. v. Blumburg*, 101 Ga. App. 587, 115

S.E.2d 266 (1960); *General Gas Corp. v. Carn*, 103 Ga. App. 542, 120 S.E.2d 156 (1961); *Bridges v. Bridges*, 216 Ga. 808, 120 S.E.2d 180 (1961); *Powers v. Gilmour*, 297 F.2d 138 (5th Cir. 1961); *Bennett v. Kimsey*, 218 Ga. 470, 128 S.E.2d 506 (1962); *King v. King*, 218 Ga. 534, 129 S.E.2d 147 (1962); *Travelers Ins. Co. v. Ansley*, 107 Ga. App. 586, 130 S.E.2d 808 (1963); *Mendel v. Pinkard*, 108 Ga. App. 128, 132 S.E.2d 217 (1963); *Milton Frank Allen Publications, Inc. v. Georgia Ass'n of Petroleum Retailers*, 219 Ga. 665, 135 S.E.2d 330 (1964); *Gillham v. Federal Express Money Order, Inc.*, 112 Ga. App. 171, 144 S.E.2d 557 (1965); *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966); *Brooke v. Phillips Petro. Co.*, 113 Ga. App. 742, 149 S.E.2d 511 (1966); *Holt v. Clairmont Dev. Co.*, 222 Ga. 598, 151 S.E.2d 151 (1966); *United States v. Snyder Bros. Co.*, 367 F.2d 980 (5th Cir. 1966); *Village Enters., Inc. v. Georgia R.R. Bank & Trust Co.*, 117 Ga. App. 773, 161 S.E.2d 901 (1968); *Strauss v. Stynchcombe*, 224 Ga. 859, 165 S.E.2d 302 (1968); *American Fruit Purveyors, Inc. v. Avis Rent-A-Car Sys.*, 118 Ga. App. 840, 165 S.E.2d 879 (1968); *Weikert v. Logue*, 121 Ga. App. 171, 173 S.E.2d 268 (1970); *Hardee's Food Sys. v. Bowers*, 121 Ga. App. 316, 173 S.E.2d 439 (1970); *Lovable Co. v. Honeywell, Inc.*, 431 F.2d 668 (5th Cir. 1970); *Shipp v. Shipp*, 125 Ga. App. 574, 188 S.E.2d 258 (1972); *Rager v. Wolf Mach. Co.*, 128 Ga. App. 399, 196 S.E.2d 689 (1973); *Buford-Clairmont, Inc. v. Jacobs Pharmacy Co.*, 131 Ga. App. 643, 206 S.E.2d 674 (1974); *Crosby v. Bloomfield Developers, Inc.*, 232 Ga. 733, 208 S.E.2d 789 (1974); *Yancey Bros. Co. v. Sure Quality Framing Contractors*, 135 Ga. App. 465, 218 S.E.2d 142 (1975); *Honea v. Gilbert*, 236 Ga. 218, 223 S.E.2d 115 (1976); *Henderson Mill, Ltd. v. McConnell*, 237 Ga. 807, 229 S.E.2d 660 (1976); *Georgia Kraft Co. v. Lee*, 140 Ga. App. 360, 231 S.E.2d 132 (1976); *Ware v. Nationwide Mut. Ins. Co.*, 140 Ga. App. 660, 231 S.E.2d 556 (1976); *Beach v. First Fed. Sav. & Loan Ass'n*, 140 Ga. App. 882, 232 S.E.2d 158 (1977); *Interstate Life & Accident Ins. Co. v. Brown*, 141 Ga. App. 195, 233 S.E.2d 44 (1977); *Trimier v. Atlanta Univ., Inc.*, 141 Ga. App. 546, 234 S.E.2d 342 (1977); *Holcomb v. Word*, 239 Ga. 847, 238 S.E.2d 915 (1977); *Bache v. Bache*, 240 Ga. 3, 239 S.E.2d 677 (1977); *Dollar v. Long*

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- Mfg., N.C., Inc., 561 F.2d 613 (5th Cir. 1977); Foster v. Economy Developers, Inc., 146 Ga. App. 282, 246 S.E.2d 366 (1978); Ira H. Hardin Co. v. Martin Assocs., 147 Ga. App. 49, 248 S.E.2d 41 (1978); H.R. Kaminsky & Sons v. Smithwick Constr. Co., 147 Ga. App. 147, 248 S.E.2d 211 (1978); Hemphill v. Taff, 242 Ga. 212, 248 S.E.2d 621 (1978); Trout v. Nash AMC/Jeep, Inc., 157 Ga. App. 399, 278 S.E.2d 54 (1981); Walter E. Heller & Co. v. Aetna Bus. Credit, Inc., 158 Ga. App. 249, 280 S.E.2d 144 (1981); Parramore Farms, Inc. v. John Deere Co., 159 Ga. App. 774, 285 S.E.2d 233 (1981); Eastern Air Lines v. C.R.A. Transp. Co., 167 Ga. App. 16, 306 S.E.2d 27 (1983); Tidwell v. Carroll Bldrs., Inc., 251 Ga. 415, 306 S.E.2d 279 (1983); Dallis v. Aetna Life Ins. Co., 574 F. Supp. 547 (N.D. Ga. 1983); Saf-T-Green of Atlanta, Inc. v. Lazenby Sprinkler Co., 169 Ga. App. 249, 312 S.E.2d 163 (1983); Marsh v. Chrysler Ins. Co., 169 Ga. App. 639, 314 S.E.2d 475 (1984); Jahncke Serv., Inc. v. DOT, 172 Ga. App. 215, 322 S.E.2d 505 (1984); Kleiner v. First Nat'l Bank, 581 F. Supp. 955 (N.D. Ga. 1984); Taliaferro v. S & A Restaurant Corp., 172 Ga. App. 399, 323 S.E.2d 271 (1984); Norton v. Hutton, 172 Ga. App. 836, 324 S.E.2d 744 (1984); Tuzman v. Leventhal, 174 Ga. App. 297, 329 S.E.2d 610 (1985); Stern's Gallery of Gifts, Inc. v. Corporate Property Investors, Inc., 176 Ga. App. 586, 337 S.E.2d 29 (1985); Watson v. Dunaway, 176 Ga. App. 802, 338 S.E.2d 28 (1985); Riddle v. Camp, 179 Ga. App. 129, 345 S.E.2d 667 (1986); Gans v. Georgia Fed. Sav. & Loan Ass'n, 179 Ga. App. 660, 347 S.E.2d 615 (1986); Comprehensive Bookkeeping & Accounting, Inc. v. John B. Woodward, Inc., 185 Ga. App. 409, 364 S.E.2d 108 (1987); Shore v. Loomis, 187 Ga. App. 674, 371 S.E.2d 96 (1988); Colony Square Co. v. Prudential Ins. Co. of Am., 843 F.2d 479 (11th Cir. 1988); Harris v. National Evaluation Sys., 719 F. Supp. 1081 (N.D. Ga. 1989); Price v. Age, Ltd., 194 Ga. App. 141, 390 S.E.2d 242 (1990); Foreman v. Eastern Foods, Inc., 195 Ga. App. 332, 393 S.E.2d 695 (1990); Hertz Equip. Rental Corp. v. Evans, 260 Ga. 532, 397 S.E.2d 692 (1990); Holliday Constr. Co. v. Sandy Springs Assocs., 198 Ga. App. 20, 400 S.E.2d 380 (1990); Avanti Group (U.S.A.), Ltd. v. Robert Half of Atlanta, Inc., 198 Ga. App. 366, 401 S.E.2d 576 (1991); Spicewood, Inc. v. Dykes Paving & Constr. Co., 199 Ga. App. 165, 404 S.E.2d 305 (1991); Hirschfield v. Continental Cas. Co., 199 Ga. App. 654, 405 S.E.2d 737 (1991); Burton v. John Thurmond Constr. Co., 201 Ga. App. 10, 410 S.E.2d 137 (1991); Ross v. Ninety-Two W., Ltd., 201 Ga. App. 887, 412 S.E.2d 876 (1991); Candler v. Davis & Upchurch, 204 Ga. App. 167, 419 S.E.2d 69 (1992); Westinghouse Credit Corp. v. Hall, 144 Bankr. 568 (S.D. Ga. 1992); Klein v. Williams, 212 Ga. App. 39, 441 S.E.2d 270 (1994); Watson v. Union Camp Corp., 861 F. Supp. 1086 (S.D. Ga. 1994); Pioneer Concrete Pumping Serv., Inc. v. T & B Scottdale Contractors, 218 Ga. App. 596, 462 S.E.2d 627 (1995); Ellenberg v. Those Certain Underwriters at Lloyd's (In re Prime Com. Corp.), 187 Bankr. 785 (Bankr. N.D. Ga. 1995); Toncee, Inc. v. Thomas, 219 Ga. App. 539, 466 S.E.2d 27 (1995); Ashkouti v. Widener, 231 Ga. App. 539, 500 S.E.2d 337 (1998); Wilbanks v. Mai, 232 Ga. App. 198, 501 S.E.2d 513 (1998); Georgia Dep't of Human Res. v. Citibank, 243 Ga. App. 433, 534 S.E.2d 422 (2000); Fontaine v. Sidelines IV, Inc., 245 Ga. App. 681, 538 S.E.2d 137 (2000); Balata Dev. Corp. v. Reed, 249 Ga. App. 528, 548 S.E.2d 668 (2001); Gullock v. Spectrum Sciences & Software, Inc., 146 F. Supp. 2d 1364 (M.D. Ga. 2001); AMB Property, L.P. v. MTS, Inc., 250 Ga. App. 513, 551 S.E.2d 102 (2001); Hibbard v. P.G.A., Inc., 251 Ga. App. 68, 553 S.E.2d 371 (2001); Hanne v. Miss. Mgmt., Inc., 255 Ga. App. 143, 564 S.E.2d 557 (2002); Emanuel Tractor Sales, Inc. v. DOT, 257 Ga. App. 360, 571 S.E.2d 150 (2002); Weed Wizard Acquisition Corp. v. A.A.B.B., Inc., 201 F. Supp. 2d 1252 (N.D. Ga. 2002); Mil-Spec Indus. Corp. v. Pyrotechnic Specialties, Inc., 262 Ga. App. 582, 586 S.E.2d 7 (2003); Porter Commun. Co. v. SouthTrust Bank, 268 Ga. App. 29, 601 S.E.2d 422 (2004); Brock v. King, 279 Ga. App. 335, 629 S.E.2d 829 (2006); Cox v. Athens Reg'l Med. Ctr., Inc., 279 Ga. App. 586, 631 S.E.2d 792 (2006); Stephens v. Trust for Pub. Land, 479 F. Supp. 2d 1341 (N.D. Ga. 2007); City of Demorest v. Roberts & Dunahoo Props., LLC, 288 Ga. App. 708, 655 S.E.2d 617 (2007); Gentry Mach. Works, Inc. v. Harleysville Mut. Ins. Co., 621 F. Supp. 2d 1288 (M.D. Ga. 2008); IP Co., LLC v. Cellnet Tech., Inc., No. 1:06-CV-03048-JEC,

2008 U.S. Dist. LEXIS 55222 (N.D. Ga. July 17, 2008); Savannah Yacht Corp. v. Thunderbolt Marine, Inc., 297 Ga. App. 104, 676 S.E.2d 728 (2009); Am. Nat'l Prop. & Cas. Co. v. Amerieast, Inc., 297 Ga. App. 443, 677 S.E.2d 663 (2009); Northland Ins. Co. v. Am. Home Assur. Co., 301 Ga. App. 726, 689 S.E.2d 87 (2009); Jimenez v. Gilbane Bldg. Co., No. A09A2061, 2010 Ga. App. LEXIS 299 (Mar. 25, 2010); C. Ingram Co. v. Phila. Indem. Ins. Co., No. A10A0646, 2010 Ga. App. LEXIS 376 (Apr. 7, 2010).

Intent of Parties

Cardinal rule of construction is to ascertain intent of parties. Mutual Life Ins. Co. v. Davis, 79 Ga. App. 336, 53 S.E.2d 571 (1949).

Enforcement where intent clear. — If intention of the parties is clear, and it contravenes no rule of law, and sufficient words are used to arrive at the intention, it shall be enforced irrespective of all technical or arbitrary rules of construction. Olympic Dev. Group, Inc. v. American Druggists' Ins. Co., 175 Ga. App. 425, 333 S.E.2d 622 (1985).

In a buyer's suit arising out of a failed deal to sell the seller's business seeking damages for breach of contract and specific performance, the trial court erred in granting summary judgment to the sellers, as construction of the plain language of an addendum to the parties' letter of intent to sell the business showed that the parties had reached a binding agreement on all material terms concerning the purchase and sale of the business. Goobich v. Waters, 283 Ga. App. 53, 640 S.E.2d 606 (2006).

Following a bench trial, the trial court properly awarded a lessee a monetary judgment, and the lessor's possession of the premises as the clear language of the underlying contract between the parties provided that the parties intended the contract to be a purchase and sale agreement, and the lessor's failure to perform barred the court from enforcing a liquidated damages provision. Lifestyle Home Rentals, LLC v. Rahman, 290 Ga. App. 585, 660 S.E.2d 409 (2008).

Written contract that is plain and unambiguous is only evidence of parties' intent and understanding. Rauschenberg v. Peeples, 30 Ga. App. 384, 118 S.E. 409 (1923).

No ambiguity unless, after application of rules of construction, uncertainty remains as

to intent. — Construction of contract when necessary is duty of court, and there can be no ambiguity unless and until application of pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents true intention of parties. Maddox v. Life & Cas. Ins. Co., 79 Ga. App. 164, 53 S.E.2d 235 (1949), overruled on other grounds, Etheridge v. Woodmen of World Life Ins. Soc'y, 114 Ga. App. 807, 152 S.E.2d 773 (1966); Early v. Kent, 215 Ga. 49, 108 S.E.2d 708 (1959).

Ambiguity in contract is resolved by determining intention of parties, which is question for jury. Roberts v. Employers Ins. Co., 79 Ga. App. 611, 54 S.E.2d 465 (1949).

If terms of a contract are ambiguous, intention of parties is question for jury. Williams v. McCoy Lumber Indus., Inc., 146 Ga. App. 380, 246 S.E.2d 410 (1978).

Intent of parties at time of contract. — It is generally question of fact for determination of jury as to what is included within contemplation of parties at time contract is made. McNaughton v. Stephens, 8 Ga. App. 545, 70 S.E. 61 (1911).

Intent of parties to settlement agreement. — In reviewing the communications between the parties, and given that the courts had a duty to construe and enforce contracts as made and not to make them for the parties, because those communications led to a binding agreement between them, the trial court erred in concluding that the parties had not reached a settlement agreement. Mealer v. Kennedy, 290 Ga. App. 432, 659 S.E.2d 809 (2008).

As a matter of law under O.C.G.A. § 13-2-1, a contract under which a marketer trained subagents to expand an insurer's market for health, medical, and surgical (HMS) insurance products was not ambiguous because it was clear from the four corners of the instrument that the insurer had a right to discontinue the HMS sales plan at any time without terminating the contract; therefore, the complaint failed to state a claim for breach of contract. Med S. Health Plans, LLC v. Life of the S. Ins. Co., No. 4:07-CV-134 (CDL), 2008 U.S. Dist. LEXIS 40223 (M.D. Ga. May 19, 2008).

Ambiguous Agreements

Courts to construe ambiguous contracts, and only where ambiguity persists is jury

Ambiguous Agreements (Cont'd)

question raised. — Although there is ambiguity in contract, the contract raises no jury question unless ambiguity remains unresolved after application of all applicable rules of construction. *Farm Supply Co. v. Cook*, 116 Ga. App. 814, 159 S.E.2d 128 (1967).

Construction of contracts is prerogative of courts which is delegated to jury only when there are ambiguous expressions in contract and resort must be had to extrinsic testimony in order to clarify meaning of language used, as it was understood by parties, and thus make plain their real intention. *Ludden & Bates S. Music House v. Dairy & Farm Supply Co.*, 17 Ga. App. 581, 87 S.E. 823 (1916). See *Martin v. Thrower*, 3 Ga. App. 784, 60 S.E. 825 (1908); *Irvindale Farms, Inc. v. W.O. Pierce Dairy, Inc.*, 78 Ga. App. 670, 51 S.E.2d 712 (1949); *Krupp v. Taylor Enters., Inc.*, 148 Ga. App. 440, 251 S.E.2d 364 (1978).

Contracts, even when ambiguous, are to be construed by court, and no jury question is presented unless after application of applicable rules of construction ambiguity persists. *American Cas. Co. v. Crain-Daly Volkswagen, Inc.*, 129 Ga. App. 576, 200 S.E.2d 281 (1973); *National Car Rental Sys. v. Council Whsle. Distribs., Inc.*, 393 F. Supp. 1128 (M.D. Ga. 1974); *Erquitt v. Solomon*, 135 Ga. App. 502, 218 S.E.2d 172 (1975); *Interstate N. Assocs. v. Hensley-Schmidt, Inc.*, 138 Ga. App. 487, 226 S.E.2d 315 (1976); *Binswanger Glass Co. v. Beers Constr. Co.*, 141 Ga. App. 715, 234 S.E.2d 363 (1977); *Kennedy v. Brand Banking Co.*, 152 Ga. App. 47, 262 S.E.2d 177 (1979); *Travelers Ins. Co. v. Blakey*, 255 Ga. 699, 342 S.E.2d 308 (1986); *Smith v. Freeport Kaolin Co.*, 687 F. Supp. 1550 (M.D. Ga. 1988).

A contract should be construed by the court where the language is undisputed but the meaning of that language is in dispute. *Board of Regents v. A.B. & E., Inc.*, 182 Ga. App. 671, 357 S.E.2d 100 (1987).

In an action for breach of a written employment contract, it was not error for the trial court to refuse the employer's requested charge that essential terms of the contract had to be stated with definiteness in the contract to show the intent of the parties where the court had resolved the ambigu-

ities in the contract and there was no matter of fact to be found by the jury. *Gram Corp. v. Wilkinson*, 210 Ga. App. 680, 437 S.E.2d 341 (1993).

Only where contractual provision is ambiguous does interpretation of the provision become a jury question. *Maggard Truck Line v. Deaton, Inc.*, 573 F. Supp. 1388 (N.D. Ga. 1983), *aff'd in part*, 783 F.2d 203 (11th Cir. 1986).

Meanings of ambiguous terms in written instrument for jury determination. — As general rule, construction of contract is question for court; but where the terms of a written instrument are ambiguous, the instruments meaning should be left to the jury. *Illges v. Dexter*, 77 Ga. 36 (1886); *Pidcock v. Nace*, 15 Ga. App. 794, 84 S.E. 226 (1915); *Schofield-Burkett Constr. Co. v. Rich*, 16 Ga. App. 321, 85 S.E. 285 (1915); *Fraser v. Jarrett*, 153 Ga. 441, 112 S.E. 487 (1922); *Rauschenberg v. Peeples*, 30 Ga. App. 384, 118 S.E. 409 (1923); *National Manufacture & Stores Corp. v. Dekle*, 48 Ga. App. 515, 173 S.E. 408 (1934); *Olympic Dev. Group, Inc. v. American Druggists' Ins. Co.*, 175 Ga. App. 425, 333 S.E.2d 622 (1985).

Except in cases where meaning of obscurely written words is involved, and where there is evidence tending to show that meaning of such words was differently understood in one way or another by parties to contract, it is improper to submit to jury any question as to construction of contract. *American Cas. Co. v. Crain-Daly Volkswagen, Inc.*, 129 Ga. App. 576, 200 S.E.2d 281 (1973).

Construction of a contract is a question of law for the court where language of contract is clear and unambiguous and capable of only one reasonable interpretation as applied to subject matter, but if any matter of fact is involved, such as proper reading of obscurely written word, the jury should find the fact. *Bress v. Keep-Safe Indus., Inc.*, 155 Ga. App. 544, 271 S.E.2d 867 (1980).

Fact that two interpretations of contract possible does not automatically create jury question. *Kennedy v. Brand Banking Co.*, 152 Ga. App. 47, 262 S.E.2d 177 (1979), *aff'd*, 245 Ga. 496, 266 S.E.2d 154 (1980).

Jury issue not created by fact of two possible interpretations of contract. — It does not follow that merely because there are two possible interpretations which might be employed in construing a contract, the

matter automatically becomes question for jury. If that were true courts would rarely, if ever, construe contracts as the law declares their duty to be. Role and function of courts is higher than that of mere referee. *Warrior Constructors, Inc. v. E.C. Ernst Co.*, 127 Ga. App. 839, 195 S.E.2d 261 (1973); *Interstate N. Assocs. v. Hensley-Schmidt, Inc.*, 138 Ga. App. 487, 226 S.E.2d 315 (1976).

Mere clerical error. — In a taxpayer's action against the Internal Revenue Service (IRS), under 28 U.S.C.S. § 1346(a)(1), seeking to recover funds paid to the IRS after the IRS informed the taxpayer that the taxpayer incorrectly deducted past collateral agreement payments from adjusted gross income (AGI) when computing "annual income" under the terms of an Offer in Compromise (OIC), the district court properly found under O.C.G.A. §§ 13-2-1 and 13-2-2(4) that the OIC and the Collateral Agreement were unambiguous and that the taxpayer was not entitled to deduct the past collateral agreement payments from AGI; the IRS's use of an older version of the Form 2261, which referenced an item line in Form 656 that permitted the illogical deduction of a social security number in the calculation of annual income, was a mere clerical error that was not sufficiently misleading so as to create an ambiguity in the contracts. *Begner v. United States*, 428 F.3d 998 (11th Cir. 2005).

Disability insurance policy. — In interpreting a disability insurance policy as a question of law under O.C.G.A. § 13-2-1, the district court properly granted summary judgment in favor of an insured on a claim for total disability benefits in relation to a real estate development occupation because the ambiguous language in the policy required the insured to be unable to perform "most," not "all," of the substantial and material duties of the insured's regular occupation, and the insured's unrefuted medical evidence showed that the insured was unable to perform the entrepreneurial, financial, planning, coordinating, and administrative duties, which were the heart of the real estate occupation. *T Giddens v. Equitable Life Assur. Soc'y*, 445 F.3d 1286 (11th Cir. 2006).

After determining that the definition of the term "total disability" in two of an insurer's disability policies was ambiguous and construing the term against the insurer, such that an insured was not required to

show that the insured was unable to perform all of the major duties of the insured's occupation to show that the insured was totally disabled, pursuant to O.C.G.A. § 13-2-1, the court left for the jury the issues of what sort of work constituted the insured's major duties and whether the insured's stroke rendered the insured unable to perform those duties, as the evidence was conflicting with regard to whether the insured was a pharmacist or an entrepreneur. *Putnal v. Guardian Life Ins. Co. of Am.*, No. 5:04-CV-130 (HL), 2006 U.S. Dist. LEXIS 70931 (M.D. Ga. Sept. 29, 2006).

Admissibility of Parol Evidence

Where contract complete, parol evidence generally admissible only as to ambiguities. —

Where contract appears complete on its face, and there is no question as to fraud, accident, or mistake, question as to quantity must be determined by court as matter of interpretation, unless there is ambiguity, latent or patent, such as would render parol evidence admissible in relation to question. *McCann v. Glynn Lumber Co.*, 199 Ga. 669, 34 S.E.2d 839 (1945).

Extrinsic evidence admissible to explain ambiguity only after application of rules of construction. — Construction of ambiguous contracts is duty of court, and only if after application of pertinent rules of construction the contract remains ambiguous, is extrinsic evidence admissible to explain ambiguity. *Farm Supply Co. v. Cook*, 116 Ga. App. 814, 159 S.E.2d 128 (1967); *Warrior Constructors, Inc. v. E.C. Ernst Co.*, 127 Ga. App. 839, 195 S.E.2d 261 (1973).

If application of statutory rules resolves all contract ambiguity, then extrinsic evidence is inadmissible. *Bituminous Cas. Corp. v. Advanced Adhesive Tech., Inc.*, 73 F.3d 335 (11th Cir. 1996).

Parol testimony for ascertaining intention of parties if contract is ambiguous. — Because the language of an easement agreement between two adjacent commercial landowners was ambiguous, parol evidence was admissible to show the parties' intent. Thus, questions of fact remained regarding intent, making summary judgment inappropriate. *McGuire Holdings, LLLP v. TSQ Partners, LLC*, 290 Ga. App. 595, 660 S.E.2d 397 (2008).

Application

Conflicting dates in contract. — When text of contract stated contract was to commence on July 1, but date two weeks later appeared at end of contract, early date is the one to which parties are bound. *American Cyanamid Co. v. Ring*, 248 Ga. 673, 286 S.E.2d 1 (1982).

Construction of unambiguous deed, like construction of any other contract, is for court determination. Its meaning and effect is question of law to be settled by judge. *Turk v. Jeffreys-McElrath Mfg. Co.*, 207 Ga. 73, 60 S.E.2d 166 (1950).

Construction of an O.C.G.A. § 20-3-514 scholarship contract. — Under the plain terms of the contract, the trial court did not err in awarding summary judgment to the State Medical Education Board, making a student liable for both the amount of the scholarship received and attorney's fees as: (1) estoppels were disfavored under Georgia law; (2) the student came forward with no more than hearsay to support a claim that oral misrepresentations of fact were made regarding the scholarship; (3) the contract was not rescinded by either party; (4) no mutual mistake of fact was found; and (5) any impossibility in performing the contract was personal to the student. *Calabro v. State Med. Educ. Bd.*, 283 Ga. App. 113, 640 S.E.2d 581 (2006).

Claim of ownership of property. — Trial court properly found that a transferor's claim of ownership of a strip of land between a lot deeded to the transferor's son and an owner's property was unsupported since the deed from the transferor to the son was unambiguous and clearly showed that the land deeded to the son extended to the border of the owner's property. *Hale v. Scarborough*, 279 Ga. App. 614, 631 S.E.2d 812 (2006).

Real estate contracts. — Trial court erred in granting summary judgment, pursuant to O.C.G.A. § 9-11-56(c), to a seller in an action to recover earnest money for the sale of a shopping center; the purchaser was entitled to the return of the money because the purchaser could not obtain financing, which was a condition for the return of the money under the terms of the contract, interpreted pursuant to O.C.G.A. §§ 13-2-1 and 13-2-2. *Ali v. Aarabi*, 264 Ga. App. 64, 589 S.E.2d 827 (2003).

In a buyer's suit seeking specific performance of a land sales contract that contained a clear and unambiguous clause stating that time was of the essence, the trial court properly granted summary judgment against the buyer, due to the buyer's failure to timely tender additional earnest money, and because that action amounted to a breach authorizing the sellers to terminate the agreement. *Chowhan v. Miller*, 283 Ga. App. 749, 642 S.E.2d 428 (2007).

Option agreements. — Where an option agreement contained no provision for suspending or tolling the five-year option period, seller's notice of intent to build on the property did not suspend the option period. *Garvin v. Smith*, 235 Ga. App. 897, 510 S.E.2d 863 (1999).

Construction of the provisions of a lease, as with other contracts, is generally one for the court to determine as a matter of law. *Peachtree on Peachtree Investors, Ltd. v. Reed Drug Co.*, 251 Ga. 692, 308 S.E.2d 825 (1983); *Winburn v. McGuire Inv. Group*, # 17, 220 Ga. App. 384, 469 S.E.2d 477 (1996).

Construction of mining lease is generally one for court to determine as a matter of law, and as such, the interpretation of such a written contract regarding the mining of certain materials from described property is properly subject to disposition by summary judgment. *Smith v. Freeport Kaolin Co.*, 687 F. Supp. 1550 (M.D. Ga. 1988).

Construction of lease. — Despite a tenant's contrary claim on appeal, when the tenant sought early termination of a lease, the tenant's conduct was governed by the early termination provision, and not a hold-over provision contained therein. Thus, the trial court properly construed the lease against the tenant when the tenant acted in a manner inconsistent with the tenant's intent to terminate the lease, supporting judgment for the rent due in the landlord's favor and in the amount the landlord claimed. *ValuGym, Inc. v. PTC Props., Inc.*, 290 Ga. App. 281, 659 S.E.2d 700 (2008).

A trial court erred in interpreting a commercial lease amendment so as to require the tenant to pay additional rental fees for utilities. No such construction was permitted because the language of the contract was plain, unambiguous, and capable of only one reasonable interpretation. *Record*

Town, Inc. v. Sugarloaf Mills L.P., 301 Ga. App. 367, 687 S.E.2d 640 (2009).

Construction contract interpretation. — Trial court erred in granting summary judgment to a subcontractor in its breach of contract action against a general contractor and its surety, arising from the parties' work on a construction project, as the court interpreted the terms of the parties' contract pursuant to O.C.G.A. § 13-2-1 to mean that the general contractor was entitled to withhold final payment to the subcontractor pursuant to O.C.G.A. § 13-11-3 when the suppliers' bills were not paid, and the general contractor was also entitled to offset that final payment by amounts owed to the suppliers, as the risk of loss was on the subcontractor. *Foster & Co. Gen. Contrs., Inc. v. House HVAC/Mechanical, Inc.*, 277 Ga. App. 595, 627 S.E.2d 188 (2006).

Tenant required to maintain property under lease in "tenantable" condition. — See *Capitol Funds, Inc. v. Arlen Realty, Inc.*, 755 F.2d 1544 (11th Cir. 1985).

Construction of insurance contract is, like any contract, ordinarily a matter for court. *Fidelity Bankers Life Ins. Co. v. Renew*, 121 Ga. App. 883, 176 S.E.2d 103 (1970).

Insurance policies being contracts, matter of construction is for court. *American Cas. Co. v. Crain-Daly Volkswagen, Inc.*, 129 Ga. App. 576, 200 S.E.2d 281 (1973).

Insurance policy is simply a contract, provisions of which to be construed as any other contract. *Mutual Life Ins. Co. v. Davis*, 79 Ga. App. 336, 53 S.E.2d 571 (1949).

When an insurer sought a declaratory judgment defining the insurer's rights and responsibilities under an insurance policy issued to an insured cemetery that was sued for desecrating a grave, the construction of the policy was a matter for the court which could be resolved by summary judgment. *Nationwide Mut. Fire Ins. Co. v. Somers*, 264 Ga. App. 421, 591 S.E.2d 430 (2003).

Construction of a contract of insurance, like any contract, is a question of law for the court. *Giles v. National Union Fire Ins. Co.*, 578 F. Supp. 376 (M.D. Ga. 1984).

Construction of terms in insurance contract. — Term "landslide" as used in the coverage provisions of an insurance policy did not apply only to natural occurring events, when no such restriction was contained within the policy language and since,

inter alia, other clauses listing perils insured against placed specific restrictions on broad terms; to the extent there was any ambiguity in the use of the term landslide, it was interpreted against the insurance company. *Auto-Owners Ins. Co. v. Parks*, 278 Ga. App. 444, 629 S.E.2d 118 (2006).

In an action filed against an insurer seeking coverage under a homeowners policy, the insureds were properly denied coverage for damages to a home they did not live in, as the policy at issue clearly stated that the "insured premises" meant the residence the insureds used as a primary residence. *Varsalona v. Auto-Owners Ins. Co.*, 281 Ga. App. 644, 637 S.E.2d 64 (2006).

Change in beneficiary in life insurance policy. — As a spouse designated the spouse's child as the beneficiary in an old life insurance policy, the new policy did not invalidate this designation, and questions of material fact remained as to whether the spouse's alleged intent to change beneficiaries was ever effectuated according to the new insurer's regulations, the surviving spouse was not entitled to summary judgment on that spouse's claim to be the beneficiary of the new policy. *Greater Ga. Life Ins. Co. v. Eason*, 292 Ga. App. 682, 665 S.E.2d 725 (2008).

Insured's duty to defend in racial discrimination suit. — Insurer was not required to defend its insureds in a race discrimination suit filed by potential property buyers who alleged that the insureds violated state and federal law by refusing to sell the buyers a lot in a subdivision because the buyers were a bi-racial couple since: (1) the court decided as a matter of law, under O.C.G.A. § 13-2-1, that the bodily injury provision of the commercial general liability policy was unambiguous and did not provide coverage because the buyers did not allege that the buyers were physically injured by the insureds' actions; and (2) the court decided as a matter of law, under O.C.G.A. § 13-2-1, that the policy's personal injury provision, which applied to personal injuries sustained when a right of occupancy was invaded, was unambiguous and did not provide coverage because the buyers were not present occupants of the land at issue. *Auto-Owners Ins. Co. v. Robinson*, No. 3:05-CV-109 (CDL), 2006 U.S. Dist. LEXIS 66551 (M.D. Ga. Sept. 6, 2006).

Pollution exclusion provisions ambiguous. — In an action brought by a lessor against a

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former lessee, a dry cleaning corporation, for indemnification for remediation expenses incurred in cleaning up the contaminated shopping center property vacated by the lessee, the trial court properly refused to examine a pollution liability exclusion endorsement in a vacuum and, rather, considered that language in concert with other policy language addressing coverage of property damage arising out of the discharge of pollutants and thereby found that an umbrella policy provided coverage for quick, abrupt, and accidental discharges of pollutants. The trial court properly determined that the inconsistent language of the pollution liability exclusion and an amendatory endorsement were ambiguous as the amendatory endorsement narrowed the scope of pollution liability exclusion by exempting from it discharges that were quick, abrupt, and accidental; but the pollution liability exclusion endorsement broadened the scope of exclusion by extending the exclusion to any discharge. *State Farm Fire & Cas. Co. v. Walnut Ave. Partners, LLC*, 296 Ga. App. 648, 675 S.E.2d 534 (2009).

Exclusion in insurance policy for assault and battery. — When an injured patron was struck in the nose by a beer bottle thrown in the insured's bar, the injured patron contended that the insured was liable because the bar and the bar's employees failed to prevent the bottle thrower's attack and the injured patron claimed to have suffered serious injury and disfigurement, but the insurer claimed that the insurer had no duty to defend or indemnify the insured because the incident fell within the policy's assault and battery exclusion; the court held that the portion of the policy addressing assault and battery was not intended to exclude coverage for a bodily injury claim arising out of an assault and battery committed by a patron, as any other interpretation would have rendered certain language in the policy meaningless. *ALEA London Ltd. v. Woodcock*, 286 Ga. App. 572, 649 S.E.2d 740 (2007), cert. denied, 2007 Ga. LEXIS 703 (Ga. 2007).

Construction of automobile insurance policy exclusion provision. — See *Georgia Mut. Ins. Co. v. Kurtz*, 206 Ga. App. 716, 426 S.E.2d 248 (1992).

Construction of guaranty contract was matter of law for court. — As no matter of fact was involved, the construction of a guaranty was a matter of law for the court, which found that the guaranty executed by a guarantor contained a very broad waiver clause which plainly and unambiguously waived any claims the guarantor might have had against the debtor and extended to claims arising in equity, or under contract, statute, or common law; the waiver obviously included a claim under O.C.G.A. § 10-7-41, so the trial court erred by denying summary judgment to the debtor and other defendants, and erred as well in granting summary judgment in favor of the guarantor. *Brookside Cmty., LLC v. Lake Dow N. Corp.*, 268 Ga. App. 785, 603 S.E.2d 31 (2004).

Ambiguous provisions of policy must be construed most favorably toward coverage and against insurer. *Allstate Ins. Co. v. Harris*, 133 Ga. App. 567, 211 S.E.2d 783 (1974).

Term "obscurely written word" is usually construed as referring to ambiguous words or provisions. *Merrill Lynch, Pierce, Fenner & Smith v. Stidham*, 506 F. Supp. 1182 (M.D. Ga. 1981), aff'd in part, vacated in part on other grounds, 658 F.2d 1098 (5th Cir. 1981).

Lease contracts are generally construed against lessor. *Farm Supply Co. v. Cook*, 116 Ga. App. 814, 159 S.E.2d 128 (1967).

If there is left uncertainty or even ambiguity in lease, it is lessee and not the lessor who is to be favored, because lessor had power of stipulating in the lessor's own favor, though the lessor may have neglected to do so. *Farm Supply Co. v. Cook*, 116 Ga. App. 814, 159 S.E.2d 128 (1967).

Where parties stipulate contract is plain and definite, construction is matter for court. — Where parties stipulate to court that contract involved is plain and definite, construction of the contract is matter of law to be submitted to court. *Carsello v. Touchton*, 231 Ga. 878, 204 S.E.2d 589 (1974).

Whether instrument is deed or bill of sale, where unambiguous, is for court determination. — It was error for court to submit to jury question as to whether instrument sued on was deed or bill of sale. Construction of paper, inasmuch as it was unambiguous, was question for court. *Nelson v. Spence*, 129 Ga. 35, 58 S.E. 697 (1907).

Claim to succession to co-owner's right to repurchase stock. — After applying the rules of construction, and looking at the extrinsic evidence, no ambiguity remained in a contract entered into between the two owners of a closely held corporation. The provision which provided that the "benefits" of the contract inured to the heirs and assigns of the parties did not entitle the heirs and assigns of one of the co-owners, who had entered into the agreement for purposes of enabling the owner to retire and whose stock was redeemed by the company, to exercise the "privilege" of repurchase given to that co-owner by another provision. *Jordan v. Smith*, 596 F. Supp. 1295 (N.D. Ga. 1984).

Construction of shareholder's agreement to sell stock. — Because a shareholder agreement containing a proposal from one shareholder to sell shares to the other three was clear and unambiguous as: (1) there was nothing in the agreement allowing a shareholder to disregard a conditional offer; and (2) the agreement created an enforceable obligation requiring another shareholder to give written notice as to how that shareholder elected to proceed within 60 days of receiving the first shareholder's offer, enforcement of the agreement was properly decided via summary judgment in favor of the selling shareholder. *Simpson v. Pendergast*, 290 Ga. App. 293, 659 S.E.2d 716 (2008).

Indemnity provision between shareholder and corporate entity. — Order granting summary judgment to an LLC was upheld, when, under the plain terms of an indemnity provision between the LLC and one of its shareholders, the shareholder was liable for costs associated with defending claims made by its agent against the LLC; but, the shareholder was not liable for costs associated with a suit over the payment of commissions, as such did not relate to the marketing and sales efforts covered by the indemnity clause and undertaken by the shareholder. *SRG Consulting, Inc. v. Eagle Hosp. Physicians, LLC*, 282 Ga. App. 842, 640 S.E.2d 306 (2006).

A settlement agreement is a contract, the construction of which is a question of law for the court. *World Bazaar Franchise Corp. v. CCC Assocs. Co.*, 167 Bankr. 985 (Bankr. N.D. Ga. 1994).

Guaranty. — In Georgia, the enforcement of unambiguous terms in a written agree-

ment, such as a guaranty, presents an issue of law properly decided by summary judgment. *Congress Fin. Corp. v. Commercial Technology, Inc.*, 910 F. Supp. 637 (N.D. Ga. 1995), *aff'd*, 74 F.3d 1253 (11th Cir. 1995).

In an action on a guaranty, because the plain and unambiguous terms of the guaranty and the guaranty's addendum only obligated the guarantor to the lease obligations of the original tenant, the guarantor's subsidiary, and not the obligations of a new tenant, the guarantor was properly absolved of any liability to the landlord for the obligations of that new tenant, entitling the guarantor to summary judgment on that issue. *Highwoods Realty L.P. v. Cmty. Loans of Am., Inc.*, 288 Ga. App. 226, 653 S.E.2d 807 (2007).

Arbitration clause. — Based on the clear terms of an arbitration clause in a timber harvesting contract between a landowner and a timber harvesting contractor, the trial court did not err in compelling the contractor into arbitration as the contract had not expired, arbitration of a tort claim was not involved, but the language within the contract clearly covered the issues the landowner sought to arbitrate. *Pickle v. Rayonier Forest Res., L.P.*, 282 Ga. App. 295, 638 S.E.2d 344 (2006), *cert. denied*, 2007 Ga. LEXIS 218 (Ga. 2007).

Whether offer accepted so as to create contract may be jury question. — Although construction of written contract is for court, whether or not offer is accepted so as to become a contract may be question for jury. *Gettier-Montanye, Inc. v. Davidson Granite Co.*, 75 Ga. App. 377, 43 S.E.2d 716 (1947).

Jury construction necessary where contract specifications apparently interpreted in various ways during performance. — Where standard specifications were by stipulation made part of contract, and evidence shows that as applied to fact situations existing during course of construction various items contained in these stipulations were given various interpretations, not only as between plaintiff and defendant, but also as between certain of defendant's engineers, evidence warranted instruction submitting construction of contract to jury. *State Hwy. Dep't v. W.L. Cobb Constr. Co.*, 111 Ga. App. 822, 143 S.E.2d 500 (1965).

Jury instruction on how to interpret contractual ambiguity harmless error. — Al-

Application (Cont'd)

though it was improper for a district court to instruct a jury on how to interpret contractual ambiguities without first having found an insurance contract to be ambiguous as a matter of law, the error was harmless because the court correctly defined the policy term "hidden from view," which was the key issue in the case. *Johnston v. Companion Prop. & Cas. Ins. Co.*, No. 08-10969, 2009 U.S. App. LEXIS 5294 (11th Cir. Mar. 12, 2009) (Unpublished).

Determining that figures represent money. — See *Hening v. Whaley*, 18 Ga. App. 208, 89 S.E. 166 (1916).

Construction of exception "result clause" in double indemnity policy in connection with military service. — See *Mutual Life Ins. Co. v. Davis*, 79 Ga. App. 336, 53 S.E.2d 571 (1949).

Where contract's meaning not in issue, submission to jury without prior court construction immaterial. — Where construction or meaning of contract is not in issue, it is immaterial that superior court submitted contract to jury without first placing construction or interpretation upon the contract. *Shahan v. AT & T*, 72 Ga. App. 749, 35 S.E.2d 5 (1945).

No new trial where court submits contract construction to jury and jury properly construes contract. — While court has duty to construe written contracts, new trial will not be granted for failure to discharge this duty if contract is submitted to jury and properly construed by the jury, especially when, if contract had been properly construed by court, construction would have been adverse to plaintiff in error and result would have been the same as reached by the jury in the jury's verdict. *Main v. Simmons*, 2 Ga. App. 821, 59 S.E. 85 (1907); *Lenox Drug Co. v. New England Jewelry Co.*, 16 Ga. App. 476, 85 S.E. 681 (1915); *South Ga. Trust Co. v. Neal*, 174 Ga. 24, 161 S.E. 815 (1931).

Since the question of agency vel non rests upon a written document and inferences deduced therefrom, the issue presented is a question of law for the trial court, since construction of written contracts is exclusively for the judge. *McMullan v. Georgia Girl Fashions, Inc.*, 180 Ga. App. 228, 348 S.E.2d 748 (1986).

Employment contracts. — It was undisputed that an employment contract pro-

vided that the agreement would be terminated "[o]ne year from the date set forth in this Agreement [August 1, 1979]." Since this provision was clear and unambiguous, the trial court did not err in finding that the employee's employment had terminated by the terms of the contract, notwithstanding continued payments to the employee as "fees for professional services." *Medical Oncology Hematology Group v. Goldklang*, 183 Ga. App. 788, 360 S.E.2d 41 (1987).

Upon a de novo review of the plain terms outlined in an employment contract, a former employer was not entitled to receive commission payments from its former employee, a licensed sales agent, for deals closed with the employee's subsequent employer, as any contrary reading would result in an unenforceable contract, under O.C.G.A. § 43-40-19(c); hence, summary judgment was properly granted to the employee on that issue, and the former employer's claim for money had and received also failed. *Richard Bowers & Co. v. Creel*, 280 Ga. App. 199, 633 S.E.2d 555 (2006).

In a breach of contract action filed by an employee, who was a third-party beneficiary to an employment contract with a contractor, the trial court erred in granting the employee summary judgment as: (1) under the plain language of the employment agreement at issue between the parties, as well as the county's personnel policy, the contractor was authorized to terminate the employee based on the employee's inability or unfitness to perform the assigned duties due to an injury; and (2) the employee could not perform all the job's requirements. *Am. Water Serv. USA v. McRae*, 286 Ga. App. 762, 650 S.E.2d 304 (2007), cert. denied, 2007 Ga. LEXIS 761 (Ga. 2007).

Divorce settlement agreement. — When parties in divorce action enter into settlement agreement which is subsequently incorporated into divorce decree, meaning and effect thereof should be determined in accordance with usual rules for construction of contracts. *Hortman v. Childress*, 162 Ga. App. 536, 292 S.E.2d 200 (1982).

Adjudication by summary judgment held improper. — Summary judgment was inappropriate in a breach of fiduciary duty action which centered around a verbal settlement agreement since material fact issues remained as to whether: (1) a company's

offer to buy the minority shareholders' stock required a written purchase agreement; (2) the parties agreed to all material terms; and (3) a note signed by one of the minority shareholders had been cancelled. *McKenna v. Capital Res. Partners, IV, L.P.*, 286 Ga. App. 828, 650 S.E.2d 580 (2007), cert. denied, 2007 Ga. LEXIS 752, 763 (Ga. 2007).

Public contracts. — Trial court did not err when the court denied the motion by the Georgia Department of Transportation

(DOT) for a directed verdict on the DOT's claim that a general contractor failed to follow procedures outlined in a contract the contractor was awarded for construction of an interchange, and asked a jury to determine whether the DOT breached the parties' contract when the DOT refused to pay a claim the contractor submitted for reimbursement of costs the contractor incurred to restore a lake. *DOT v. Hardin-Sunbelt*, 266 Ga. App. 139, 596 S.E.2d 397 (2004).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, § 240 et seq.

C.J.S. — 17A C.J.S., Contracts, § 294 et seq.

ALR. — Construction of contract as regards services contemplated by it where attorney claims compensation in addition to amount named therein, 2 ALR 844.

Punctuation as affecting construction of contract, 3 ALR 1062.

Construction and application of provision of construction contract as regards retention of percentage of current earnings until completion, 107 ALR 960.

Right of architect or engineer to construe building or construction contract, 137 ALR 530.

Validity and construction of contract for

exclusive representation of persons participating in, or connected with, entertainment enterprises, 175 ALR 617.

Question whether oral statements amount to express warranty, as one of fact for jury or of law for court, 67 ALR2d 619.

Admissibility of extrinsic evidence to identify person or persons intended to be designated by the name in which a contract is made, 80 ALR2d 1137.

Waiver of, or estoppel to assert, substantive right or right to arbitrate as question for court or arbitrator, 26 ALR3d 604.

Division of opinion among judges on same court or among other courts or jurisdictions considering same question, as evidence that particular clause of insurance policy is ambiguous, 4 ALR4th 1253.

13-2-2. Rules for interpretation of contracts generally.

The following rules, among others, shall be used in arriving at the true interpretation of contracts:

(1) Parol evidence is inadmissible to add to, take from, or vary a written contract. All the attendant and surrounding circumstances may be proved and, if there is an ambiguity, latent or patent, it may be explained; so, if only a part of a contract is reduced to writing (such as a note given in pursuance of a contract) and it is manifest that the writing was not intended to speak the whole contract, then parol evidence is admissible;

(2) Words generally bear their usual and common signification; but technical words, words of art, or words used in a particular trade or business will be construed, generally, to be used in reference to this peculiar meaning. The local usage or understanding of a word may be proved in order to arrive at the meaning intended by the parties;

(3) The custom of any business or trade shall be binding only when it is of such universal practice as to justify the conclusion that it became, by

implication, a part of the contract, except in regard to those transactions covered by Title 11;

(4) The construction which will uphold a contract in whole and in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part;

(5) If the construction is doubtful, that which goes most strongly against the party executing the instrument or undertaking the obligation is generally to be preferred;

(6) The rules of grammatical construction usually govern, but to effectuate the intention they may be disregarded; sentences and words may be transposed, and conjunctions substituted for each other. In extreme cases of ambiguity, where the instrument as it stands is without meaning, words may be supplied;

(7) When a contract is partly printed and partly written, the latter part is entitled to most consideration;

(8) Estates and grants by implication are not favored; and

(9) Time is not generally of the essence of a contract; but, by express stipulation or reasonable construction, it may become so. (Orig. Code 1863, §§ 1, 2721; Code 1868, §§ 1, 2715; Code 1873, § 1, 2757; Code 1882, §§ 1, 2757; Civil Code 1895, §§ 1, 3675; Civil Code 1910, §§ 1, 4268; Code 1933, § 20-704; Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 38; Ga. L. 1964, p. 414, § 1; Ga. L. 2010, p. 878, § 13/HB 1387.)

The 2010 amendment, effective June 3, 2010, part of an Act to revise, modernize, and correct the Code, added "and" at the end of paragraph (8).

Law reviews. — For article, "The Parol Evidence Rule in Georgia," see 17 Ga. B.J. 49 (1954). For article, "The Parol Evidence Rule in Georgia — Part Two," see 17 Ga. B.J. 184 (1954). For article noting the effect of local business custom on warranties under the U.C.C., see 1 Ga. St. B.J. 191 (1964). For article discussing the advantages of contract rescission as a remedy for fraud, with respect to the parol evidence rule and the statute of frauds, in light of *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974), see 11 Ga. St. B.J. 172 (1975). For article discussing interpretation in Georgia of insurance policies containing evidentiary conditions, see 12 Ga. L. Rev. 783 (1978). For article discussing parol evidence in the law of commercial paper, see 13 Ga. L. Rev. 53 (1978). For article surveying recent legislative and judicial developments in Georgia's

real property laws, see 31 Mercer L. Rev. 187 (1979). For article, "Trial Practice and Procedure," see 53 Mercer L. Rev. 475 (2001). For annual survey of labor and employment law, see 56 Mercer L. Rev. 291 (2004). For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004).

For note, "Misrepresentations and Non-disclosures in the Insurance Application," see 13 Ga. L. Rev. 876 (1979).

For comment on *Buchanan v. Hieber*, 78 Ga. App. 434, 50 S.E.2d 815 (1948), see 12 Ga. B.J. 67 (1949). For comment on *West View Corp. v. Alston*, 208 Ga. 122, 65 S.E.2d 406 (1951), see 14 Ga. B.J. 230 (1951). For comment on *Fisher v. J.A. Jones Constr. Co.*, 87 Ga. App. 317, 73 S.E.2d 587 (1952), see 4 Mercer L. Rev. 374 (1953). For comment on *Burdines, Inc. v. Pan-Atlantic S.S. Corp.*, 199 F.2d 577 (5th Cir. 1952), an admiralty case treating a rubber stamp as a means of writing in construing a contract, see 4 Mercer L. Rev. 376 (1953).

JUDICIAL DECISIONS

ANALYSIS

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WHEN TIME IS OF THE ESSENCE

General Consideration

1. Application in General

Construction of employee dishonesty insurance contract provision. — Appellate court properly determined that an insured was only entitled to one cumulative policy limit for a loss due to embezzlement by an employee; upon consideration pursuant to O.C.G.A. § 13-2-2, the insurance policy in question stated that the insurer would only pay for one occurrence during the policy term, and the acts of the employee constituted one occurrence as defined by the policy. *Sherman & Hemstreet, Inc. v. Cincinnati Ins. Co.*, 277 Ga. 734, 594 S.E.2d 648 (2004).

Construction impermissible where language capable of only one reasonable interpretation. — No construction is required or even permissible when language employed by parties to contract is plain, unambiguous, and capable of only one reasonable interpretation. *R.S. Helms, Inc. v. GST Dev. Co.*, 135 Ga. App. 845, 219 S.E.2d 458 (1975); *Merrill Lynch, Pierce, Fenner & Smith v. Stidham*, 506 F. Supp. 1182 (M.D. Ga. 1981), *aff'd* in part, *vacated* in part on other grounds, 658 F.2d 1098 (5th Cir. 1981).

It was error for a trial court to apply the rules of contract construction to a contract which clearly and unambiguously provided that a customer was not obligated to pay its supplier for services if the customer's client did not pay the customer for those services. *Blueshift, Inc. v. Advanced Computing Techs., Inc.*, 273 Ga. App. 802, 616 S.E.2d 816 (2005).

Construction of waiver provision in contract. — Upon construction of a contract between an independent contractor and a billboard owner under O.C.G.A. § 13-2-2, because: (1) it was clear that the contractor did not waive any right to recover against the owner under any possible scenario, but only waived a right to recover against the owner's predecessor for damages if the waiver did not invalidate the insurance coverage; and (2) the contract only waived the owner's liability if the waiver did not invalidate the contractor's insurance, summary judgment was erroneously entered to the owner on grounds that the contractor waived a right to recover from the owner and because the trial court failed to consider whether the waiver invalidated the contractor's insurance. *Holmes v. Clear Channel Outdoor, Inc.*, 284 Ga. App. 474, 644 S.E.2d 311 (2007).

General Consideration (Cont'd)**1. Application in General (Cont'd)**

In contract dispute not involving language of contract, parties bound by writing. — In dispute over meaning of contract and subsequent acts of parties during contract's execution, which is not over language of contract, party is bound by what has been reduced to writing. *R.S. Helms, Inc. v. GST Dev. Co.*, 135 Ga. App. 845, 219 S.E.2d 458 (1975).

In an action regarding an alleged breach of an employment contract seeking commissions on deals made by a real estate agent that a former real estate broker alleged it was entitled to, after a plain reading of the unambiguous contract, the trial court erred in entering summary judgment against the agent, finding that the agent owed the broker commissions as to one of two contested deals, because: (1) the agent closed the deal with that client after terminating employment with the broker; and (2) it was undisputed that the agent had not agreed to share commissions with the broker on deals struck after the agent left the broker's employ; thus, since summary judgment was properly entered in the agent's favor regarding commissions paid to the agent as to the second of the two contested clients, the broker was not entitled to litigation costs under O.C.G.A. § 13-6-11. *Morgan v. Richard Bowers & Co.*, 280 Ga. App. 533, 634 S.E.2d 415 (2006).

Rules of construction invoked by Court of Appeals only where raised by assignment of error. — Whatever may be application of rules of construction of contracts as a whole on issues before trial court, such application is invoked by Court of Appeals only to extent, directly or indirectly, that it may be raised by assignment of error, preserving for review any or all of those issues. *Boston Ins. Co. v. Harmon*, 66 Ga. App. 383, 18 S.E.2d 84 (1941).

Plain language of contract upheld. — In a breach of contract action filed by an employee, who was a third-party beneficiary to an employment contract with a contractor, the trial court erred in granting the employee summary judgment as: (1) under the plain language of the employment agreement at issue between the parties, as well as the county's personnel policy, the contractor

was authorized to terminate the employee based on the employee's inability or unfitness to perform the assigned duties due to an injury; and (2) the employee could not perform all the job's requirements. *Am. Water Serv. USA v. McRae*, 286 Ga. App. 762, 650 S.E.2d 304 (2007), cert. denied, 2007 Ga. LEXIS 761 (Ga. 2007).

In a declaratory judgment action between a water utility and residents of a subdivision, given that the residents had standing to sue on a contract for the provision of water services as incidental beneficiaries, the trial court erred in finding that the utility was charging the appropriate rates thereunder; but, the utility was allowed to increase the utility's minimum annual fee and, given the clear and ambiguous language of the contract, enforce a restrictive covenant. *Alday v. Decatur Consol. Water Servs.*, 289 Ga. App. 902, 658 S.E.2d 476 (2008).

Trial court properly granted summary judgment to a condominium association member in an action by the association, seeking to resolve a dispute between the parties as to the proper manner of assessing expenses for the common elements of the condominium development as the declaration restricted limited common element expenses to a special assessment among the assigned unit owners, apart from the general common expenses that were to be divided among all unit owners; that interpretation of the declaration reflected the meaning of the entire document pursuant to O.C.G.A. § 13-2-2(4). *Museum Tower Condo. Ass'n v. Children's Museum of Atlanta, Inc.*, 297 Ga. App. 84, 676 S.E.2d 448 (2009).

In a breach of contract suit between a licensee of certain patents and a licensor, the licensor's sale of the licensor's assets did not violate the parties' agreement because the plain language of the agreement permitted a sale to a certain entity without notice to the licensee, and the licensee's interpretation of the contract to the contrary did not involve construing the contract as a whole, as required by O.C.G.A. § 13-2-2(4). *Ip Co., LLC v. Cellnet Tech., Inc.*, No. 1:06-CV-03048-JEC, 2009 U.S. Dist. LEXIS 89467 (N.D. Ga. Sept. 28, 2009).

Federal court construing language not previously construed in Georgia to use rules of the Georgia Code. — Where interpretation of contractual language has been differ-

ently construed by courts of different jurisdictions but not previously construed by Georgia courts, thus making construction doubtful, rules of interpretation of contracts, as found in the Georgia Code are properly applicable by federal court. *Boston Ins. Co. v. Gable*, 352 F.2d 368 (5th Cir. 1965).

Contract between spouses to settle question of alimony subject to usual rules of construction. — Where contract between husband and wife in divorce suit was entered into for purpose of settling question of alimony, the contract's meaning and effect should be determined according to usual rules for construction of contracts, the cardinal rule being to ascertain intention of parties. *Brown v. Farkas*, 195 Ga. 653, 25 S.E.2d 411 (1943).

Entirety of an agreement should be looked to in arriving at the construction of any part; a requirement in a divorce settlement agreement that the husband pay money to the wife, with or without a sale of the marital home, was not conditional. *Horwitz v. Weil*, 275 Ga. 467, 569 S.E.2d 515 (2002).

Construction of settlement agreement in divorce actions. — Language of second divorce settlement agreement that stated certain property belonged to the former husband and was not marital property subject to division, and that the former husband and the former wife agreed to release each other from any and all obligations whatsoever against each other unambiguously meant that the former wife released the former husband from any claim to any equity interest in the property despite the fact that an earlier divorce settlement agreement provided for the wife to receive an equity interest in the property under certain circumstances. *Barnett v. Platz*, 261 Ga. App. 51, 581 S.E.2d 682 (2003).

Decedent died before changing the beneficiary of an IRA, the decedent's ex-spouse. A provision in a divorce settlement agreement stating that the ex-spouse relinquished all claims to any IRAs titled in the decedent's name was sufficiently broad to waive the ex-spouse's beneficiary designation and to release the ex-spouse's expectancy interest in the IRA; thus, the proceeds of the IRA belonged to the decedent's estate. *Young v. Stump*, 294 Ga. App. 351, 669 S.E.2d 148 (2008).

Visitation provision of consent order. — It was error under O.C.G.A. § 13-2-2 to rule that under a consent order, a father was entitled to an extension of holiday visitation into a weekend preceding or following a holiday. No provision of the consent order allowed a merger of holiday visitation with standard weekend visitation; since the consent order contained specific, unambiguous language governing how holiday visitation was to be exercised, that language controlled whenever the father elected to take advantage of holiday visitation instead of weekend visitation. *Immel v. Immel*, 298 Ga. App. 424, 680 S.E.2d 505 (2009).

Construction of divorce settlement agreement with periodic alimony. — Summary judgment was properly granted to a former husband in his declaratory judgment action, seeking a determination that his obligation to make "periodic alimony" payments for his former wife's car payments pursuant to the parties' divorce settlement agreement ceased upon the wife's remarriage pursuant to O.C.G.A. § 19-6-5(b), as the settlement agreement was clear and unambiguous in its designation of certain payments as a form of periodic alimony rather than as equitable distribution; contract interpretation principles under O.C.G.A. §§ 13-2-2(4) and 13-2-3 supported that interpretation of the agreement. *Crosby v. Lebert*, 285 Ga. 297, 676 S.E.2d 192 (2009).

Meaning and effect of will, contract, or pleading to be ascertained by language employed in document's preparation. *Brantley Co. v. Briscoe*, 246 Ga. 310, 271 S.E.2d 356 (1980).

Simple ambiguity does not render contract unenforceable if explainable from attendant and surrounding circumstances. *Indian Trail Village, Inc. v. Smith*, 139 Ga. App. 691, 229 S.E.2d 508 (1976).

Where more than one meaning is reasonable, one serving public interest to be preferred. — In choosing among reasonable meanings of promise or agreement or term thereof, meaning that serves public interest is generally preferred. *Clear-VU Cable, Inc. v. Town of Trion*, 244 Ga. 790, 262 S.E.2d 73 (1979).

A limited or specific provision will prevail over one that is more broadly inclusive. *Griffin v. Barrett*, 155 Ga. App. 509, 271 S.E.2d 647 (1980).

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Deficiency in contract caused by indefiniteness or lack of mutuality is cured by performance. *Self v. Smith*, 98 Ga. App. 876, 107 S.E.2d 721 (1959).

Law will not make contract for parties which is different from the contract executed by the parties. *Sellers v. Alco Fin., Inc.*, 130 Ga. App. 769, 204 S.E.2d 478 (1974).

Rights and liabilities flowing from simultaneous contracts may not be considered in isolation from each other. *Barton v. Olshan*, 244 Ga. 341, 260 S.E.2d 83 (1979).

Contract to be construed as whole and no part discarded if avoidable preference for upholding contracts. — When a tenant which terminated the tenant's lease early and agreed to pay the landlord the difference between the tenant's rental obligation and rent the landlord was able to obtain from a third party this agreement was a guaranty from which the tenant had been discharged, the landlord was entitled to partial summary judgment on the landlord's breach of contract claim in the landlord's suit to enforce the agreement, because the agreement was not a guaranty subject to the discharge provisions of O.C.G.A. § 10-7-20 et seq., as the tenant did not agree to be answerable for the debt of another but, instead, agreed to continue the tenant's rental obligation to the landlord, subject to any credit the tenant might be entitled to for rent the landlord received from a third party, and the use of the phrase "Lessee guarantees" in the contract did not make it a guaranty because, under O.C.G.A. § 13-2-2(4), the whole contract was to be looked at in determining the meaning of any part. *Equifax, Inc. v. 1600 Peachtree, L.L.C.*, 268 Ga. App. 186, 601 S.E.2d 519 (2004).

Upon construing the plain language of paragraph 15 in the parties' prenuptial agreement, because it was clear that the legitimate conveyance of a husband's separate property, consisting of a residence and a brokerage account, would change the treatment of these assets for purposes of distribution in accordance with the terms of the agreement, and because the trial court failed to make findings of fact regarding the circumstances surrounding the changes at issue, it was not clear that the conveyances

were legitimate; thus, the matter was reversed and the case was remanded for the trial court to make such findings and to construe the parties' agreement as a whole. *Grissom v. Grissom*, 282 Ga. 267, 647 S.E.2d 1 (2007).

In an action arising from an alleged breach of a nonsolicitation covenant within a consultant agreement, because the employee subject to the covenant understood the covenant to apply only to those clients the employee's employer acquired when the employer bought the employee's former company, or with whom the employee had material contact during the course of the employment, the trial court misconstrued the agreement by limiting the agreement's scope, and the employer was erroneously granted summary judgment based on the employee's alleged breach. *Atl. Ins. Brokers, LLC v. Slade Hancock Agency, Inc.*, 287 Ga. App. 677, 652 S.E.2d 577 (2007).

Option contracts for sale of realty require same degree of definiteness as general contracts; required definiteness includes such matters as price, and terms of payment; contract must either state price to be paid for property or set forth criteria by which the price may be calculated. *Wiley v. Tom Howell & Assocs.*, 154 Ga. App. 235, 267 S.E.2d 816 (1980).

Real estate contract viewed as whole. — Clause in a real estate sale contract that stated no claims or legal actions were pending could not be construed to be a blanket representation that the seller was not aware of any facts that might cause the buyer not to go forward with the transaction since under O.C.G.A. § 13-2-2(4) a court must construe a contract to uphold the contract in whole and in every part. *Savage v. KGE Assocs., L.P.*, 260 Ga. App. 770, 580 S.E.2d 591 (2003).

Trial court acted properly in determining whether the property buyer was entitled to specific performance of the property seller's obligation in the purchase and sales agreement to execute a restrictive covenant by examining the whole contract in determining whether the parties intended that the obligation to execute the restrictive covenant survive the real estate closing as the parties had agreed in an addendum signed at the time of the closing that they intended unfulfilled obligations under the agreement

to survive the closing, and only by examining the whole contract was the trial court able to determine the parties' intention that the obligation to execute the restrictive covenant survived the closing. *Neely Dev. Corp. v. Serv. First Invs., Inc.*, 261 Ga. App. 253, 582 S.E.2d 200 (2003).

Earnest money. — Trial court erred in granting summary judgment, pursuant to O.C.G.A. § 9-11-56(c), to a seller in an action to recover earnest money for the sale of a shopping center; the purchaser was entitled to the return of the money because the purchaser could not obtain financing, which was a condition for the return of the money under the terms of the contract, interpreted pursuant to O.C.G.A. §§ 13-2-1 and 13-2-2. *Ali v. Aarabi*, 264 Ga. App. 64, 589 S.E.2d 827 (2003).

When instruments are executed at same time in course of same transaction, the instruments should be read and construed together. *Interstate Fire Ins. Co. v. National Indem. Co.*, 157 Ga. App. 516, 277 S.E.2d 802 (1981).

Incorporation of promissory notes into contract. — Unless a lease agreement expressly provides that the rent is to be paid by promissory notes, the notes do not become a part of the contract, and cannot be considered in determining the intention of the parties where the contract is not ambiguous. *Brackin Tie, Lumber & Chip Co. v. McLarty Farms, Inc.*, 95 F.R.D. 328 (S.D. Ga. 1982), *aff'd*, 704 F.2d 585 (11th Cir. 1983).

Two insurance policies containing escape clauses in event of other insurance, to be read together. — Just as contract must be read as a whole, two or more insurance contracts from different companies applicable to single occurrence, each containing escape clauses in event of other insurance covering same occurrence, or each limited to excess of other policies covering same occurrence must be read together in order to arrive at true interpretation. *Southern Home Ins. Co. v. Willoughby*, 124 Ga. App. 162, 182 S.E.2d 910 (1971).

Contemporaneous written agreements properly construed together. — In a breach of contract action arising from a guaranty agreement between a guarantor and a retail space owner, the trial court properly granted summary judgment in the owner's favor, as the court properly construed contempora-

neous written agreements, which were executed on the same date, at the same time, and at the same location, despite a misnomer contained therein, as such did not render the agreement unenforceable. Thus, it was not erroneous for the court to correct an obvious error in the agreement, specifically, the failure to substitute one entity's name for another as the parties intended, and interpret the guaranty accordingly. *C.L.D.F., Inc. v. Aramore, LLC*, 290 Ga. App. 271, 659 S.E.2d 695 (2008), *cert. denied*, 2008 Ga. LEXIS 668 (Ga. 2008).

Covenant not to sue positively reserving right to sue parties not named clearly expresses intent. — Covenant not to sue which not only expressly names covenantees, but positively reserves right to proceed against any other party not named in covenant, is clear expression of intent and must be recognized to mean what it says. *Brantley Co. v. Briscoe*, 246 Ga. 310, 271 S.E.2d 356 (1980).

Merger clause stating that it was the intent of the parties that the agreement superseded all precontractual agreements and representations, both oral and written, precluded a claim by one party that the other party's pre-contractual representations amounted to theft by deception. *First Data POS, Inc. v. Willis*, 273 Ga. 792, 546 S.E.2d 781 (2001).

Nonrenewal not considered termination of contract where parties dealt with each separately. — While conceptually nonrenewal might be considered a form of contract termination, this categorization is of no consequence where parties to agreement deal with nonrenewal and termination as separate matters. *Kushner v. Southern Adventist Health & Hosp. Sys.*, 151 Ga. App. 425, 260 S.E.2d 381 (1979).

Construction of clause abating rent in event of casualty to premises. — Where lease of realty premises contains provisions that if premises are damaged by storm, fire, earthquake, or other casualty, but not rendered wholly untenable, rental shall abate in proportion as premises have been damaged, properly construed the provision means that stipulated rent shall be reduced in proportion to amount of damages premises have undergone during period premises remained thus damaged. *Buchanan v. Hieber*, 78 Ga. App. 434, 50 S.E.2d 815 (1948).

Recovery in quantum meruit. — Georgia follows the English rule which allows recov-

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ery in quantum meruit by a plaintiff who is in substantial breach of the contract, as long as the breach is not willful or deliberate. *Anderson v. Golden*, 569 F. Supp. 122 (S.D. Ga. 1982).

It was error for a trial court to find, in a contract dispute, that a supplier was entitled to recover from its non-paying customer in quantum meruit because the parties' dispute was controlled by the terms of their express contract. *Blueshift, Inc. v. Advanced Computing Techs., Inc.*, 273 Ga. App. 802, 616 S.E.2d 816 (2005).

Forum selection clause. — Trial court erred in finding that the court lacked jurisdiction over a successor lessor in an action by a guarantor of a lessee's obligation, based on an alleged false credit report of the guarantor, where the jurisdiction clause of the lease did not designate an exclusive forum for bringing the suit; rather, the clause simply permitted suit to be brought in a place where jurisdiction and venue might not otherwise have been proper, but it did not dictate the forum, based on contract interpretation principles pursuant to O.C.G.A. § 13-2-2(5). *Carbo v. Colonial Pac. Leasing Corp.*, 264 Ga. App. 785, 592 S.E.2d 445 (2003).

Ambiguity existed as to whether property was to be included in listing agreement. — See *International Bus. Invs., Inc. v. Archer Motor Co.*, 187 Ga. App. 97, 369 S.E.2d 268 (1988).

Ambiguity existed in first right of refusal contract. — Trial court correctly determined that there was an ambiguity in the terms of a first right of refusal contract, and correctly found that the intent of the parties and the "dominant purpose" of the contract was to give the husband the opportunity to purchase all or any portion of certain property before the wife was allowed to sell the property to another. *Coker v. Coker*, 265 Ga. App. 720, 595 S.E.2d 556 (2004).

Standard of review. — The appellate court will presume that a trial court proceeded properly, even where the record does not clearly reveal the process employed in construing a contract to determine if it is ambiguous. *Alpha Beta Dickerson Southeastern, Inc. v. White Co.*, 235 Ga. App. 273, 509 S.E.2d 351 (1998).

Cited in *Jackson v. Carswell*, 34 Ga. 279 (1866); *Fletcher & Bullock v. Young*, 69 Ga. 591 (1882); *Patterson v. Ramspeck & Green*, 81 Ga. 808, 10 S.E. 390 (1888); *Macon & B.R.R. v. Gibson*, 85 Ga. 1, 11 S.E. 442, 21 Am. St. R. 135 (1890); *Singer v. Grand Rapids Match Co.*, 117 Ga. 86, 43 S.E. 755 (1903); *Lytle v. Scottish Am. Mtg. Co.*, 122 Ga. 458, 50 S.E. 402 (1905); *Muscogee Mfg. Co. v. Eagle & Phenix Mills*, 126 Ga. 210, 54 S.E. 1028, 7 L.R.A. (n.s.) 1139 (1906); *Bowen v. E. A. Waxelbaum & Bro.*, 2 Ga. App. 521, 58 S.E. 784 (1907); *Vanzant v. Bank of Abbeville*, 2 Ga. App. 763, 59 S.E. 85 (1907); *Dozier v. Davison & Fargo*, 138 Ga. 190, 74 S.E. 1086 (1912); *Mill Wood & Coal Co. v. Flint River Cypress Co.*, 16 Ga. App. 636, 85 S.E. 943 (1915); *Peacock v. Savannah Woodenware Co.*, 18 Ga. App. 127, 88 S.E. 906 (1916); *Verdery v. Withers*, 30 Ga. App. 63, 116 S.E. 894 (1923); *Horne & Ponder v. Evans*, 31 Ga. App. 370, 120 S.E. 787 (1923); *Keith v. Chastain*, 157 Ga. 1, 121 S.E. 233 (1923); *Irvin v. New Brunswick Fire Ins. Co.*, 32 Ga. App. 182, 122 S.E. 710 (1924); *Rogers-Morgan Co. v. Webb*, 34 Ga. App. 424, 130 S.E. 78 (1925); *Palmer, Phinizy & Connell v. Heinzerling*, 34 Ga. App. 544, 130 S.E. 537 (1925); *Miller v. First Nat'l Bank*, 35 Ga. App. 334, 132 S.E. 783 (1926); *Continental Life Ins. Co. v. Wells*, 38 Ga. App. 99, 142 S.E. 900 (1928); *Bernstein v. Fagelson*, 38 Ga. App. 294, 143 S.E. 237 (1928); *Nolan v. Calhoun*, 38 Ga. App. 227, 143 S.E. 606 (1928); *Napier v. Pool*, 39 Ga. App. 187, 146 S.E. 783 (1929); *Sewell v. Armour Fertilizer Works, Inc.*, 39 Ga. App. 516, 147 S.E. 717 (1929); *American Cas. Co. v. Cohen*, 40 Ga. App. 593, 151 S.E. 56 (1929); *Wellhouse v. Central Leases, Inc.*, 41 Ga. App. 731, 154 S.E. 708 (1930); *Fireman's Fund Ins. Co. v. Davis*, 42 Ga. App. 49, 155 S.E. 105 (1930); *Holloway v. Brown*, 171 Ga. 481, 155 S.E. 917 (1930); *White v. Cook*, 171 Ga. 663, 156 S.E. 657 (1931); *Kitchens v. Noland*, 172 Ga. 684, 158 S.E. 562 (1931); *Buffalo Forge Co. v. Southern Ry.*, 43 Ga. App. 445, 159 S.E. 301 (1931); *Rich-Garrison Motor Co. v. Hicks*, 43 Ga. App. 834, 160 S.E. 547 (1931); *Southern Brighton Mills v. Taber Mill*, 44 Ga. App. 513, 162 S.E. 515 (1931); *Philips v. Philips*, 174 Ga. 413, 162 S.E. 672 (1932); *Glass v. Grant*, 46 Ga. App. 327, 167 S.E. 727 (1933); *King v. Smith*, 47 Ga. App. 360, 170 S.E. 546 (1933); *Weems v. Des Portes*, 47 Ga. App. 546, 171

S.E. 182 (1933); Tyus v. Duke, 178 Ga. 800, 174 S.E. 527 (1934); Greeson v. F & M Bank, 50 Ga. App. 566, 179 S.E. 191 (1935); Cocke v. Bank of Dawson, 180 Ga. 714, 180 S.E. 711 (1935); Carver v. Leach, 53 Ga. App. 112, 185 S.E. 155 (1936); Williamson-Inman & Co. v. Thompson, 53 Ga. App. 821, 187 S.E. 194 (1936); Atlantic Fertilizer Co. v. Southern States Phosphate & Fertilizer Co., 53 Ga. App. 798, 187 S.E. 237 (1936); Allen v. Dickey, 54 Ga. App. 451, 188 S.E. 273 (1936); Trippe v. Crescent Farms, Inc., 58 Ga. App. 1, 197 S.E. 330 (1938); Macon Gas Co. v. Crockett, 58 Ga. App. 361, 198 S.E. 267 (1938); American Mut. Liab. Ins. Co. v. Curry, 187 Ga. 342, 200 S.E. 150 (1938); Beavers v. Le Sueur, 188 Ga. 393, 3 S.E.2d 667 (1939); United States Fid. & Guar. Co. v. Skinner, 188 Ga. 823, 5 S.E.2d 9 (1939); Williams v. Bernath, 61 Ga. App. 350, 6 S.E.2d 184 (1939); Whitfield v. Maddox, 189 Ga. 870, 8 S.E.2d 57 (1940); Brooke v. Dellinger, 193 Ga. 66, 17 S.E.2d 178 (1941); Sparks v. Sparks, 193 Ga. 368, 18 S.E.2d 556 (1942); In re Cent. of Ga. Ry., 47 F. Supp. 786 (S.D. Ga. 1942); Hardware Mut. Cas. Co. v. Collier, 69 Ga. App. 235, 25 S.E.2d 136 (1943); Nichols v. Ocean Accident & Guarantee Corp., 70 Ga. App. 169, 27 S.E.2d 764 (1943); Progressive Life Ins. Co. v. Smith, 71 Ga. App. 157, 30 S.E.2d 411 (1944); Mutual Life Ins. Co. v. Barron, 198 Ga. 1, 30 S.E.2d 879 (1944); McWane Cast Iron Pipe Co. v. Barrett, 72 Ga. App. 161, 33 S.E.2d 528 (1945); Albany Fed. Sav. & Loan Ass'n v. Henderson, 200 Ga. 79, 36 S.E.2d 330 (1945); Irvin v. Locke, 200 Ga. 675, 38 S.E.2d 289 (1946); Lively v. Munday, 201 Ga. 409, 40 S.E.2d 62 (1946); Warehouses, Inc. v. Wetherbee, 203 Ga. 483, 46 S.E.2d 894 (1948); Marsh v. Baird, 203 Ga. 819, 48 S.E.2d 529 (1948); Sampson v. General Elec. Supply Corp., 78 Ga. App. 2, 50 S.E.2d 169 (1948); Childs v. Hampton, 80 Ga. App. 748, 57 S.E.2d 291 (1950); Finney v. Blalock, 206 Ga. 655, 58 S.E.2d 429 (1950); Touchstone v. Louis Friedlander & Sons, 81 Ga. App. 489, 59 S.E.2d 281 (1950); Millender v. Looper, 82 Ga. App. 563, 61 S.E.2d 573 (1950); Blanchard & Calhoun Realty Co. v. Fogel, 207 Ga. 602, 63 S.E.2d 382 (1951); Smith v. Smith, 208 Ga. 300, 66 S.E.2d 711 (1951); Thomas v. Eason, 208 Ga. 822, 69 S.E.2d 729 (1952); Petkas v. Wright Co., 87 Ga. App. 189, 73 S.E.2d 224 (1952); Plaza Hotel Co. v.

Fine Prods. Corp., 87 Ga. App. 460, 74 S.E.2d 372 (1953); Moore v. Johnson, 89 Ga. App. 164, 78 S.E.2d 823 (1953); Lander Motors, Inc. v. Lee Tire & Rubber Co., 89 Ga. App. 194, 78 S.E.2d 839 (1953); Carter v. Turbeville, 90 Ga. App. 367, 83 S.E.2d 72 (1954); Scheer v. Doss, 211 Ga. 7, 83 S.E.2d 612 (1954); Bishop v. Act-O-Lane Gas Serv. Co., 91 Ga. App. 154, 85 S.E.2d 169 (1954); Willingham v. Life & Cas. Ins. Co., 216 F.2d 226 (5th Cir. 1954); American Aviation & Gen. Ins. Co. v. Georgia Telco Credit Union, 223 F.2d 206 (5th Cir. 1955); Dwyer v. Providence Wash. Ins. Co., 95 Ga. App. 672, 98 S.E.2d 592 (1957); Nichols v. Williams Pontiac, Inc., 95 Ga. App. 752, 98 S.E.2d 659 (1957); Sundry v. Allgood, 96 Ga. App. 570, 101 S.E.2d 125 (1957); Carparking, Inc. v. Chappell's, Inc., 96 Ga. App. 862, 101 S.E.2d 894 (1958); Weldon v. Lashley, 214 Ga. 99, 103 S.E.2d 385 (1958); Alexander v. Skandalakis, 98 Ga. App. 755, 106 S.E.2d 842 (1958); Hafib v. Maslia, 214 Ga. 654, 106 S.E.2d 905 (1959); Nikas v. Hindley, 99 Ga. App. 194, 108 S.E.2d 98 (1959); Georgia, S. & Fla. Ry. v. United States Cas. Co., 177 F. Supp. 751 (M.D. Ga. 1959); Wheeler v. Jones County, 101 Ga. App. 234, 113 S.E.2d 238 (1960); State Hwy. Dep't v. MacDougald Constr. Co., 102 Ga. App. 254, 115 S.E.2d 863 (1960); Collier v. Akins, 102 Ga. App. 274, 116 S.E.2d 121 (1960); Kunz v. Custer, 103 Ga. App. 593, 120 S.E.2d 186 (1961); United States ex rel. Dixie Plumbing Supply Co. v. Taylor, 293 F.2d 717 (5th Cir. 1961); Williams v. Hudgens, 217 Ga. 706, 124 S.E.2d 746 (1962); Shaw v. State Farm Mut. Ins. Co., 107 Ga. App. 8, 129 S.E.2d 85 (1962); Liberty Mut. Ins. Co. v. Mead Corp., 219 Ga. 6, 131 S.E.2d 534 (1963); McIntyre v. Zac-Lac Paint & Lacquer Corp., 107 Ga. App. 807, 131 S.E.2d 640 (1963); Kennesaw Life & Accident Ins. Co. v. Hendricks, 108 Ga. App. 148, 132 S.E.2d 152 (1963); Pethel v. Waters, 219 Ga. 376, 133 S.E.2d 334 (1963); Johnson v. Atlanta Auto Auction, Inc., 108 Ga. App. 735, 134 S.E.2d 538 (1963); S. & S. Bldrs., Inc. v. Equitable Inv. Corp., 219 Ga. 557, 134 S.E.2d 777 (1964); Peacock Constr. Co. v. West, 111 Ga. App. 604, 142 S.E.2d 332 (1965); Brown v. Chrysler Corp., 112 Ga. App. 22, 143 S.E.2d 575 (1965); Martell v. Atlanta Biltmore Hotel Corp., 114 Ga. App. 646, 152 S.E.2d 579 (1966); Parkhill Trust Fund, Inc. v. Carroll, 115 Ga. App. 108, 153

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S.E.2d 615 (1967); Cotton States Mut. Ins. Co. v. Hutto, 115 Ga. App. 164, 154 S.E.2d 375 (1967); Reynolds v. Long, 115 Ga. App. 182, 154 S.E.2d 299 (1967); Monroe v. Citizens & S. Nat'l Bank, 117 Ga. App. 288, 160 S.E.2d 203 (1968); Lake Spivey Parks v. Jones, 118 Ga. App. 60, 162 S.E.2d 801 (1968); B.L. Ivey Constr. Co. v. Pilot Fire & Cas. Co., 295 F. Supp. 840 (N.D. Ga. 1968); Ashburn Bank v. Childress, 120 Ga. App. 632, 171 S.E.2d 768 (1969); Travelers Indem. Co. v. Federal Ins. Co., 297 F. Supp. 1346 (N.D. Ga. 1969); Carter v. Rary, 311 F. Supp. 1386 (N.D. Ga. 1969); Padgett v. Bryant, 121 Ga. App. 807, 175 S.E.2d 884 (1970); Fidelity Bankers Life Ins. Co. v. Renew, 121 Ga. App. 883, 176 S.E.2d 103 (1970); Bostwick Banking Co. v. Arnold, 227 Ga. 18, 178 S.E.2d 890 (1970); Georgia Elec. Co. v. Malone, 123 Ga. App. 439, 181 S.E.2d 317 (1971); Trust Co. v. Guardian Life Ins. Co. of Am., 124 Ga. App. 465, 184 S.E.2d 363 (1971); Ranger Ins. Co. v. Culberson, 454 F.2d 857 (5th Cir. 1971); Aetna Life Ins. Co. v. Sanders, 127 Ga. App. 352, 193 S.E.2d 173 (1972); Redman Dev. Corp. v. Piedmont Heating & Air Conditioning, Inc., 128 Ga. App. 447, 197 S.E.2d 167 (1973); Pinkerton & Laws Co. v. Atlantis Realty Co., 128 Ga. App. 662, 197 S.E.2d 749 (1973); Stone Mt. Scenic R.R., Inc. v. Stone Mt. Mem. Ass'n, 230 Ga. 800, 199 S.E.2d 216 (1973); Hamlin v. Timberlake Grocery Co., 130 Ga. App. 648, 204 S.E.2d 442 (1974); Pitman v. Griffith, 131 Ga. App. 489, 206 S.E.2d 115 (1974); Aetna Fire Underwriters Ins. Co. v. Crawley, 132 Ga. App. 181, 207 S.E.2d 666 (1974); Bank Bldg. & Equip. Corp. v. Georgia State Bank, 132 Ga. App. 762, 209 S.E.2d 82 (1974); National Car Rental Sys. v. Council Whsle. Distribs., Inc., 393 F. Supp. 1128 (M.D. Ga. 1974); Haynie v. A & H Camper Sales, Inc., 233 Ga. 654, 212 S.E.2d 825 (1975); Hodges Appliance Co. v. United States Fid. & Guar. Co., 133 Ga. App. 936, 213 S.E.2d 46 (1975); Clark v. Peck, 134 Ga. App. 868, 216 S.E.2d 687 (1975); Ansley v. Forest Servs., Inc., 135 Ga. App. 745, 218 S.E.2d 914 (1975); City of Jonesboro v. Clayton County Water Auth., 136 Ga. App. 768, 222 S.E.2d 76 (1975); Barton v. Scott Hudgens Realty & Mtg., Inc., 136 Ga. App.

565, 222 S.E.2d 126 (1975); Showers v. Allstate Ins. Co., 136 Ga. App. 792, 222 S.E.2d 198 (1975); Peach State Uniform Serv., Inc. v. American Ins. Co., 507 F.2d 996 (5th Cir. 1975); Barksdale v. Peoples Fin. Corp., 393 F. Supp. 112 (N.D. Ga. 1975); Harrison v. Goodyear Serv. Stores, 137 Ga. App. 223, 223 S.E.2d 261 (1976); Price v. Guardian Mtg. Corp., 137 Ga. App. 519, 224 S.E.2d 451 (1976); Phillips v. Hertz Com. Leasing Corp., 138 Ga. App. 441, 226 S.E.2d 287 (1976); Interstate N. Assocs. v. Hensley-Schmidt, Inc., 138 Ga. App. 487, 226 S.E.2d 315 (1976); WTTI Broadcasters, Inc. v. Lloyd, 139 Ga. App. 115, 227 S.E.2d 905 (1976); Henderson Mill, Ltd. v. McConnell, 237 Ga. 807, 229 S.E.2d 660 (1976); Hardman v. Dahlonga-Lumpkin County Chamber of Commerce, 238 Ga. 551, 233 S.E.2d 753 (1977); Ford Motor Credit Co. v. Hunt, 141 Ga. App. 612, 234 S.E.2d 112 (1977); Hendon v. Ponderosa Ins. Adjusters, 141 Ga. App. 623, 234 S.E.2d 130 (1977); Brown v. Brigham, 143 Ga. App. 178, 237 S.E.2d 675 (1977); Dulock v. Shiver, 239 Ga. 604, 238 S.E.2d 397 (1977); In re Smith, 436 F. Supp. 469 (N.D. Ga. 1977); Jansen v. Emory Univ., 440 F. Supp. 1060 (N.D. Ga. 1977); Baker Mtg. Corp. v. Hugenberg, 145 Ga. App. 528, 244 S.E.2d 56 (1978); Lindwall v. Lindwall, 242 Ga. 13, 247 S.E.2d 752 (1978); Henderson Few & Co. v. Rollins Communications, Inc., 148 Ga. App. 139, 250 S.E.2d 830 (1978); Brigadier Indus. Corp. v. Pippin, 148 Ga. App. 145, 251 S.E.2d 114 (1978); Dolanson Co. v. Citizens & S. Nat'l Bank, 242 Ga. 681, 251 S.E.2d 274 (1978); General Fin. Corp. v. Sprouse, 577 F.2d 989 (5th Cir. 1978); Gobbi v. Hurt, 150 Ga. App. 60, 256 S.E.2d 664 (1979); Mossie v. Pilgrim Self-Service Storage, 150 Ga. App. 715, 258 S.E.2d 548 (1979); Clear-VU Cable, Inc. v. Town of Trion, 244 Ga. 790, 262 S.E.2d 73 (1979); Walter E. Heller & Co. v. Aetna Bus. Credit, Inc., 151 Ga. App. 898, 262 S.E.2d 151 (1979); Kennedy v. Brand Banking Co., 152 Ga. App. 47, 262 S.E.2d 177 (1979); Indian Trail Village, Inc. v. Smith, 152 Ga. App. 301, 262 S.E.2d 581 (1979); Johnson v. Bouchier, 245 Ga. 124, 263 S.E.2d 157 (1980); Wiggins v. Southern Bell Tel. & Tel. Co., 245 Ga. 526, 266 S.E.2d 148 (1980); Diggs v. Swift Loan & Fin. Co., 154 Ga. App. 389, 268 S.E.2d 433 (1980); Rollins v. Gault, 153 Ga. App. 781, 266 S.E.2d

560 (1980); American Century Mtg. Investors v. Bankamerica Realty Investors, 246 Ga. 39, 268 S.E.2d 609 (1980); Worlds v. Worlds, 154 Ga. App. 850, 270 S.E.2d 68 (1980); Chambley v. Georgia Steel, Inc., 617 F.2d 144 (5th Cir. 1980); Belk & Co. v. Millender Sales Corp., 158 Ga. App. 522, 281 S.E.2d 287 (1981); Summerville v. Belk-Rhodes Co., 160 Ga. App. 162, 286 S.E.2d 497 (1981); Myron v. Trust Co. Bank Long Term Disability Benefit Plan, 522 F. Supp. 511 (N.D. Ga. 1981); Morris v. Thrift Credit Union, 17 Bankr. 62 (Bankr. N.D. Ga. 1981); Lee v. White, 249 Ga. 99, 286 S.E.2d 723 (1982); Martin v. Southern Atlanta Inv. Corp., 160 Ga. App. 852, 287 S.E.2d 692 (1982); McMillan v. Jacobs, 249 Ga. 117, 288 S.E.2d 211 (1982); Travelers Indem. Co. v. Pullen & Co., 161 Ga. App. 784, 289 S.E.2d 792 (1982); Southern Fed. Sav. & Loan Ass'n v. Lyle, 249 Ga. 284, 290 S.E.2d 455 (1982); Perimeter Mall v. Retail Sense, Inc., 162 Ga. App. 465, 291 S.E.2d 392 (1982); Horton v. Childress, 162 Ga. App. 536, 292 S.E.2d 200 (1982); Aetna Cas. & Sur. Co. v. W.G. Lothridge Contracting Co., 163 Ga. App. 731, 296 S.E.2d 83 (1982); Lakeshore Marine, Inc. v. Hartford Accident & Indem. Co., 164 Ga. App. 417, 296 S.E.2d 418 (1982); U.S. Enters., Inc. v. Mikado Custom Tailors, 250 Ga. 415, 297 S.E.2d 290 (1982); Brookhaven Landscape & Grading Co. v. J.F. Barton Contracting Co., 676 F.2d 516 (11th Cir. 1982); Management Assistance, Inc. v. Computer Dimensions, Inc., 546 F. Supp. 666 (N.D. Ga. 1982); Equitable Life Assurance Soc'y v. Sullivan, 165 Ga. App. 223, 299 S.E.2d 615 (1983); F & M Bank v. State, 167 Ga. App. 77, 306 S.E.2d 11 (1983); Anderson v. Southeastern Fid. Ins. Co., 251 Ga. 556, 307 S.E.2d 499 (1983); Hall v. Simkins Indus., Inc., 584 F. Supp. 955 (N.D. Ga. 1983); Baker v. Jellibeans, Inc., 252 Ga. 458, 314 S.E.2d 874 (1984); Dodson v. Ward, 171 Ga. App. 469, 320 S.E.2d 193 (1984); In re Wauka, Inc., 39 Bankr. 734 (Bankr. N.D. Ga. 1984); Norton v. Hutton, 172 Ga. App. 836, 324 S.E.2d 744 (1984); Reed v. Crown Ctr. Mgt. Co., 173 Ga. App. 520, 326 S.E.2d 825 (1985); Georgia Farm Bureau Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 173 Ga. App. 844, 328 S.E.2d 737 (1985); Smithloff v. Benson, 173 Ga. App. 870, 328 S.E.2d 759 (1985); Marjon Assocs. v. Leasing Int'l, Inc., 174 Ga. App. 679, 331 S.E.2d 20 (1985);

Quigley v. Jones, 174 Ga. App. 787, 332 S.E.2d 7 (1985); National City Bank v. Busbin, 175 Ga. App. 103, 332 S.E.2d 678 (1985); Quigley v. Jones, 255 Ga. 33, 334 S.E.2d 664 (1985); Stern's Gallery of Gifts, Inc. v. Corporate Property Investors, Inc., 176 Ga. App. 586, 337 S.E.2d 29 (1985); Chandler v. Drexel Burnham Lambert, Inc., 633 F. Supp. 760 (N.D. Ga. 1985); Riddle v. Camp, 179 Ga. App. 129, 345 S.E.2d 667 (1986); Gans v. Georgia Fed. Sav. & Loan Ass'n, 179 Ga. App. 660, 347 S.E.2d 615 (1986); Gulf Life Ins. Co. v. Brown, 181 Ga. App. 72, 351 S.E.2d 267 (1986); United States Fire Ins. Co. v. Cowley & Assocs., 183 Ga. App. 478, 359 S.E.2d 160 (1987); Rigg v. New World Pictures, Inc., 183 Ga. App. 446, 359 S.E.2d 207 (1987); In re Royal, 75 Bankr. 50 (Bankr. S.D. Ga. 1987); Comprehensive Bookkeeping & Accounting, Inc. v. John B. Woodward, Inc., 185 Ga. App. 409, 364 S.E.2d 108 (1987); Original Appalachian Artworks, Inc. v. Schlaifer Nance & Co., 679 F. Supp. 1564 (N.D. Ga. 1987); Mag Mut. Ins. Co. v. Gatewood, 186 Ga. App. 169, 367 S.E.2d 63 (1988); Shore v. Loomis, 187 Ga. App. 674, 371 S.E.2d 96 (1988); McClintock v. Wellington Trade, Inc., 187 Ga. App. 898, 371 S.E.2d 893 (1988); Cincinnati Ins. Co. v. Page, 188 Ga. App. 876, 374 S.E.2d 768 (1988); Wages v. Mount Harmony Mem. Gardens, Inc., 189 Ga. App. 99, 375 S.E.2d 57 (1988); Chem Tech Finishers, Inc. v. Paul Mueller Co., 189 Ga. App. 433, 375 S.E.2d 881 (1988); Kusuma v. Metamatrix, Inc., 191 Ga. App. 255, 381 S.E.2d 322 (1989); Benoit v. Emory Univ., 191 Ga. App. 211, 381 S.E.2d 394 (1989); Holyoke Mut. Ins. Co. v. Cherokee Ins. Co., 192 Ga. App. 757, 386 S.E.2d 524 (1989); Davenport v. Nance, 194 Ga. App. 313, 390 S.E.2d 281 (1990); McGee v. Southern Gen. Ins. Co., 194 Ga. App. 783, 391 S.E.2d 669 (1990); Maddox v. Superior Rigging & Erecting Co., 195 Ga. App. 114, 393 S.E.2d 42 (1990); Shoffner v. Woodward, 195 Ga. App. 778, 394 S.E.2d 921 (1990); Hertz Equip. Rental Corp. v. Evans, 260 Ga. 532, 397 S.E.2d 692 (1990); White v. Lawyers Title Ins. Corp., 197 Ga. App. 780, 399 S.E.2d 526 (1990); Acord v. Maynard, 198 Ga. App. 296, 401 S.E.2d 315 (1991); Daniel v. Douglas County, 261 Ga. 103, 401 S.E.2d 508 (1991); Brunswick Floors, Inc. v. Carter, 199 Ga. App. 110, 403 S.E.2d 855 (1991); Smith v. Haywood Oil Co., 199 Ga. App. 562,

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405 S.E.2d 560 (1991); *Hirschfield v. Continental Cas. Co.*, 199 Ga. App. 654, 405 S.E.2d 737 (1991); *Schoen v. Atlanta Cas. Co.*, 200 Ga. App. 109, 407 S.E.2d 91 (1991); *Johnson v. Raatz*, 200 Ga. App. 289, 407 S.E.2d 489 (1991); *CM3, Inc. v. Associated Realty Investors/Prado*, 201 Ga. App. 428, 411 S.E.2d 320 (1991); *Country Pride Homes, Inc. v. DuBois*, 201 Ga. App. 740, 412 S.E.2d 282 (1991); *U3S Corp. of Am. v. Parker*, 202 Ga. App. 374, 414 S.E.2d 513 (1991); *Club Assocs. v. Consolidated Capital Realty Investors*, 951 F.2d 1223 (11th Cir. 1992); *Life Care Ambulance, Inc. v. Hospital Auth.*, 202 Ga. App. 864, 415 S.E.2d 502 (1992); *Myers v. Texaco Ref. & Mktg., Inc.*, 205 Ga. App. 292, 422 S.E.2d 216 (1992); *Loveless v. Sun Steel, Inc.*, 206 Ga. App. 247, 424 S.E.2d 887 (1992); *Dixon v. Home Indem. Co.*, 206 Ga. App. 623, 426 S.E.2d 381 (1992); *Donohue v. Green*, 209 Ga. App. 381, 433 S.E.2d 431 (1993); *Westminster Group, Inc. v. Perimeter 400 Partners*, 218 Ga. App. 293, 460 S.E.2d 827 (1995); *Hurst v. Grange Mut. Cas. Co.*, 266 Ga. 712, 470 S.E.2d 659 (1996); *Duke v. KHD Deutz of Am. Corp.*, 221 Ga. App. 452, 471 S.E.2d 537 (1996); *Choice Hotels Int'l, Inc. v. Ocmulgee Fields, Inc.*, 222 Ga. App. 185, 474 S.E.2d 56 (1996); *Caribbean Lumber Co. v. Phoenix Assurance Co.*, 227 Ga. App. 236, 488 S.E.2d 718 (1997); *Thomas v. Americal Global Ins. Co.*, 229 Ga. App. 107, 493 S.E.2d 12 (1997); *Associated Mechanical Contractors, Inc. v. Martin K. Eby Constr. Co.*, 964 F. Supp. 1576 (M.D. Ga. 1997); *CareAmerica, Inc. v. Southern Care Corp.*, 229 Ga. App. 878, 494 S.E.2d 720 (1997); *Grier v. Brogdon*, 234 Ga. App. 79, 505 S.E.2d 512 (1998); *Georgia Dep't of Human Res. v. Citibank*, 243 Ga. App. 433, 534 S.E.2d 422 (2000); *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs.*, 97 F. Supp. 2d 1363 (N.D. Ga. 2000); *Brown v. Blackmon*, 272 Ga. 435, 530 S.E.2d 712 (2000); *Malcom v. Newton County*, 244 Ga. App. 464, 535 S.E.2d 824 (2000); *Fontaine v. Sidelines IV, Inc.*, 245 Ga. App. 681, 538 S.E.2d 137 (2000); *Connell v. Guarantee Trust Life Ins. Co.*, 246 Ga. App. 467, 541 S.E.2d 403 (2000); *Booker v. Hall*, 248 Ga. App. 639, 548 S.E.2d 391 (2001); *Nobel Lodging, Inc. v. Holiday Hospitality*

Franchising, Inc., 249 Ga. App. 497, 548 S.E.2d 481 (2001); *Balata Dev. Corp. v. Reed*, 249 Ga. App. 528, 548 S.E.2d 668 (2001); *George L. Smith II Ga. World Congress Ctr. Auth. v. Soft Comdex, Inc.*, 250 Ga. App. 461, 550 S.E.2d 704 (2001); *Pfeiffer v. Georgia DOT*, 250 Ga. App. 643, 551 S.E.2d 58 (2001); *Sharple v. Airtouch Cellular of Ga., Inc.*, 250 Ga. App. 216, 551 S.E.2d 87 (2001); *Hibbard v. P.G.A., Inc.*, 251 Ga. App. 68, 553 S.E.2d 371 (2001); *Hallum v. Provident Life & Accident Ins. Co.*, 257 F. Supp. 2d 1373 (N.D. Ga. 2001); *Tachdjian v. Phillips*, 256 Ga. App. 166, 568 S.E.2d 64 (2002); *Emanuel Tractor Sales, Inc. v. DOT*, 257 Ga. App. 360, 571 S.E.2d 150 (2002); *Lodgenet Entm't Corp. v. Heritage Inn Assocs.*, 261 Ga. App. 557, 583 S.E.2d 225 (2003); *Woody's Steaks, LLC v. Pastoria*, 261 Ga. App. 815, 584 S.E.2d 41 (2003); *Carolina Cas. Ins. Co. v. Ragan Mech. Contrs., Inc.*, 262 Ga. App. 6, 584 S.E.2d 646 (2003); *Eckerd Corp. v. Alterman Props.*, 264 Ga. App. 72, 589 S.E.2d 660 (2003); *Iraola & CIA., S.A. v. Kimberly-Clark Corp.*, 325 F.3d 1274 (11th Cir. 2003); *Western Pac. Mut. Ins. Co. v. Davies*, 267 Ga. App. 675, 601 S.E.2d 363 (2004); *Eudy v. Universal Wrestling Corp.*, 272 Ga. App. 142, 611 S.E.2d 770 (2005); *DOT v. Meadow Trace, Inc.*, 274 Ga. App. 267, 617 S.E.2d 246 (2005); *Miami Heights LT, LLC v. Home Depot U.S.A., Inc.*, 283 Ga. App. 779, 643 S.E.2d 1 (2007); *Interfinancial Midtown, Inc. v. Choate Constr. Co.*, 284 Ga. App. 747, 644 S.E.2d 281 (2007); *UniFund Fin. Corp. v. Donaghue*, 288 Ga. App. 81, 653 S.E.2d 513 (2007); *Fireman's Fund Ins. Co. v. Univ. of Ga. Ath. Ass'n*, 288 Ga. App. 355, 654 S.E.2d 207 (2007); *Lambert v. Alfa Gen. Ins. Corp.*, 291 Ga. App. 57, 660 S.E.2d 889 (2008); *Med S. Health Plans, LLC v. Life of the S. Ins. Co.*, No. 4:07-CV-134 (CDL), 2008 U.S. Dist. LEXIS 40223 (M.D. Ga. May 19, 2008); *Savannah Yacht Corp. v. Thunderbolt Marine, Inc.*, 297 Ga. App. 104, 676 S.E.2d 728 (2009); *Byers v. McGuire Props.*, 285 Ga. 530, 679 S.E.2d 1 (2009); *Am. Nat'l Prop. & Cas. Co. v. Americast, Inc.*, 297 Ga. App. 443, 677 S.E.2d 663 (2009); *Azzouz v. Prime Pediatrics, P.C.*, 296 Ga. App. 602, 675 S.E.2d 314 (2009); *Hathaway Dev. Co. v. Am. Empire Surplus Lines Ins. Co.*, 301 Ga. App. 65, 686 S.E.2d 855 (2009); *Jimenez v. Gilbane Bldg. Co.*, No. A09A2061, 2010 Ga. App. LEXIS 299 (Mar. 25, 2010).

2. Intent of Parties

In construction of contract cardinal rule is to ascertain intention of parties, and to this end whole contract must be considered. *Hull v. Lewis*, 180 Ga. 721, 180 S.E. 599 (1935) See *In re Estate of Sims*, 259 Ga. App. 786, 578 S.E.2d 498 (2003).

Cardinal rule of construction is ascertainment and effectuation of intent. *McVay v. Anderson*, 221 Ga. 381, 144 S.E.2d 741 (1965).

Intention of parties as controlling factor. — Cardinal rule of construction is to ascertain intention of parties to contract, and this is to be gathered from entire contract, considering each provision in connection with others, and not giving contract construction which entirely neutralizes one provision if the provision is susceptible of another which gives effect to all provisions. *Holcim (US), Inc. v. AMDG, Inc.*, 265 Ga. App. 818, 596 S.E.2d 197 (2004).

It is a fundamental principle in construction of contracts that meaning placed upon terms of contract by contracting parties is to be adopted. This is particularly true of contract relating to particular trade or business. *MacDougald Constr. Co. v. State Hwy. Dep't*, 59 Ga. App. 708, 2 S.E.2d 197, rev'd on other grounds, 189 Ga. 490, 6 S.E.2d 570 (1939).

Fundamental rule is to give instrument that meaning which will best carry into effect intent of parties. *Brooke v. Phillips Petro. Co.*, 113 Ga. App. 742, 149 S.E.2d 511 (1966).

Cardinal rule of contract construction is to ascertain the intent of the parties; where a sublease was ambiguous regarding a sublessee's obligation to pay operating expenses due under the master lease, fact questions remained as to the parties' intent, and a trial court erred in entering summary judgment for the sublessee but not in denying the sublessor's summary judgment motion. *Drake v. Wayne*, 52 Ga. App. 654, 184 S.E. 339 (1936).

Intention of parties is determined from consideration of entire contract; and, if possible, all of its provisions should be so interpreted as to harmonize with each other. *McCann v. Glynn Lumber Co.*, 199 Ga. 669, 34 S.E.2d 839 (1945); *Morgan Guar. Trust Co. v. Atlanta Nat'l Real Estate Trust*, 149 Ga. App. 118, 253 S.E.2d 774 (1979).

To effectuate intent of parties, court to consider whole instrument and surrounding circumstances. — In order to ascertain intention of parties, language of agreement should be considered in light of attendant and surrounding circumstances. Court should place itself as nearly as possible in situation of parties in seeking true meaning and correct application of language of contract. *Aetna Life Ins. Co. v. Padgett*, 49 Ga. App. 666, 176 S.E. 702 (1934).

To effectuate intent of parties, court is to take whole of instrument together, and to consider this with surrounding circumstances. *Brooke v. Phillips Petro. Co.*, 113 Ga. App. 742, 149 S.E.2d 511 (1966).

Undertaking must be construed in light of substantial purpose which influenced parties to enter into contract in first place, and surrounding circumstances may be looked to in determining intention of parties to contract. *Consolidated Freightways Corp. v. Williams*, 139 Ga. App. 302, 228 S.E.2d 230 (1976).

When more than one reasonable construction may be placed upon the language of an agreement or when the language in the agreement is in conflict, ambiguity exists, requiring the trial court to construe the contract to determine the intent of the parties as a matter of law to resolve any ambiguity under O.C.G.A. § 13-2-2(1); the court seeks to determine the intent of the parties within the terms of the entire agreement. *In re Estate of Sims*, 259 Ga. App. 786, 578 S.E.2d 498 (2003).

Intent in breach of contract actions. — In a breach of contract suit arising from a patent licensor's sale of its assets to the affiliate of a specified third party without giving prior notification to its licensee, the parties' notification agreement, construed in its entirety as required by O.C.G.A. § 13-2-2(4), was held to expressly permit the licensor to sell the assets to any affiliate of the specified third party. *IP Co., LLC v. Cellnet Tech., Inc.*, No. 1:06-CV-03048-JEC, 2008 U.S. Dist. LEXIS 55222 (N.D. Ga. July 17, 2008).

Intent of parties to settlement agreement. — In reviewing the communications between the parties, and given that the courts had a duty to construe and enforce contracts as made and not to make contracts for the parties, because those communications led

General Consideration (Cont'd)**2. Intent of Parties** (Cont'd)

to a binding agreement between the parties, the trial court erred in concluding that the parties had not reached a settlement agreement. *Mealer v. Kennedy*, 290 Ga. App. 432, 659 S.E.2d 809 (2008).

Intent of parties in construing insurance policy. — “Duplicate” insurance policy rendered the original contract of insurance void, and evidence showed that it was the intent of both parties to include the same table of guaranteed values found in the original policy within the terms of the “new” policy. *Brannen v. Gulf Life Ins. Co.*, 201 Ga. App. 241, 410 S.E.2d 763 (1991).

Intent of parties in separation agreement. — When an attorney sued a former client’s ex-spouse to enforce a lien on the former client’s former marital residence, which was titled in the ex-spouse’s name, the ex-spouse’s separation agreement with the former client unambiguously provided for the payment of liens against the parties to the agreement, and this included the attorney’s lien. *Northern v. Tobin*, 262 Ga. App. 339, 585 S.E.2d 681 (2003).

Home purchase and sale agreement. — Trial court did not abuse the court’s discretion in resolving an ambiguity in a home purchase and sale agreement to find that the home buyers, pursuant to the intent of the parties to the agreement, unilaterally extended the closing date so that the agreement did not expire before the extended closing. *Yargus v. Smith*, 254 Ga. App. 338, 562 S.E.2d 371 (2002).

Divorce settlement. — Trial court properly found that the term “gross income” in the parties’ divorce settlement agreement was ambiguous, and, in construing the agreement against the father as the obligor, that the parties intended for child support to be based on Georgia’s Child Support Guidelines, and that, by assigning earned income to the father’s professional corporation, thereby substantially understating the father’s gross income, the father wilfully violated the conditions of the settlement agreement; the father’s “gross income” significantly exceeded Form W-2 wages, and the father’s computation of child support based only on the father’s Form W-2 salary created a child support deficiency. *Pate v.*

Pate, 280 Ga. 796, 631 S.E.2d 103 (2006).

Restrictive covenant that authorized transfer of property did not allow a brother to transfer subdivision property to another brother, who owned a lot adjoining the subdivision property; the covenant expressly applied to the subdivision and it was the intent of the parties that the restrictive covenant apply only to the subdivision. *Danos v. Thompson*, 272 Ga. App. 69, 611 S.E.2d 678 (2005).

Debtor’s objection to creditor’s claims. — Two Chapter 13 debtors’ objection to a creditor’s claim, which lumped both a secured amount and an unsecured amount into one claim, was well-taken; when the canons of construction that applied to such contracts, including that concerning ambiguity in O.C.G.A. § 13-2-3 and that concerning the parties’ intent in O.C.G.A. § 13-2-2 were applied to the two agreements under which the creditor had financed the debtors’ purchase of a house trailer and then extended additional credit to the debtors to allow them to move the trailer to a new location, it was clear that only the original transaction was intended to result in a secured obligation. *In re Toland*, No. 04-54126-JDW, 2005 Bankr. LEXIS 3139 (Bankr. M.D. Ga. Aug. 8, 2005).

Intent of parties in lease. — Trial court was authorized to construe commercial lease and shareholder buyout agreements between a lessor and a lessee together as multiple documents executed during the course of a single transaction; in so doing, the court’s finding that the agreement was linked to the lease’s 10-year term upheld the contract as a whole, reflected the parties’ intent as expressed in the testimony and documentary evidence offered at trial, and was supported by all the attendant and surrounding circumstances. *Allen v. Harkness Stone Co.*, 271 Ga. App. 397, 609 S.E.2d 647 (2004).

After applying the rules of contract construction under O.C.G.A. §§ 13-2-2 and 13-2-3, the Court of Appeals of Georgia upheld an order granting summary judgment to a lessee, as it was not required to pay the lessee’s portion of security related costs under the terms of the lease, according to the Common Area Costs formula contained therein; hence, the lessee was authorized to refuse to pay those costs without being in

breach of the lease agreement. *Covington Square Assocs., LLC v. Ingles Mkts., Inc.*, 283 Ga. App. 307, 641 S.E.2d 266 (2007).

Lease agreement could be supplemented with implied terms. — Where a provision in a golf course lease between a Chapter 11 debtor and a city provided that “authorized representatives” of the city and the debtor could use rounds at the golf course at no charge to entertain sponsors and clients and for other business purposes, the lease was not unenforceable due to vagueness because it was possible for the court to determine the reasonable intention of the parties by asking them to submit practical suggestions for workable procedures to implement the provision. *In re Cherokee Run Country Club, Inc. v. City of Conyers (In re Cherokee Run Country Club, Inc.)*, No. 08-84120-JB, 2009 Bankr. LEXIS 3700 (Bankr. N.D. Ga. Nov. 3, 2009).

Trial court held not to err in receiving affidavits which sought to illuminate the intention of the parties at the time of the agreement. *Tidwell v. Carroll Bldrs., Inc.*, 251 Ga. 415, 306 S.E.2d 279 (1983).

When language susceptible of more than one understanding, intent of parties to be ascertained. — When language of written instrument may be fairly understood in more ways than one, it should be taken in sense put upon the instrument by the parties at time of the instrument’s execution, and court will hear evidence as to facts and surroundings. *National Manufacture & Stores Corp. v. Dekle*, 48 Ga. App. 515, 173 S.E. 408 (1934).

Restrictive covenants upheld because otherwise purchase agreement would be rendered meaningless. — As parties to an asset purchase agreement intended that the buyer acquire the seller’s restrictive covenants, and that the seller release its rights in covenants as to its employees who became the seller’s employees, a former employee of the seller who became the buyer’s employee was bound by covenants. The employee’s argument that the buyer purchased, but simultaneously extinguished, the restrictive covenants was rejected because, by purchasing restrictive covenants that it could not enforce, the buyer would have purchased no covenants at all, which would have rendered provisions of the purchase agreement meaningless. *Stevens v. YCA, LLC*, 268 Ga. App.

413, 602 S.E.2d 214 (2004).

Application of indemnity provision. — Trial court properly granted summary judgment to a limited liability company (LLC) and its owners on a corporation’s indemnity and guaranty claims as the indemnity provisions in the parties’ contract applied only to the corporation’s guaranties, while the loan and capital conversion provisions applied to all members of a joint venture; further, as the owners personally guaranteed the LLC’s debt to the corporation, the members were only liable if the LLC was liable. *Alimenta (USA), Inc. v. Oil Seed South, LLC*, 276 Ga. App. 62, 622 S.E.2d 363 (2005).

Disability insurance policy. — An insurer’s interpretation that an employee was not totally disabled for purposes of a disability policy if the employee had only an inability to perform some material duties was correct; under O.C.G.A. §§ 13-2-3 and 13-2-2(4), in determining the parties’ intent from the whole contract, the use of “total” and “totally” showed the intent to define a state of whole, rather than partial, disability. However, a worker’s condition did not merely preclude the worker from doing as much in a day; there were duties of the occupation that the worker could not perform, and, although the worker could perform some light duties after the injury, whether the worker was wholly disabled from performing the “material” duties of the occupation within 180 days of the injury was a jury question such that summary judgment was error. *Fountain v. Unum Life Ins. Co. of Am.*, 297 Ga. App. 458, 677 S.E.2d 334 (2009).

Construction of surety contract. — Surety prevailed regarding a five year warranty on the roofs of certain newly constructed buildings because the plain language of the bond stated that the bond covered the roofs only for the five years after an architect issued a final certificate, and the architect had refused to issue a final certificate since the work had not been completed. *Ga. State Fin. v. XL Specialty Ins. Co.*, No. A10A0504, 2010 Ga. App. LEXIS 380 (Apr. 7, 2010).

3. Intent Based on Conduct

Conduct as evidence of intent. — Although the parties in drafting Amendment 3 apparently did not contemplate that rezoning might be denied, it was apparent from the conduct of both parties that the parties

General Consideration (Cont'd)**3. Intent Based on Conduct (Cont'd)**

intended that the amendment provide for an inspection period of 45 days after the county's action on the zoning request. *Ashkouti v. Widener*, 231 Ga. App. 539, 500 S.E.2d 337 (1998).

Testing service, which required test takers to present valid identification at the time of a test, did not waive the identification requirement by allowing an examinee to take a test without presenting valid identification, as there was no evidence that the service dispensed with the examinee's duty to present acceptable identification for the subsequent tests. *Sims v. Taylor*, No. 07-13974, 2008 U.S. App. LEXIS 6770 (11th Cir. Mar. 26, 2008) (Unpublished).

Omitted form paragraphs are parts of written document and serve to explain intent of parties, just as typewritten or handwritten statements serve to clarify or to change sense of printed paragraphs. *Ranger Ins. Co. v. Culberson*, 454 F.2d 857 (5th Cir. 1971), cert. denied, 407 U.S. 916, 92 S. Ct. 2440, 32 L. Ed. 2d 691 (1972).

It cannot be presumed that either party to timber lease intended waste, and therefore it must have been intended by both that lease would include, with respect to size, only such timber as an ordinarily prudent owner would use or lease. *Dorsey v. Clements*, 202 Ga. 820, 44 S.E.2d 783 (1947).

Substitution by court of word "or" for "and also" to carry out intent of parties. — In marriage settlement where contract did not express intention of parties, court substituted the word "or" for words "and also" to carry intention of parties into effect. *Ardis v. Printup*, 39 Ga. 648 (1869).

Agreement that house buyer would pay real estate commission presumed. — Although the intentions of the parties was not expressed, an agreement between a buyer of a house and a broker that the buyer would pay the real estate sales commission was implied or presumed from their actions. *Dorsey v. Harrison*, 171 Ga. App. 774, 320 S.E.2d 881 (1984).

Intent ambiguous where provision went unpriced, unsigned. — In a claim for damages resulting from delays in the performance of a construction contract, the omitted price term and unexecuted condition of

a no-damages-for-delay clause of a contract form prepared by defendant's engineers rendered the parties' intent to be bound by that clause ambiguous, creating a question of fact for resolution at trial. *Atlanta Economic Dev. Corp. v. Ruby-Collins, Inc.*, 206 Ga. App. 434, 425 S.E.2d 673 (1992).

4. Jury-Court Determinations

If after application of rules of construction, ambiguity remains, issue is for jury. — Construction of ambiguous written contracts is matter for court, and no jury question is raised unless after application of all applicable rules of construction ambiguity remains. *Western Contracting Corp. v. State Hwy. Dep't*, 125 Ga. App. 376, 187 S.E.2d 690 (1972).

Construction of ambiguous contracts is duty of court, and no jury question is raised unless after application of pertinent rules of construction ambiguity remains. *Erquitt v. Solomon*, 135 Ga. App. 502, 218 S.E.2d 172 (1975); *Archer v. Carson*, 213 Ga. App. 161, 444 S.E.2d 82 (1993).

When, after reviewing the record, the Court of Appeals agrees that the trial court first properly decided that the language of an insurance policy was ambiguous, and applying the applicable rules of construction, including paragraphs (2), (4), and (5) of O.C.G.A. § 13-2-2, the Court of Appeals concludes that the contract terms in question were still ambiguous, the Court of Appeals will hold that the trial court properly turned the question of contract construction over to the jury. *Travelers Ins. Co. v. Blakey*, 180 Ga. App. 520, 349 S.E.2d 474 (1986).

Court's role in interpreting insurance policy exclusion. — Where an injured patron was struck in the nose by a beer bottle thrown in the insured's bar, the injured patron contended that the insured was liable because the bar and the bar's employees failed to prevent the bottle thrower's attack and the injured patron claimed to have suffered serious injury and disfigurement, but the insurer claimed that the insurer had no duty to defend or indemnify the insured because the incident fell within the policy's assault and battery exclusion; the court held that the portion of the policy addressing assault and battery was not intended to exclude coverage for a bodily injury claim arising out of an assault and battery commit-

ted by a patron, as any other interpretation would have rendered certain language in the policy meaningless. *ALEA London Ltd. v. Woodcock*, 286 Ga. App. 572, 649 S.E.2d 740 (2007), cert. denied, 2007 Ga. LEXIS 703 (Ga. 2007).

In an action brought by a lessor against a former lessee, a dry cleaning corporation, for indemnification for remediation expenses incurred in cleaning up the contaminated shopping center property vacated by the lessee, the trial court properly refused to examine a pollution liability exclusion endorsement in a vacuum and, rather, considered that language in concert with other policy language addressing coverage of property damage arising out of the discharge of pollutants and thereby found that an umbrella policy provided coverage for quick, abrupt, and accidental discharges of pollutants. The trial court properly determined that the inconsistent language of the pollution liability exclusion and an amendatory endorsement were ambiguous as the amendatory endorsement narrowed the scope of the pollution liability exclusion by exempting from it discharges that were quick, abrupt, and accidental; but the pollution liability exclusion endorsement broadened the scope of the exclusion by extending the exclusion to any discharge. *State Farm Fire & Cas. Co. v. Walnut Ave. Partners, LLC*, 296 Ga. App. 648, 675 S.E.2d 534 (2009).

Existence or nonexistence of ambiguity in contract is question of law for court; and if there are ambiguities, reference may be had to other related instruments to explain such ambiguity. *Cassville-White Assocs. v. Bartow Assocs.*, 150 Ga. App. 561, 258 S.E.2d 175 (1979).

If court determines ambiguity exists, court must attempt to resolve ambiguity by applying the rules of construction set forth in O.C.G.A. § 13-2-2. *Smith v. Freeport Kolin Co.*, 687 F. Supp. 1550 (M.D. Ga. 1988).

Because the trial court was faced with an ambiguity in a covenants declaration regarding the construction of improvements on commercial property, the court erred in granting summary judgment to the property's owner and the lessee, and finding that the ambiguity had to be construed against the developer, instead of first attempting to resolve the ambiguity by applying the rules

of contract construction provided in O.C.G.A. § 13-2-2(4). *White v. Kaminsky*, 271 Ga. App. 719, 610 S.E.2d 542 (2004).

When contracts are unambiguous it is error to submit construction to jury. *State Hwy. Dep't v. MacDougald Constr. Co.*, 102 Ga. App. 254, 115 S.E.2d 863 (1960).

Intent of parties to ambiguous contract for jury determination. — If there is any ambiguity or uncertainty in written contract, it is for the jury to determine, from consideration of all of evidence, just what purpose, intention, and design of parties were. *Taylor v. Estes*, 85 Ga. App. 716, 70 S.E.2d 82 (1952).

Disagreement as to intent of parties is evidentiary, factual matter for resolution by jury and not a matter of law for determination by court. *Crestlawn Mem. Park v. Scott*, 146 Ga. App. 715, 247 S.E.2d 175 (1978); *St. Charles Foods, Inc. v. America's Favorite Chicken Co.*, 198 F.3d 815 (11th Cir. 1999); *Maiz v. Virani*, 253 F.3d 641 (11th Cir. 2001).

Jury to determine meanings of obscure words. — Whenever there is any matter of fact involved as to meaning of obscure word in contract, jury should make finding of fact thereon. *Kilgore v. Nasworthy*, 124 Ga. App. 261, 183 S.E.2d 481 (1971).

Parol Evidence

1. In General

Presumption that writing contains entire contract. — When parties have reduced to writing what appears to be a complete and certain agreement, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the entire contract, and parol evidence of prior or contemporaneous representations or statements is inadmissible to add to, take from, or vary the written instrument. *Andrews v. Skinner*, 158 Ga. App. 229, 279 S.E.2d 523 (1981).

Parol evidence rule is rule of positive or substantive law. — Rule which denies effect to an oral agreement which contradicts a written contract entered into at the same time or later is not one merely of evidence, but is one of positive or substantive law founded upon substantive rights of parties. *Albany Fed. Sav. & Loan Ass'n v. Henderson*, 198 Ga. 116, 31 S.E.2d 20 (1944).

The parol evidence rule is not a rule of

Parol Evidence (Cont'd)**1. In General (Cont'd)**

evidence, but, rather, a rule of substantive law. *Dixon v. S & S Loan Serv. of Waycross, Inc.*, 754 F. Supp. 1567 (S.D. Ga. 1990).

Purpose of parol evidence rule is to establish finality of written contracts. — Purpose of rule that terms of valid written agreement which is complete and terms of which are not ambiguous cannot be contradicted, added to, altered, or varied by parol agreements, is to establish finality of written contracts. *Stoneypher v. Georgia Power Co.*, 183 Ga. 498, 189 S.E. 13 (1936).

Rule also precludes use of written evidence. — Despite its name, the parol evidence rule also precludes the use of written evidence to add to, take from, or vary the terms of a written agreement. *Dixon v. S & S Loan Serv. of Waycross, Inc.*, 754 F. Supp. 1567 (S.D. Ga. 1990).

Parol evidence rule fixes finality of written contract which is unimixed with fraud respecting subject matter; it is a rule of substantive law, and though parol evidence be erroneously admitted without objection, it is without probative value to vary terms of written contract. *Cooper v. Vaughan*, 81 Ga. App. 330, 58 S.E.2d 453 (1950).

Where no definiteness within contract, neither parol nor other extraneous evidence alone may supply deficiency. *Burden v. Thomas*, 104 Ga. App. 300, 121 S.E.2d 684 (1961).

Contracts may be modified by subsequent parol agreements. *Fisher v. J.A. Jones Constr. Co.*, 87 Ga. App. 317, 73 S.E.2d 587 (1952).

Prerequisites to parol proof to complete agreement. — To bring case within rule admitting parol evidence to complete entire agreement of which writing is only part, two things are essential: first, writing must appear on inspection to be an incomplete contract; and, second, parol evidence must be consistent with, and not contradictory of, written instrument. *Bowen v. Swift & Co.*, 52 Ga. App. 793, 184 S.E. 625 (1936).

Oral agreements contemporaneous with written contracts are unenforceable where in conflict with written instrument. *Fisher v. J.A. Jones Constr. Co.*, 87 Ga. App. 317, 73 S.E.2d 587 (1952).

Parol negotiations eventuating in unambiguous written contract merge into writing,

and cannot vary or contradict writing. *Wynn v. First Nat'l Bank*, 176 Ga. 218, 167 S.E. 513 (1933); *Early v. Kent*, 215 Ga. 49, 108 S.E.2d 708 (1959).

Merger of oral agreement with written agreement. — Once parties have reduced their contract to writing, all prior oral negotiations and agreements pertaining to same subject matter are merged into and superseded by writing. *Albany Fed. Sav. & Loan Ass'n v. Henderson*, 198 Ga. 116, 31 S.E.2d 20 (1944).

Contract of sale merges prior negotiations and all oral understandings and court cannot rewrite agreement to suit one party. *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 401 F. Supp. 1051 (S.D. Ga. 1975).

Parol evidence inadmissible if language of agreement is clear. — Because a lienholder signed a subordination agreement that expressly stated that it subordinated a certain security deed held by the lienholder to the interests of another, it was clear from the agreement's language that it also subordinated another security deed held by the lienholder regarding the same property, so, under O.C.G.A. § 13-2-2(1), parol evidence was inadmissible to vary this language. *VATACS Group, Inc. v. HomeSide Lending, Inc.*, 276 Ga. App. 386, 623 S.E.2d 534 (2005).

Oral promise merged into writing cannot serve as basis for action in fraud or contract. — Alleged oral promise, made contemporaneously with written contract, is thus merged into that contract and cannot serve as basis for action in fraud or in contract. *Thomas v. Henkin*, 146 Ga. App. 508, 246 S.E.2d 501 (1978).

Contradictory parol evidence. — When the contract is complete on its face and the evidence offered to explain the ambiguity contradicts the terms of the written instrument, parol evidence should not be admitted. *American Cyanamid Co. v. Ring*, 248 Ga. 673, 286 S.E.2d 1 (1982).

Grafting additional obligation onto written contract by parol testimony. — All previous negotiations are merged in the subsequent written contract, and an additional obligation cannot be grafted thereon by parol testimony. *Garcia v. Unique Realty & Property Mgt. Co.*, 205 Ga. App. 876, 424 S.E.2d 14 (1992).

2. Distinct Collateral Oral Agreements

Distinct collateral oral agreement, not inconsistent with written one, not merged into latter. — All prior or contemporaneous parol agreements between same parties are not necessarily merged into written contract; distinct collateral oral agreement, not inconsistent with the written agreement, is not so merged. *Cooper v. Vaughan*, 81 Ga. App. 330, 58 S.E.2d 453 (1950).

Generally, all prior and contemporaneous oral agreements between contracting parties are merged into the written contract which purports to be the entire agreement of the parties, although a distinct, collateral oral agreement which is not inconsistent with the written contract may still be proven. *Adams v. North Am. Bus. Brokers, Inc.*, 168 Ga. App. 341, 309 S.E.2d 164 (1983).

Oral agreement that contradicts written agreement inadmissible. — Evidence that attorney verbally agreed to keep fees at the low end of the range specified in the attorney's written agreement with plaintiff and to complete the project within two weeks was inadmissible, since the evidence contradicted the parties' written agreement. *Schluter v. Perrie, Buker, Stagg & Jones*, 230 Ga. App. 776, 498 S.E.2d 543 (1998).

Independent, complete verbal agreement, not part of written one, not subject to parol evidence rule. — When alleged verbal agreement is independent and complete contract within itself and forms no part of written contract, the verbal agreement does not come within operation of parol evidence rule. *Taylor Freezer Sales Co. v. Hydrick*, 138 Ga. App. 738, 227 S.E.2d 494 (1976).

Parol testimony may be admitted to explain ambiguous language, or to show distinct collateral understanding, although it may not contradict or vary writing itself. *Tanner v. Tinsley*, 152 Ga. App. 330, 262 S.E.2d 602 (1979).

Oral agreement separate and distinct from and not inconsistent with written contract is admissible. — Test to determine whether oral agreement is admissible is whether the oral agreement constitutes part of a written contract or whether, instead, it is a separate and distinct, oral contract which is not inconsistent with the written contract. If the latter, the agreement is admissible. *S. & S. Bldrs., Inc. v. Equitable Inv. Corp.*, 219 Ga. 557, 134 S.E.2d 777 (1964).

Independent parol agreement dealing with subject not covered by writing, admissible if consistent with writing. — Rule of evidence which favors written contracts excludes parol stipulations relating to subject matter of contract, which add to, vary, or qualify terms as written; but contract which is consistent with these terms, and of independent nature, when writing does not expressly or by implication undertake to deal with any of its terms, may be set up and proved by parol evidence. *Long v. Cash*, 54 Ga. App. 764, 189 S.E. 73 (1936).

Admissibility of independent oral agreement which induced purchasers to enter contract of sale. — It is a well-settled rule that one contract may be consideration of another, inducement to execution thereof; and where independent parol agreement has been made as inducement to making of written contract, former may be proved and enforced, though not referred to in latter. *Cooper v. Vaughan*, 81 Ga. App. 330, 58 S.E.2d 453 (1950).

Distinct collateral oral agreement, not inconsistent with written contract, is not necessarily merged therein, and one contract may be consideration of another, the inducement to its execution, and independent oral agreement which has been so induced may be proved and enforced though not referred to in written contract. *Fisher v. J.A. Jones Constr. Co.*, 87 Ga. App. 317, 73 S.E.2d 587 (1952).

Equity will take cognizance of action on independent oral agreement, consideration of which is that it induced purchasers to enter into contract of sale. *Garrett v. Diamond*, 144 Ga. App. 428, 240 S.E.2d 912 (1977).

3. Complete Agreements

When the parties agree that a written contract contains the entire agreement, any understanding not embodied in the writing is irrelevant. *Kelson Cos. v. Feingold*, 168 Ga. App. 391, 309 S.E.2d 394 (1983).

Parol evidence inadmissible to vary plain, unambiguous terms of written contract. — Parol evidence, purpose of which was to change or vary plain and unambiguous terms of written contract, is inadmissible. *Early v. Kent*, 215 Ga. 49, 108 S.E.2d 708 (1959).

When terms of contract are clear, parol

Parol Evidence (Cont'd)**3. Complete Agreements (Cont'd)**

evidence will not be allowed to raise ambiguity for purpose of proving that contract was different from that expressed in writing. *Universal Profile, Inc. v. Atlanta Fed. Sav. & Loan Ass'n*, 6 Bankr. 196 (Bankr. N.D. Ga. 1980).

As a separation agreement clearly and unambiguously required a decedent to maintain life insurance naming the decedent's former spouse as beneficiary, parol evidence was inadmissible to vary the agreement. *In re Estate of Belcher*, 299 Ga. App. 432, 682 S.E.2d 581 (2009).

Parol evidence inadmissible as to unambiguous, complete contracts. — Parol evidence is not permitted when there is no latent or patent ambiguity, and written agreement was intended to and did speak entire contract. *Victory Motors of Savannah, Inc. v. Chrysler Motors Corp.*, 357 F.2d 429 (5th Cir. 1966).

Absent fraud, accident, or mistake, parol evidence is not admissible to vary, add to, modify, or contradict an unambiguous written contract. *Neal v. Conwell*, 127 Ga. 238, 55 S.E. 936 (1906); *Bush v. Roberts*, 4 Ga. App. 531, 62 S.E. 92 (1908); *Gaulding v. Baker*, 9 Ga. App. 578, 71 S.E. 1018 (1911); *Coleman v. Barber*, 137 Ga. 22, 72 S.E. 399 (1911); *Jones v. Jones*, 141 Ga. 727, 82 S.E. 451 (1914); *Citizens Bank v. Southern Sec. & Fin. Co.*, 143 Ga. 101, 84 S.E. 465 (1915); *McConnell v. Hulse*, 17 Ga. App. 387, 87 S.E. 156 (1915).

When contract is entire, part of which is written and part parol, written part cannot be varied by parol evidence in absence of fraud, accident, or mistake. *Johnson v. Nisbet*, 137 Ga. 150, 72 S.E. 915 (1911).

If a written contract for sale of personalty appears on the contract's face to contain the entire agreement, and there are no circumstances surrounding the contract's execution which would authorize an inference to the contrary, the contract cannot, in absence of fraud, accident, or mistake, be amplified, or added to by a contemporaneous parol agreement between parties. *Palmer v. Knoxville Lumber & Mfg. Co.*, 27 Ga. App. 386, 108 S.E. 557 (1921).

Absent fraud, accident, or mistake, parol evidence inadmissible to affect complete

and unambiguous written contract. *American Sumatra Tobacco Corp. v. Willis*, 170 F.2d 215 (5th Cir. 1948).

Valid written contract, which is complete, and terms of which are not ambiguous, cannot be contradicted, added to, altered, or varied by parol agreements. *Smith v. Standard Oil Co.*, 227 Ga. 268, 180 S.E.2d 691 (1971).

Terms of complete and unambiguous written contract cannot be varied by parol agreement in absence of allegation of fraud, accident, or mistake. *Vulcan Materials Co. v. Douglas*, 131 Ga. App. 21, 205 S.E.2d 84 (1974).

In absence of fraud, accident, or mistake, parol evidence of prior or contemporaneous conversations, representations, or statements is inadmissible to add to or vary written instrument. *C.P.D. Chem. Co. v. National Car Rental Sys.*, 148 Ga. App. 756, 252 S.E.2d 665 (1979).

When contract complete, parol evidence generally admissible only as to ambiguities.

— When contract for cutting of timber appears upon the contract's face to be complete, that is, to embody an entire agreement, and there is no question as to fraud, accident, or mistake, question as to quantity must be determined by court as matter of interpretation, unless there is ambiguity, latent or patent, such as would render parol evidence admissible in relation to that question. *McCann v. Glynn Lumber Co.*, 199 Ga. 669, 34 S.E.2d 839 (1945).

When contract appears complete, absent allegation to contrary, parol evidence inadmissible to vary terms.

— While it is true that in order to arrive at true interpretation of contracts all attendant and surrounding circumstances may be proved, in absence of allegation that something was omitted from contract or that writing did not constitute entire contract, and such fact is not apparent upon face of writing, allegation that contemporaneously with or subsequently to execution of contract, parties agreed to variation of the contract would be objectionable, as it would be in contravention of rule denying parol proof variant from written terms of contract. All previous negotiations merged in written contract and additional obligation cannot be grafted thereon. *Wilson v. Martin*, 73 Ga. App. 82, 35 S.E.2d 532 (1945).

When writing appears to be complete and

certain agreement and there is no evidence or allegation of fraud or accident, then the contract will be presumed to contain the entire contract, and parol evidence of prior or contemporaneous representations or statements will not be considered to add to, take from, or vary the written instruments involved. *R.S. Helms, Inc. v. GST Dev. Co.*, 135 Ga. App. 845, 219 S.E.2d 458 (1975).

Car dealership was entitled to summary judgment in a wrongful repossession action because the terms of the promissory note and both installment contracts were clear and unambiguous as to the dates when payment was due; the purchaser's testimony that sought to contradict or vary those terms based on a situation that required the bill of sale and installment contract to be redone to reflect the correct trade-in allowance was inadmissible under the parol evidence rule in O.C.G.A. § 13-2-2(1) and thus created no material issue of fact. *Coleman v. Arrington Auto Sales & Rentals*, 294 Ga. App. 247, 669 S.E.2d 414 (2008).

Absent fraud, accident, or mistake, writing which appears complete and certain, conclusively presumed complete. — When parties have reduced to writing what appears to be a complete and certain agreement, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the entire contract, and parol evidence of prior or contemporaneous representations or statements cannot be allowed to add to, take from, or vary the written instrument. *Albany Fed. Sav. & Loan Ass'n v. Henderson*, 198 Ga. 116, 31 S.E.2d 20 (1944).

When parties have reduced to writing what appears to be complete and certain agreement, it will, in absence of fraud, accident, or mistake, be conclusively presumed that writing contains entire contract. *Smith v. Standard Oil Co.*, 227 Ga. 268, 180 S.E.2d 691 (1971).

4. Incomplete Agreements

Where circumstances indicate writing not intended to be complete, consistent, separate, oral agreement admissible. — When contract appears to have been reduced to writing, before parol evidence can be admitted to show collateral agreement, it must appear, either from contract itself or from attendant circumstances, that contract is in-

complete and that what is sought to be shown as collateral agreement does not in any way conflict with or contradict what is contained in writing. *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 37 S.E. 485, 81 Am. St. R. 28 (1900).

General rule is that parol evidence is not admissible to add to, take from, or vary a written contract. Rule which permits parol proof in case of apparent incompleteness in written statements of obligations of parties, denies parol proof variant from written terms, which imposes additional and other terms dependent upon prior or contemporaneous parol agreement. All previous negotiations are merged in subsequent written contract, and an additional obligation cannot be grafted thereon by parol testimony. *Boston Ins. Co. v. H.B. Burch & Bros.*, 40 Ga. App. 517, 150 S.E. 458 (1929).

Party entitled to prove existence of any separate oral agreement as to any matter on which document is silent, and which is not inconsistent with the document's terms, if from circumstances of case, court infers that parties did not intend document to be complete and final statement of whole of transactions between the parties. *Preferred Risk Mut. Ins. Co. v. Jones*, 233 Ga. 423, 211 S.E.2d 720 (1975).

Parol agreement which assumes unchanged validity of apparently incomplete writing, admissible to complete writing. — When instrument incomplete on the instrument's face, parol evidence is allowed to show agreement referable to incompleteness when parol agreement assumes unchanged validity of contract as expressed in written terms of note, and deals with possible contingency in future as to which separate or supplementary agreement is made. *Bowen v. Swift & Co.*, 52 Ga. App. 793, 184 S.E. 625 (1936).

When writing incomplete on the writing's face, parol evidence consistent with written terms is admissible. — When writing does not purport to contain all the stipulations of the contract, parol evidence is admissible to prove portions thereof not inconsistent with writing. *Barclay v. Hopkins*, 59 Ga. 562 (1877); *Bank of Abbeville v. Georgia Fertilizer & Oil Co.*, 154 Ga. 44, 113 S.E. 146 (1922).

Rule which permits parol proof in cases of apparent incompleteness in written state-

Parol Evidence (Cont'd)**4. Incomplete Agreements (Cont'd)**

ments of obligations of parties, denies parol proof variant from written terms, which imposes additional and other terms dependent upon prior or contemporaneous parol agreement. *Johnson v. Nisbet*, 137 Ga. 150, 72 S.E. 915 (1911); *Bank of Abbeville v. Georgia Fertilizer & Oil Co.*, 154 Ga. 44, 113 S.E. 146 (1922).

Parol evidence is admissible to explain ambiguity, and where writing does not purport to contain all stipulations of contract, such other or additional stipulations may be shown by parol. *Head v. Waycross Coca-Cola Bottling Co.*, 47 Ga. App. 842, 171 S.E. 583 (1933).

While it is the general rule that parol or extrinsic evidence is not admissible to vary, add to, modify, or contradict terms or provisions of written instrument, if writing does not purport to contain all stipulations of contract, parol evidence shall be admissible to prove other portions thereof not inconsistent with writing; so collateral undertakings between parties would not properly be looked for in writing. *Shubert v. Speir*, 201 Ga. 20, 38 S.E.2d 835 (1946).

If writing appears on the writing's face to be an incomplete contract and if parol evidence offered is consistent with and not contradictory of terms of written instrument, then parol evidence is admissible to complete agreement between parties. *Preferred Risk Mut. Ins. Co. v. Jones*, 233 Ga. 423, 211 S.E.2d 720 (1975); *Doyle v. Estes Heating & Air Conditioning, Inc.*, 173 Ga. App. 491, 326 S.E.2d 846 (1985); *Thomas v. Clark*, 178 Ga. App. 823, 344 S.E.2d 754 (1986); *Pounds v. Hospital Auth.*, 191 Ga. App. 689, 382 S.E.2d 602 (1989).

Extrinsic evidence admissible to establish intent behind and meaning of incomplete ambiguous contract. — If written contract is incomplete and meaning is uncertain and left to inference, extrinsic evidence is competent for purpose of showing intent of parties and establishing full meaning of contract. *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966).

Parol evidence admissible to show that land is located within described area. — The answer to the question whether the property in dispute was or was not located within Lot

34 of a recorded subdivision plat was not evident from an examination of the plat; the testimony of witnesses was necessary to aid the court in interpreting the warranty deeds and plat and did not offend the parol evidence rule since it has been specifically held that parol evidence is admissible to show that certain land is located within property described in a deed. *Lawhorne v. Soltis*, 259 Ga. 502, 384 S.E.2d 662 (1989).

5. Ambiguous Agreements

Parol testimony admissible for ascertaining intention of parties where contract is ambiguous. *Taylor Freezer Sales Co. v. Hydrick*, 138 Ga. App. 738, 227 S.E.2d 494 (1976).

Parol evidence did not resolve ambiguity. — Grant of summary judgment for the realty company was error since the contract was ambiguous as to whether the real estate commission was refundable once the property sale failed to close, and a question of material fact existed as to the parties' intent on that issue; the issue could not be resolved by application of the rules of contract construction, O.C.G.A. § 13-2-3, nor by parol evidence, O.C.G.A. § 13-2-2. *Krogh v. Pargar, LLC*, 277 Ga. App. 35, 625 S.E.2d 435 (2005).

Parol evidence admissible to explain ambiguities but not to contradict or vary written instrument. — In case of written contract, all attendant and surrounding circumstances can be proven and if there is ambiguity, parol evidence is admissible to explain the ambiguity. But parol evidence cannot be employed to add to, take from, or vary the terms of a written instrument. *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 401 F. Supp. 1051 (S.D. Ga. 1975).

When written contract incorporates ambiguous condition, parol evidence admissible to aid in construction of condition. *Columbia Nitrogen Corp. v. Dean's Power Oil Co.*, 136 Ga. App. 879, 222 S.E.2d 602 (1975).

Although parol evidence as to surrounding circumstances is admissible to explain ambiguities and to aid in construction of contracts, parol evidence which contradicts or varies terms of written instrument is inadmissible. *Kellos v. Parker-Sharpe, Inc.*, 245 Ga. 130, 263 S.E.2d 138 (1980).

Parol evidence is admissible to explain an

ambiguity in a written contract, although such evidence is inadmissible to add to, take from, or vary the writing itself. *Andrews v. Skinner*, 158 Ga. App. 229, 279 S.E.2d 523 (1981).

If written contract contains either latent or patent ambiguities, parol evidence is admissible for explanatory purposes. *Universal Profile, Inc. v. Atlanta Fed. Sav. & Loan Ass'n*, 6 Bankr. 196 (Bankr. N.D. Ga. 1980).

Ambiguity defined. — Ambiguity in contract may be defined as duplicity, indistinctness, and uncertainty of meaning or expression. *Tarbutton v. Duggan*, 45 Ga. App. 31, 163 S.E. 298 (1932); *McKee v. Cartledge*, 79 Ga. App. 629, 54 S.E.2d 665 (1949); *Taylor v. Estes*, 85 Ga. App. 716, 70 S.E.2d 82 (1952); *Salvatori Corp. v. Rubin*, 159 Ga. App. 369, 283 S.E.2d 326 (1981).

Word or phrase is ambiguous only when the word or phrase is of uncertain meaning, and may be fairly understood in more ways than one. *Burden v. Thomas*, 104 Ga. App. 300, 121 S.E.2d 684 (1961).

A contract is not ambiguous, even where difficult to construe, unless and until an application of the pertinent rules of interpretation leaves it uncertain as to which of two or more possible meanings represents the true intention of the parties. *Crooks v. Crim*, 159 Ga. App. 745, 285 S.E.2d 84 (1981); *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), *aff'd*, 667 F.2d 30 (11th Cir. 1982).

Distinction between ambiguity which imports doubleness and uncertainty and that which imports no meaning. — There is difference between ambiguity, which imports doubleness and uncertainty of meaning, and that degree of indefiniteness which imports no meaning at all; former can be explained by parol; latter cannot be merely explained, but a deficiency must be supplied. *Wiley v. Tom Howell & Assocs.*, 154 Ga. App. 235, 267 S.E.2d 816 (1980).

Ambiguity involves choice between two or more constructions of contract. Where, there is no ambiguity, and the terms of the contract are not set out with sufficient particularity to enable the court to say what in fact was intended by parties as full compliance, then matter of choice between two or more constructions is not involved. *Burden v. Thomas*, 104 Ga. App. 300, 121 S.E.2d 684 (1961).

No ambiguity such as to admit parol evidence unless, after construction, parties' intent remains uncertain. — There can be no ambiguity within rule as to admission of parol evidence unless and until application of pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties. *McCann v. Glynn Lumber Co.*, 199 Ga. 669, 34 S.E.2d 839 (1945).

Mere clerical error. — In a taxpayer's action against the Internal Revenue Service (IRS), under 28 U.S.C.S. § 1346(a)(1), seeking to recover funds paid to the IRS after the IRS informed the taxpayer that the taxpayer incorrectly deducted past collateral agreement payments from adjusted gross income (AGI) when computing "annual income" under the terms of an Offer in Compromise (OIC), the district court properly found under O.C.G.A. §§ 13-2-1 and 13-2-2(4) that the OIC and the Collateral Agreement were unambiguous and that the taxpayer was not entitled to deduct the past collateral agreement payments from AGI; the IRS's use of an older version of the Form 2261, which referenced an item line in Form 656 that permitted the illogical deduction of a social security number in the calculation of annual income, was a mere clerical error that was not sufficiently misleading so as to create an ambiguity in the contracts. *Begner v. United States*, 428 F.3d 998 (11th Cir. 2005).

Bank signature card. — In an action involving the unauthorized transfer of funds, the signature card which embodied the contract between the parties was ambiguous since both names of appellee and her late father appeared on the front of the card, but only the latter's "x" appeared on the reverse side; therefore, appellee's contemporaneous parol evidence was admissible in an effort to determine the parties' intent. *Washington Loan & Banking Co. v. Mitchell*, 162 Ga. App. 749, 292 S.E.2d 424 (1982).

Spousal and child support. — Parol evidence could not have been admitted to contradict the language of an agreement to award support to wife and children. *Van Dyck v. Van Dyck*, 263 Ga. 161, 429 S.E.2d 914 (1993).

Construction of insurance contract. — Summary judgment was properly granted to an insured pursuant to O.C.G.A. § 9-11-56(c) and denied to an insurer in the

Parol Evidence (Cont'd)**5. Ambiguous Agreements (Cont'd)**

insured's action seeking to collect unpaid claims under the insured's policy wherein the insured was entitled to indemnification for losses arising from employee dishonesty; however, based on the construction rules of O.C.G.A. § 13-2-2, the ambiguous non-cumulative policy liability limit was construed in the insured's favor, but could not be interpreted to allow the limit for each of the years of coverage, but rather, the limit was applied to the entire three-year policy period. *Cincinnati Ins. Co. v. Sherman & Hemstreet, Inc.*, 260 Ga. App. 870, 581 S.E.2d 613 (2003), *aff'd*, 277 Ga. 734, 594 S.E.2d 648 (2004).

After an insured designated the insured's former spouse and the insured's mother as each being 100% beneficiaries of the insured's life insurance policy, ambiguity existed, but parol evidence admitted under O.C.G.A. § 13-2-2(1), which included testimony from a benefits coordinator at the insured's employer, through whom the policy was purchased, established that the insured had intended to create contingent beneficiaries, thus entitling the former spouse, who was listed first, to the entire policy proceeds. *Henninger v. Std. Ins. Co.*, No. 08-16324, 2009 U.S. App. LEXIS 11735 (11th Cir. June 2, 2009) (Unpublished).

Construction of real estate. — Trial court properly found that a transferor's claim of ownership of a strip of land between a lot deeded to the transferor's son and an owner's property was unsupported since the deed from the transferor to the son was unambiguous and clearly showed that the land deeded to the son extended to the border of the owner's property. *Hale v. Scarborough*, 279 Ga. App. 614, 631 S.E.2d 812 (2006).

Construction of ambiguous commercial lease. — In a suit wherein the buyer/lessor of a shopping center asserted a breach of contract claim against the seller/lessee, the trial court properly found ambiguous the commercial lease entered into in conjunction with the sale because the contract did not define master lease and did not address a build out time granted to new tenants before rent was due from them; therefore, a judgment against the seller/lessor was

proper. *4 G Props., LLC v. GALS Real Estate, Inc.*, 289 Ga. App. 315, 656 S.E.2d 922 (2008).

6. Admissibility of Circumstances Surrounding Execution

For purpose of aiding in interpretation of contract, surrounding circumstances may be proved. *Salvatori Corp. v. Rubin*, 159 Ga. App. 369, 283 S.E.2d 326 (1981).

Circumstances surrounding execution of contract are proper subjects of proof by parol evidence. *Universal Profile, Inc. v. Atlanta Fed. Sav. & Loan Ass'n*, 6 Bankr. 196 (Bankr. N.D. Ga. 1980).

Although under O.C.G.A. §§ 13-2-2(1) and 24-6-1, parol evidence was inadmissible to add to, take from, or vary a written contract, it was properly admitted to show that a promisor who died signing a guaranty had actually signed the guaranty. A store employee testified that the employee witnessed the store owner sign the guaranty. *John Deere Co. v. Haralson*, 278 Ga. 192, 599 S.E.2d 164 (2004).

Surrounding circumstances may explain but not vary written agreement. — Ambiguities and words of doubtful meaning are often explained by considering surrounding circumstances. Matters outside contract are frequently looked to when those matters can aid construction. In other words, those matters may be looked to to explain but never to vary. A contract free from ambiguity is conclusively presumed to express the intention of the parties. *Foote & Davies Co. v. Southern Wood Preserving Co.*, 11 Ga. App. 164, 74 S.E. 1037 (1912).

Circumstances surrounding execution, ambiguities, and verbal portion of partly written contract may be shown by parol. *Lagenback v. Mays*, 205 Ga. 706, 54 S.E.2d 401 (1949).

For purpose of aiding in interpretation of contracts, all attendant and surrounding circumstances may be proved, and if there is ambiguity, latent or patent, the ambiguity may be explained, and parol evidence is admissible for this purpose. *Tarbutton v. Duggan*, 45 Ga. App. 31, 163 S.E. 298 (1932).

When it appears from the face of the contract or attendant circumstances that the contract is incomplete, parol evidence is admissible to prove collateral agreements

which do not in any way conflict with what is contained in the writing. *Universal Profile, Inc. v. Atlanta Fed. Sav. & Loan Ass'n*, 6 Bankr. 196 (Bankr. N.D. Ga. 1980).

Court should place itself in situation of parties. — When language is ambiguous and susceptible of more than one construction, court should attempt to place itself as near as possible in situation of parties to it at time agreement was entered into, so that the court may view circumstances as viewed by parties, and thus be enabled to understand language used in sense with which parties used the language. In order to accomplish this object it is generally proper for court to take notice of surroundings and attendant circumstances, and construe language used in light of such circumstances. *Carter v. Marble Prods., Inc.*, 171 Ga. 49, 154 S.E. 891 (1930).

Jury to consider circumstances surrounding transaction. — In an action between an insurer and its insured regarding the insured's claim for additional coverage, because the provisions regarding blanket liability and additional limits of liability were ambiguous, and application of O.C.G.A. § 13-2-2 was insufficient to eliminate the ambiguity in that it was impossible to ascertain how much coverage was provided for the items at issue, particularly soft cost, a jury was to consider the circumstances surrounding the transaction to determine the scope and effect of the policy; hence, the insured was erroneously granted partial summary judgment on the issue. *RLI Ins. Co. v. Highlands on Ponce, LLC*, 280 Ga. App. 798, 635 S.E.2d 168 (2006).

If parties' intentions ascertainable from writing, attendant circumstances inadmissible. — Whether receipt of promissory note amounts to payment of pre-existing debt depends upon intention of parties. If such intention can be gathered with certainty from papers themselves, resort need not be had to attending circumstances. If papers are ambiguous, parol evidence is admissible to establish intent. *Hall's Self-Feeding Cotton Gin Co. v. Black*, 71 Ga. 450 (1883).

7. Admissibility of Parol Evidence to Show Fraud

Parol evidence admissible to show contract procured by fraud. — When alleged misrepresentations go to inducement of con-

tract rather than promise to perform under contract, parol evidence is admissible to show that contract was procured by fraud. *Smith v. Jones*, 154 Ga. App. 629, 269 S.E.2d 471 (1980).

Parol evidence is admissible to prove that one was fraudulently induced to enter into contract. *Universal Profile, Inc. v. Atlanta Fed. Sav. & Loan Ass'n*, 6 Bankr. 196 (Bankr. N.D. Ga. 1980).

Purpose of evidence in such cases is not to vary terms, but to show invalidity. *Universal Profile, Inc. v. Atlanta Fed. Sav. & Loan Ass'n*, 6 Bankr. 196 (Bankr. N.D. Ga. 1980).

Oral representations made as inducements to contract inadmissible to add to, take from, or vary writing. *Pepsico Truck Rental, Inc. v. Eastern Foods, Inc.*, 145 Ga. App. 410, 243 S.E.2d 662 (1978).

Violation of inconsistent, contemporaneous parol agreement not fraud such as permits varying written instrument. — Making and violating contemporaneous parol agreement if inconsistent with writing would not be such fraud as to permit varying of written instrument where no sufficient reason appears why agreement was not incorporated in writing. *Bowen v. Swift & Co.*, 52 Ga. App. 793, 184 S.E. 625 (1936).

Parol evidence is admissible to explain capacity in which one signed ambiguous agreement. *Dundon v. Forehand*, 152 Ga. App. 749, 263 S.E.2d 687 (1979).

Admission of affidavits to show second life insurance beneficiary designation form void. — Trial court erred by granting summary judgment to a child in a suit brought by a sibling seeking a determination that the sibling was the sole beneficiary of their parent's life insurance policy as the sibling sufficiently alleged fraud and/or forgery with regard to a second beneficiary designation form allegedly signed by the parent. As such, the trial court should have permitted the sibling to introduce two affidavits that supported the sibling's allegations that the second beneficiary designation form was void. *Weatherly v. Weatherly*, 292 Ga. App. 879, 665 S.E.2d 922 (2008).

8. Evidentiary Issues

Testimony of plaintiff's witness which directly conflicted with provisions of policy was without probative value. *Peninsular Cas.*

Parol Evidence (Cont'd)**8. Evidentiary Issues** (Cont'd)

Co. v. McCloud, 47 Ga. App. 316, 170 S.E. 396 (1933).

Admissibility of parol evidence to prove failure of consideration. — Where in some instances parol evidence that real consideration of contract is different from that actually recited in instrument is admissible for purpose of proving that true consideration has failed, it is never allowable, under guise of inquiring into consideration, to vary or contradict by parol the substance and meaning of written terms of contract itself. Middlebrooks v. Dunlap-Huckabee Auto Co., 44 Ga. App. 543, 162 S.E. 153 (1932).

Determination as to timeliness of objection to introduction of parol evidence is unnecessary, since parol evidence, by its nature, is incompetent and without probative value to alter terms or conditions of written contract. Lyon v. Patterson, 138 Ga. App. 816, 227 S.E.2d 423 (1976).

Mere ambiguities as to subject matter may be supplied by parol evidence, and this even though contract recites that the contract contains entire agreement between parties. Jones v. Ely, 95 Ga. App. 4, 96 S.E.2d 536 (1957).

Parol testimony may explain written terms when doubtful, and if those terms do not show clear meaning, understanding of parties may be shown outside to ascertain meaning. First Nat'l Bank v. Hancock Whse. Co., 142 Ga. 99, 82 S.E. 481 (1914).

Directed verdict improper where ambiguity remains. — If after the introduction of parol evidence, there remains a conflict in the evidence as to the intent of the parties, this disagreement is an evidentiary, factual matter for resolution by the jury and not a matter of law for determination by the court, and it is error to grant a motion for directed verdict. Karlan, Inc. v. King, 202 Ga. App. 713, 415 S.E.2d 319 (1992).

Extension of car rental agreement. — Even where a car rental contract specified that the contract could not be changed, except by writing, the renter's retention of the car and the fact that both the renter and the renter insurance company paid for the car until the car was damaged in a collision showed the parties intended to and did modify the original contract by extending

the contract's term. Thompson v. Enterprise Leasing Co., 240 Ga. App. 222, 522 S.E.2d 670 (1999).

9. Application

Signing writing with blanks left to be filled in by other party binds signer. Butts v. Atlanta Fed. Sav. & Loan Ass'n, 152 Ga. App. 40, 262 S.E.2d 230 (1979).

To show one signed as agent requires that contract purport to be that of principal. — Parol evidence is not admissible to show that one signed written contract under seal as agent unless contract purports upon the contract's face to be contract of principal. Universal Profile, Inc. v. Atlanta Fed. Sav. & Loan Ass'n, 6 Bankr. 196 (Bankr. N.D. Ga. 1980).

Right of first offer. — A right of first offer (RFO) did not require seller's notice to be sent upon plaintiff executrix's formation of a desire to sell the property at issue for two reasons: (1) a contrary interpretation was contrary to the obvious intent of the parties at the time the parties entered into the sale agreement at issue, O.C.G.A. § 13-2-3; and (2) a contrary construction would have rendered a portion of the contract meaningless, O.C.G.A. § 13-2-2(4). Stephens v. Trust for Pub. Land, 479 F. Supp. 2d 1341 (N.D. Ga. 2007).

Loan documents. — Regardless of whether a note's reference to collecting fees when "legal proceedings are instituted" meant a lawsuit needed to have been filed to obtain fees under the note, a loan agreement signed contemporaneously with the note clearly entitled the lender to attorney fees if the borrowers defaulted on the loan whether or not there was a lawsuit, and, since the borrowers admitted that the borrowers defaulted on the loan, the trial court erred in concluding that the loan documents required the lender to file suit before the lender was entitled to collect attorney fees. Lovell v. Thomas, 279 Ga. App. 696, 632 S.E.2d 456 (2006).

Maker of a note, when sued, has right to show by parol want or failure of consideration, but the maker will not be allowed to prove that the maker's obligation to pay was dependent or conditional upon promisee's compliance with prior or contemporaneous agreement not expressed in note, unless execution of note was induced by fraud,

accident, or mistake. *Virginia-Carolina Chem. Corp. v. Fuller*, 35 F. Supp. 482 (N.D. Ga. 1940); *Smith v. Standard Oil Co.*, 227 Ga. 268, 180 S.E.2d 691 (1971).

Employment contract setting out mutual obligations. — When written employment contract states consideration, not by mere recital of something paid or to be paid, but sets forth mutual obligations which constitute terms of contracts, parol evidence is not admissible to show that their true consideration was lifetime employment promise of alleged prior oral agreement. *Vulcan Materials Co. v. Douglas*, 131 Ga. App. 21, 205 S.E.2d 84 (1974).

Admissibility of parol evidence to identify subject matter of article named in written contract. — When name of article, as used in written contract, is ambiguous and uncertain term which does not of itself disclose character of material, parol evidence is admissible, not to contradict, add to, or vary terms of written contract, but to identify subject matter thereof, and to explain what ambiguous term meant. *Porter v. Sterling Prods. Co.*, 40 Ga. App. 522, 150 S.E. 457 (1929).

Admissibility of parol evidence as to agreement containing integration clause. — Prior and contemporaneous statements and agreements cannot be shown to vary, contradict, or change the terms of a valid written contract purporting on the contract's face to contain all the terms of agreement between parties. *Taylor Freezer Sales Co. v. Hydriick*, 138 Ga. App. 738, 227 S.E.2d 494 (1976).

Contract stipulating whole agreement. — If contract is in fact ambiguous as to some matters, stipulation in contract to effect that the contract expresses whole agreement and that there is no agreement or modification of any kind in connection therewith that is not expressly set forth therein will not prevent explanation in usual manner. *Wood v. Phoenix Ins. Co.*, 199 Ga. 461, 34 S.E.2d 688 (1945).

Admissibility of parol evidence of site plan to show nonexistence of use restriction. — In a land use restriction action, a trial court erred by failing to consider a 1997 site plan, which allowed the parties to seek to amend the use of the land at issue and future development of the land; therefore, the trial court erred in enjoining a developer from constructing condominium towers since no such use restriction existed. *CPI Phipps, LLC*

v. 100 Park Ave. Partners, L.P., 288 Ga. App. 614, 654 S.E.2d 690 (2007), cert. denied, 2008 Ga. LEXIS 286 (Ga. 2008).

Applicability of parol evidence rule to suit against surety on real estate bond. — See *Pfeffer v. General Cas. Co. of Am.*, 87 Ga. App. 173, 73 S.E.2d 234 (1952).

Application of parol evidence rule as to open price term in option agreement. — Option agreements have generally been held or recognized to be sufficiently definite as to price to justify the agreement's enforcement if either specific price is provided for in agreement or a practical mode is provided by which price can be determined by the court without any new expression by parties themselves; the agreement must be complete within itself as to essential elements or a key or practical mode provided within contract by which definite price may be ascertained, and if there is such deficiency, parol evidence is not admissible to add to, take away from, or vary the written contract, but would be admissible to explain ambiguities. *Wiley v. Tom Howell & Assocs.*, 154 Ga. App. 235, 267 S.E.2d 816 (1980).

Parol evidence is admissible to explain meaning of technical terms employed in written contracts. *Pace Constr. Corp. v. Houdaille-Duvall-Wright Div.*, 247 Ga. 367, 276 S.E.2d 568 (1981).

Parol evidence is inadmissible to show parties' intentions in lease and debt. — Summary judgment was properly entered for a lessee bank on a lessor developer's counterclaim against it, which alleged that the bank was obligated to pay the entire debt to the bondholder incurred to fund the project, rather than the debt service over the 15-year term of the lease, as the parties knew that the lease term was 15 years and that the term of the note was 20 years, yet failed to specifically provide that the bank pay the debt after the lease expired; parol evidence was inadmissible under O.C.G.A. § 13-2-2(1) to prove the parties' intentions as the lease was unambiguous. *Porter Communs. Co. v. SouthTrust Bank*, 268 Ga. App. 29, 601 S.E.2d 422 (2004).

Both the terms "approximately" and "firm order" in a sales contract were ambiguous in that their indistinctiveness made their meaning uncertain and capable of more than one reasonable definition. These ambiguities rendered it appropriate for the

Parol Evidence (Cont'd)**9. Application (Cont'd)**

trial court, as trier of fact, to consider parol evidence to determine the meaning of those material terms and thus the true agreement between the parties. *Wahnschaff Corp. v. O.E. Clark Paper Box Co.*, 166 Ga. App. 242, 304 S.E.2d 91 (1983).

When promissory note not containing entire agreement, letters by parties containing additional terms admissible. — When promissory note did not express entire contract between parties, but remainder thereof was contained in letters written by the parties in connection with making of note, such letters were admissible in evidence, in suit between maker and one who took note after maturity. *Marietta Sav. Bank v. Janes*, 66 Ga. 286 (1881).

Applicability of parol evidence rule to promissory note. — To the extent plaintiff was relying on conversations “to add to, take from or vary” the terms of the plaintiff’s promissory note with defendant bank, the conversations were barred by the parol evidence rule. *S & A Indus., Inc. v. Bank Atlanta*, 247 Ga. App. 377, 543 S.E.2d 743 (2000).

Parol evidence when loan note in writing. — Judgment for amount of note sued on, with interest, was not contrary to law and evidence because lender, at time of making loan and executing note and bill of sale, stated to borrower that, if first installment of loan was not paid, the lender would sell certain shares of stock, conveyed by borrower as collateral to satisfy indebtedness represented by note, as any parol statements and agreements made before or simultaneously with execution of note and bill of sale, which were inconsistent with provisions thereof, were merged into the writing. *Allison v. United Small-Loan Corp.*, 54 Ga. App. 820, 189 S.E. 263 (1936).

Notes and bond for title are parts of same contract, and stipulation in bond for title should have same effect as if contained in notes; only difference is one of position. Construing all documents together, dates of maturity as fixed in notes are necessarily subject to accelerating clause in bond for title. In such a case maker promises to pay on a certain day, and earlier on condition. *Gilford v. Green*, 33 Ga. App. 1, 125 S.E. 80 (1924).

Note and mortgage written on same paper at same time, construed as one contract. —

When note and mortgage given to secure it are written upon same paper and executed at same time, they must be construed as constituting but one contract. *Smith v. Downing Co.*, 21 Ga. App. 741, 95 S.E. 19 (1918), and see *Read v. Gould*, 139 Ga. 499, 77 S.E. 642 (1913); *Adams v. Hatfield*, 17 Ga. App. 680, 87 S.E. 1099 (1916).

Promissory note for “value received” and imposing no obligation upon payee is facially incomplete agreement. — Ordinary promissory note in which consideration is recited only as “value received,” and which contains no provision imposing any obligation upon payee, does not purport to contain all stipulations of contract relative to subject matter for which it is given. When terms and stipulations of such contract rest in parol agreements and understandings between parties, and do not in any way contradict terms of note, they may be established as part of contract. *Buckeye Cotton Oil Co. v. Malone*, 33 Ga. App. 519, 126 S.E. 913 (1925).

Parol evidence admissible if contract ambiguous as to description, model, and style of time sold. — If contract of sale was ambiguous or completely lacking as to description of model, style, and size of refrigerator intended to be sold, door was open to parties to show by parol evidence just what model, style and size of refrigerator was intended to be conveyed by contract. *Raymond Rowe Furn. Co. v. Simms*, 84 Ga. App. 184, 65 S.E.2d 830 (1951).

When note not entire agreement, stipulated price not preclusive of proof of other distinct agreements. — When note was not intended as entire contract, but was given in pursuance of contract for sale of described land, agreement in note to pay specified amount was not exclusive of proof of other distinct agreements which parties might have made in relation to land, such as agreement that purchaser was to take up certain papers necessary to acquire good title, and to deduct amount so expended in perfecting title from purchase price of property. *Long v. Cash*, 54 Ga. App. 764, 189 S.E. 73 (1936).

If contract silent as to price, evidence as to reasonable price may be offered. *J. T. Stewart & Son v. Cook*, 118 Ga. 541, 45 S.E. 398 (1903).

Proof of existence of undisclosed principal by parol evidence. — When fact of agency is concealed, it is ordinarily necessary to prove by parol evidence existence of undisclosed principal. *United States Fid. & Guar. Co. v. Coastal Serv., Inc.*, 103 Ga. App. 133, 118 S.E.2d 710 (1961).

When contract not under seal, parol evidence admissible to establish existence of undisclosed principal. — Since there was nothing in record to show that contract for purchase of car was under seal, testimony of agent that the agent was acting for an undisclosed principal was properly admitted; thus, fact that agency was not disclosed at time of contract would not prevent principal from enforcing contract in the principal's own name. *United States Fid. & Guar. Co. v. Coastal Serv., Inc.*, 103 Ga. App. 133, 118 S.E.2d 710 (1961).

Admissibility of extrinsic evidence to show agency as to integrated contract. — If fact of agency does not appear in integrated contract, agent who appears to be party thereto cannot introduce extrinsic evidence to show that one is not a party, except: (a) for purpose of reforming contract; or (b) to establish that one's name was signed as business name of principal and that it was so agreed by parties. *Haas v. Koskey*, 138 Ga. App. 448, 226 S.E.2d 279 (1976).

Parol evidence of a decedent's instructions to a trustee as memorialized in a memorandum written by a trust officer was admissible to show the types of investments permitted; the trust agreement was silent as to the types of investments permitted and the memorandum was contemporaneous with the contract. *Namik v. Wachovia Bank of Ga.*, 279 Ga. 250, 612 S.E.2d 270 (2005).

When description applies equally to several tracts, it may be shown which tract grantor claims. — When description of land applies equally to several tracts, a latent ambiguity results, which may be explained by showing which one of the several tracts was claimed by grantor. *Petretes v. Atlanta Loan & Trust Co.*, 161 Ga. 468, 131 S.E. 510 (1926); *Stanaland v. Stephens*, 78 Ga. App. 68, 50 S.E.2d 258 (1948).

Assignment of "goods and effects in store-house" subject to parol evidence regarding contents and value. — After one made assignment for benefit of creditors, of "all goods and effects now in store-house on

Cherry Street", parol evidence in regard to the circumstances attending and surrounding assignment was admissible in order to explain ambiguity as to what were goods and effects covered by the assignment, and to show their value. *Block v. Peter*, 63 Ga. 260 (1879).

Parol evidence inadmissible to contradict deeds absolute on their face. *Garrett v. Diamond*, 144 Ga. App. 428, 240 S.E.2d 912 (1977).

Since unambiguous deed is instrument that necessarily speaks for itself, parol evidence is inadmissible to add to, take from, or vary the deed's terms in any way. *Turk v. Jeffreys-McElrath Mfg. Co.*, 207 Ga. 73, 60 S.E.2d 166 (1950).

Parol contemporaneous agreement cannot vary absolute, unconditional promissory note. — Terms of absolute, unconditional promissory note cannot be varied by engrafting upon the note condition made by parol contemporaneous agreement. *Stapleton v. Monroe*, 111 Ga. 848, 36 S.E. 428 (1900); *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 37 S.E. 485, 81 Am. St. R. 28 (1900); *Union Cent. Life Ins. Co. v. Wynne*, 123 Ga. 470, 51 S.E. 389 (1905).

Parol evidence inadmissible to vary terms of official bonds which is absolute and unconditional on its face and conforms precisely to statute. *Jones v. Smith*, 64 Ga. 711 (1880).

Parol evidence inadmissible to add to or vary terms of clear, unambiguous, written rental contract. *Little v. Lary*, 12 Ga. App. 754, 78 S.E. 470 (1913).

Unconditional promise in note to pay cannot be contradicted by parol agreement. — When promissory note contains an unconditional promise to pay, oral agreement between parties made contemporaneously with execution of note or prior thereto that maker would be relieved of any obligation to pay on condition not expressed in note, is incompetent to change contract as represented on face of note. *Cairo Banking Co. v. Hall*, 42 Ga. App. 785, 157 S.E. 346 (1931).

After contract complete, parol evidence inadmissible to show signature as agent if contract recites otherwise. — After a contract recites that the contract represents the entire agreement between the parties, it cannot be shown by extrinsic parol evidence that one of signatories did not sign, as

Parol Evidence (Cont'd)**9. Application (Cont'd)**

recited therein, on the signatory's own behalf, but signed as agent of another. *Haas v. Koskey*, 138 Ga. App. 448, 226 S.E.2d 279 (1976).

Parol lifetime employment contract superseded by inconsistent, complete, unambiguous written one. — Parol lifetime employment contract upon which plaintiff relied, even if certain and definite enough to be enforceable, is superseded by inconsistent, valid, complete, unambiguous, written employment contracts covering same subject matter and providing for termination of employment by written notice. *Vulcan Materials Co. v. Douglas*, 131 Ga. App. 21, 205 S.E.2d 84 (1974).

Parol evidence was inadmissible, where an employment contract was complete on the contract's face, and contained precise language as to how employment could be terminated, such that no ambiguity existed for which parol evidence was required to assist the court in interpreting the contract. *Nel v. DWP/Bates Tech.*, 260 Ga. App. 426, 579 S.E.2d 842 (2003).

When writing expressly limits effectiveness to 12 months, parol agreement inadmissible to add or vary. — Written contract expressly limiting the contract's effectiveness to term of 12 months cannot be added to or varied by parol, contemporaneous agreement which attempts to set up agreement different from and contrary to that expressed in writing. *Head v. Waycross Coca-Cola Bottling Co.*, 47 Ga. App. 842, 171 S.E. 583 (1933).

Parol testimony necessary to establish oral agreement and to connect it with written portion inadmissible. — Where parol testimony is necessary both to establish oral agreement made contemporaneously with written deed and to connect it with written portion of contract (which had been executed) so as to show such part performance as to take oral agreement out of statute of frauds, such testimony not being admissible, for either purpose, oral agreement cannot be established or enforced. *Stonecypher v. Georgia Power Co.*, 183 Ga. 498, 189 S.E. 13 (1936).

Parol evidence not admissible for insurance assignment. — Pursuant to O.C.G.A.

§ 53-12-93, a creditor could not establish that the creditor was a beneficiary of a constructive trust because such a determination depended upon a finding that an assignment of a debtor's insurance proceeds occurred, giving the creditor an identifiable interest in the insurance proceeds; here, there was no written assignment, and oral conversations between the creditor and debtor about the insurance proceeds were not enough to constitute an assignment, particularly in light of the parol evidence rule, O.C.G.A. § 13-2-2. *Aero Housewares, LLC v. Interstate Restoration Group, Inc. (In re Aero Plastics, Inc.)*, No. 05-60451-MHM, 2006 Bankr. LEXIS 3245 (Bankr. N.D. Ga. Sept. 27, 2006).

Contract calling only for \$14,000.00 cash, \$14,500.00 to be financed, is unenforceable for indefiniteness. — Written contract for sale of designated realty for consideration of \$28,500.00 to be paid \$14,000.00 cash, \$14,500.00 to be financed, and containing no further enumeration of terms of payment, is unenforceable for indefiniteness and uncertainty and will not form basis of action by vendor against purchaser for damages for breach thereof. *Stanaland v. Stephens*, 78 Ga. App. 68, 50 S.E.2d 258 (1948).

Effect of merger clauses. — Parties' management agreement contained a merger clause and, as such, a trial court did not err in refusing to admit a separate master agreement to which one of the parties was not a signatory. *Rome Healthcare LLC v. Peach Healthcare Sys.*, 264 Ga. App. 265, 590 S.E.2d 235 (2003).

Parol evidence of verbal agreements reflected in cover letter did not change employment contract. — Trial court properly rejected a teacher's attempt to add verbal agreements to an employment contract where the agreements were made during the job interview process and were written in the cover letter that accompanied the proposed employment contract. There was no evidence that the cover letter was intended to be a part of the employment contract. *Zhou v. LaGrange Acad. Inc.*, 266 Ga. App. 445, 597 S.E.2d 522 (2004).

Not admissible if contract unambiguous. — Trial court properly struck a paragraph in an estate executrix's affidavit in opposition to the decedent's nephew's motion for sum-

mary judgment, arising from an action regarding estate assets and joint venture agreements, as the executrix's assertions regarding a handwritten note by the husband constituted parol evidence which could not be used to alter the meaning of the unambiguous language of the agreements, and necessity was not shown for admission of the hearsay evidence, pursuant to O.C.G.A. §§ 13-2-2(1), 24-3-1(b), 24-6-1, and 24-6-2; accordingly, the handwritten notation that the properties at issue were to be sold for "market value" could not change the contractual language that indicated that the properties would be sold for a predetermined price. *Zaglin v. Atlanta Army Navy Store, Inc.*, 275 Ga. App. 855, 622 S.E.2d 73 (2005).

Condition precedent requiring performance under O.C.G.A. § 13-3-4 did not exist in a guaranty as the provision at issue regarding invoices being mailed to the surety on a monthly basis employed no explicit words of condition and there were no expressions in the entirety of the guaranty to the effect that the cited provision was to be construed as a condition precedent; since the provision was not ambiguous, the surety could not introduce parol evidence under O.C.G.A. § 13-2-2(1) that the guaranty was only effective if the surety received monthly billings. *General Steel, Inc. v. Delta Bldg. Sys.*, 297 Ga. App. 136, 676 S.E.2d 451 (2009).

Specific provision prevails over general in employment contract. — Former employee was improperly granted summary judgment on a claim regarding the term of the employment in the employer's suit asserting breach of the employment contract as, although the contract provided that the employment was generally at-will, it was subject to the former employee's agreement to refrain from terminating the employee's employment for 12 months. To the extent there was any conflict in terms as to whether the former employee could terminate the employment at-will or was limited to a fixed term of at least one year, the issue was resolved by upholding the minimum term since the provision specifically addressed the issue in question, which prevailed over any conflicting general language. *Avion Sys. v. Thompson*, 293 Ga. App. 60, 666 S.E.2d 464 (2008).

Construction of arbitration agreement. — Failure of an arbitration agreement between

a contractor and a limited liability company to name an architect in the blank space provided, while making continuing references to the role of the architect, created an ambiguity explainable by parol evidence. *Tillman Park, LLC v. Dabbs-Williams Gen. Contrs., LLC*, 298 Ga. App. 27, 679 S.E.2d 67 (2009).

Employer not entitled to commission payments. — Upon a de novo review of the plain terms outlined in an employment contract, a former employer was not entitled to receive commission payments from its former employee, a licensed sales agent, for deals closed with the employee's subsequent employer, as any contrary reading would result in an unenforceable contract under O.C.G.A. § 43-40-19(c); hence, summary judgment was properly granted to the employee on that issue, and the former employer's claim for money had and received also failed. *Richard Bowers & Co. v. Creel*, 280 Ga. App. 199, 633 S.E.2d 555 (2006).

Incomplete agreement between home purchaser and contractor. — Home purchasers were not entitled to summary judgment on a contractor's quantum meruit claim because although the parties had entered into written agreements, factual issues remained regarding the scope of work contemplated in the construction agreement, and additional evidence under O.C.G.A. § 13-2-2(1) was necessary to establish the plans, specifications, and drawings agreed upon by the parties as Exhibit B to the agreement was blank. *Bollers v. Noir Enters.*, 297 Ga. App. 435, 677 S.E.2d 338 (2009).

Intent of parties obtained by parol evidence. — It is duty of court to construe contracts unless they are ambiguous, in which event parol testimony may be admitted for purpose of ascertaining intention of parties. *Knight v. Causby*, 68 Ga. App. 572, 23 S.E.2d 458 (1942).

Action to recover on promissory notes. — In an action to recover on two promissory notes, because material fact issues remained regarding the consideration given for the notes, creating an ambiguity for which parol evidence was admissible, and as to whether the notes were signed as part of the same transaction, summary judgment to either the lender or the debtor was inappropriate. *Foreman v. Chattooga Int'l Techs., Inc.*, 289 Ga. App. 894, 658 S.E.2d 470 (2008).

Parol Evidence (Cont'd)**9. Application (Cont'd)**

Parol evidence admissible in easement agreement dispute. — Because the language of an easement agreement between two adjacent commercial landowners was ambiguous, parol evidence was admissible to show the parties' intent. Thus, questions of fact remained regarding intent, making summary judgment inappropriate. *McGuire Holdings, LLLP v. TSQ Partners, LLC*, 290 Ga. App. 595, 660 S.E.2d 397 (2008).

Construction of Words

Ordinary meanings. — Unless there is some valid reason for doing otherwise, a contract should be construed according to the ordinary meanings of the words employed therein. *Stinchcomb v. Clayton County Water Auth.*, 177 Ga. App. 558, 340 S.E.2d 217 (1986).

Construction of word "lender". — In an action arising from the sale of a condominium unit, because there was no issue of material fact as to whether the declaration of condominium's "lender" exception applied to the sale of the unit to the buyer, in giving the word "lender" its usual and common meaning, the trial court erred in concluding that the issue was for the jury. *Quality Foods, Inc. v. Smithberg*, 288 Ga. App. 47, 653 S.E.2d 486 (2007), cert. denied, 2008 Ga. LEXIS 316 (Ga. 2008).

Dictionaries may supply plain and ordinary sense of word. *Market Place Shopping Ctr. v. Basic Bus. Alternatives, Inc.*, 213 Ga. App. 722, 445 S.E.2d 824 (1994).

Dictionary definitions of "borrow" and "receive" apply in the interpretation of insurance policies. *State Farm Fire & Cas. Co. v. American Hdwe. Mut. Ins. Co.*, 224 Ga. App. 789, 482 S.E.2d 714 (1997).

Unambiguous terms to be taken in plain, ordinary, and popular sense, as supplied by dictionaries. — If terms used are clear and unambiguous the terms are to be taken and understood in their plain, ordinary, and popular sense, which is supplied by dictionaries. *Henderson v. Henderson*, 152 Ga. App. 846, 264 S.E.2d 299 (1979).

In ascertaining intention of parties, words to be given ordinary meaning unless words of art which may have acquired some different connotation. *St. Regis Paper Co. v.*

Aultman, 280 F. Supp. 500 (M.D. Ga. 1967), aff'd, 390 F.2d 878 (5th Cir. 1968).

Words given usual and primary meaning at time of execution. — Generally, words in contract are to be given their usual and primary meaning at time of execution of contract. *Asa G. Candler, Inc. v. Georgia Theater Co.*, 148 Ga. 188, 96 S.E. 226, 1918F L.R.A. 389 (1918).

When language to be afforded literal meaning and plain ordinary words given usual significance. — When language used in contract is plain, unambiguous, and capable of only one reasonable interpretation, it must be afforded its literal meaning and plain ordinary words given their usual significance. *R.S. Helms, Inc. v. GST Dev. Co.*, 135 Ga. App. 845, 219 S.E.2d 458 (1975).

Absent contrary indications, word will be given the word's usual and common signification. *Undercofler v. Whiteway Neon Ad, Inc.*, 114 Ga. App. 644, 152 S.E.2d 616 (1966).

Construction of words of art or those connected with particular trade subordinate to parties' intentions. — Words of art, or words connected with particular trade, are to be given signification attached to them by experts in such art or trade. This rule is one of construction, and, like every such rule is subordinate to the intentions of parties to contract. *Asa G. Candler, Inc. v. Georgia Theater Co.*, 148 Ga. 188, 96 S.E. 226, 1918F L.R.A. 389 (1918).

Intent of parties when ascertained will control technical terms. *Carter v. Marble Prods., Inc.*, 171 Ga. 49, 154 S.E. 891 (1930).

Witness cannot give opinion as to meaning of nontechnical words or phrases. — Parol evidence is admissible to explain patent ambiguity; but, where words or phrases are not technical, a witness cannot, as expert or otherwise, give the expert's opinion of meaning of instrument. *Fillion v. Aetna Cas. & Sur. Co.*, 150 Ga. App. 619, 258 S.E.2d 222 (1979).

Construction of insurance policy against party preparing policy. — Words generally bear their usual and common signification; but technical words, or words of art, or used in a particular trade or business will be construed, generally, to be used in reference to this peculiar meaning. The local usage or understanding of a word may be proved in order to arrive at the meaning intended by

the parties. This rule is applicable in interpreting insurance policies and courts use this rule in conjunction with the rule that the policy of insurance like other contracts is construed most strongly against the party who prepares the policy. *Johnson v. United States Fid. & Guar. Co.*, 93 Ga. App. 336, 91 S.E.2d 779 (1956).

Construction of word “sustain.” — In interpreting an insurance policy, the word “sustain” must be given its usual meaning, and that does not include a connotation of a causation. *Jefferson Pilot Life Ins. Co. v. Clark*, 202 Ga. App. 385, 414 S.E.2d 521 (1991), cert. denied, 202 Ga. App. 906, 414 S.E.2d 521 (1992).

Construction of word “corroborate.” — See *Langford v. Royal Indem. Co.*, 208 Ga. App. 128, 430 S.E.2d 98 (1993).

Construction of word “unsecured.” — Ordinary meaning of “unsecured” is that there is no security interest that can be effective against third parties under the Georgia Uniform Commercial Code, specifically O.C.G.A. § 11-9-109. In re Estate of Sims, 259 Ga. App. 786, 578 S.E.2d 498 (2003).

Construction of word “operation.” — While a fire which started on a site occupied by a tenant damaged the owner’s property, it did not follow that the tenant’s “operation” was the cause of either the fire or the ensuing damage; since there was no evidence that the fire was caused by the tenant’s operation at the site, it followed that the tenant was not liable to the owner under a provision of the agreement making the tenant responsible for damages caused by the tenant’s operation. *Sawtell Ptnrs, LLC v. Visy Recycling, Inc.*, 277 Ga. App. 563, 627 S.E.2d 58 (2006).

Construction of term “Unit One.” — Term “Unit One” as used in a mutual release between the parties unambiguously referred only to the 71 lots that the builders had already purchased from the owner, and so parol evidence was inadmissible to vary the terms of the release. *Stinchcomb v. Wright*, 278 Ga. App. 136, 628 S.E.2d 211 (2006).

Construction of “customer” and “purchaser.” — Affording the words “customer” and “purchaser” their “usual and common signification,” as required by O.C.G.A. § 13-2-2(2), it was clear that there was no

ambiguity as to the debtor on a credit application. *Capital Color Printing, Inc. v. Ahern*, 291 Ga. App. 101, 661 S.E.2d 578 (2008).

Construction of “last approved cost report.” — On remand in a nursing facility’s appeal of the Medicaid reimbursement rate calculated by the Georgia Department of Community Health, the trial court judgment reversing that rate calculation was upheld as the 10-month cost report submitted by the nursing facility was an approved report and should not have been ignored by the department since, in applying the rules of contract interpretation, the phrase “last approved cost report” in the department’s manual was ambiguous and nothing in the contract language of the parties’ agreement disqualified an unaudited report from use as the last approved cost report. *Dep’t of Cmty. Health v. Pruitt Corp.*, 295 Ga. App. 629, 673 S.E.2d 36 (2009).

Because a participation agreement required the originating bank to notify the participating bank when it changed the credit ratings on a construction loan, which included material downgrades in the originating bank’s relationship with the borrower, and because the term “downgrades” was not defined in the agreement, this term was viewed in the context of the entire contract which supported a construction of the term according to the contract’s plain meaning. *Sun Am. Bank v. Fairfield Fin. Servs.*, No. 5:08-cv-341(CAR), 2010 U.S. Dist. LEXIS 11004 (M.D. Ga. Feb. 9, 2010).

Terms of guaranty agreement not ambiguous. — The terms of the guaranty agreement were not ambiguous in regard to the extent of liability imposed on the individual guarantors since the landlord was aware that the three individual guarantors held unequal shares of ownership in the tenant corporation, the reference to “their respective interest” was unambiguous and was clearly intended to impose liability upon the three in relation to their ownership interest. *Tucker Station, Ltd. v. Chalet I, Inc.*, 203 Ga. App. 383, 417 S.E.2d 40 (1992).

Ineffectiveness in employment contract. — The trial court is obligated to give “ineffectiveness” in an employment contract its usual, ordinary, and common meaning. *Zhou v. LaGrange Acad. Inc.*, 266 Ga. App. 445, 597 S.E.2d 522 (2004).

Language of business liability policy. — Under a business liability policy, the parties

Construction of Words (Cont'd)

are presumed to have in contemplation the nature and character of the business, and to have foreseen the usual course and manner of conducting the business. Thus, in construing a policy of insurance so as to arrive at the true intention of the parties, the ordinary legal and literal meaning of the words must be given effect where it is possible to do so without destroying the substantial purpose and effect of the contract. *Travelers Indem. Co. v. Nix*, 644 F.2d 1130 (5th Cir.), cert. denied, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

Unambiguous terms of insurance contract taken in plain, ordinary, and popular sense. — Words used in insurance contracts must be given their usual and ordinary meaning. *Nichols v. Ocean Accident & Guarantee Corp.*, 70 Ga. App. 169, 27 S.E.2d 764 (1943); *American Motorists Ins. Co. v. Vermont*, 115 Ga. App. 663, 155 S.E.2d 675 (1967).

Contracts of insurance, like other contracts, are to be construed according to sense and meaning of terms which parties have used, and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense. *Wallace v. Virginia Sur. Co.*, 80 Ga. App. 50, 55 S.E.2d 259 (1949).

The words used in policies of insurance, as in all other contracts, bear their usual and common significance and policies of insurance are, as all other contracts, to be construed in their ordinary meaning. *Pilot Life Ins. Co. v. Morgan*, 94 Ga. App. 394, 94 S.E.2d 765 (1956).

Rule generally applicable to construction of insurance contracts is: words employed in contract of insurance are to be taken and understood in their plain, ordinary, usual and popular sense. *Continental Cas. Co. v. Robertson*, 245 F.2d 604 (5th Cir. 1957).

Policies of insurance are, as all other contracts, to be construed in their ordinary meaning. *National Life & Accident Ins. Co. v. Wilson*, 106 Ga. App. 504, 127 S.E.2d 306 (1962).

Plain meaning of insurance policy obviously controls. *Ranger Ins. Co. v. Culbertson*, 454 F.2d 857 (5th Cir. 1971), cert. denied, 407 U.S. 916, 92 S. Ct. 2440, 32 L. Ed. 2d 691 (1972).

Words of an insurance contract must be given their usual, ordinary, and common meaning. *Bold Corp. v. National Union Fire Ins. Co.*, 216 Ga. App. 382, 454 S.E.2d 582 (1995).

Terms in insurance contract must be considered in light of surrounding circumstances. — Words used in insurance contracts must be given their usual and ordinary meaning and must be considered in light of surrounding circumstances. *Danielson v. Insurance Co. of N. Am.*, 309 F. Supp. 26 (N.D. Ga. 1969).

Intention of parties to insurance contract as determinative of sense in which terms employed. — In construing contract of insurance, intention of parties, as in other cases, must be sought for in accordance with the true meaning and spirit in which the agreement was made and expressed in the written instrument, and the ordinary and legal meaning of the words employed must be taken into consideration. *Insurance Co. of N. Am. v. Samuels*, 31 Ga. App. 258, 120 S.E. 444 (1923).

Insurance policy is contract of indemnity for loss, and intention of parties, if it can be ascertained, must determine sense in which terms employed are used. Intention of parties must be sought for in accordance with true meaning and spirit in which agreement was made and expressed in written instrument, and ordinary and legal meaning of words employed must be taken into consideration. *American Cas. Co. v. Fisher*, 195 Ga. 136, 23 S.E.2d 395 (1942).

When an insurance policy required inventory to be taken, cost price of articles was sufficient and actual value was not required. *Goldman v. Aetna Ins. Co.*, 162 Ga. 313, 133 S.E. 741, later appeal, 35 Ga. App. 586, 134 S.E. 201 (1926).

Construction on “doing my employment.” — Although the district court correctly determined that an invention agreement, on its face, was ambiguous on whether the parties meant for the agreement to have retrospective or prospective effect, the court erred in concluding that the applicable rules of construction resolved the ambiguity and gave the contract retrospective effect by focusing only on one phrase—“during my employment”—and by failing to apply all relevant rules of construction. *Georgia-Pacific Corp. v. Lieberam*, 959 F.2d 901 (11th Cir. 1992).

Determining liability for excise taxes. — When there is no written agreement between manufacturer and buyer supplementing the terms of purchase orders in regard to federal excise taxes and there has been no prior course of dealing between these parties, no construction of the contract can be drawn through the custom and usage of the trade or prior business dealings regarding liability for the taxes. *Chatham v. Southern Ry.*, 157 Ga. App. 831, 278 S.E.2d 717 (1981).

Exceptions, limitations, and exclusions to insuring agreements require a narrow construction on the theory that the insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations on that coverage in clear and explicit terms. *Alley v. Great Am. Ins. Co.*, 160 Ga. App. 597, 287 S.E.2d 613 (1981).

Construction of word “about”. — See *Brawley v. United States*, 96 U.S. 168, 24 L. Ed. 622 (1878); *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 113 Ga. 1142, 39 S.E. 471 (1901).

Construction of word “immediately”. — “Immediately” has been construed in many cases to mean within reasonable diligence and within a reasonable length of time in view of attending circumstances of each particular case. *Dwoskin v. Rollins, Inc.*, 634 F.2d 285 (5th Cir. 1981).

Construction of word “presently”. — The word “presently” or its synonyms should be given a reasonable and substantial construction, in view of thing to be done, and not to be considered as equivalent to instant. *Dwoskin v. Rollins, Inc.*, 634 F.2d 285 (5th Cir. 1981).

Construction of word “building”. — The term “building” in an insurance contract did not include a culvert. *Arkin v. Fireman’s Fund Ins. Co.*, 228 Ga. App. 564, 492 S.E.2d 314 (1997).

Construction of anchor store in mall. — Free-standing warehouse-type store erected adjacent to a mall was not a replacement for an “anchor” store, as defined in the lease, that had vacated the store’s premises in the mall. Therefore, a mall tenant was entitled to pay reduced rent according to the terms of the lease. *Rainbow United States, Inc. v. Cumberland Mall, LLC*, 301 Ga. App. 642, 688 S.E.2d 631 (2009).

Construction of word “due”. — Where an employment agreement did not specifically define what was meant by the word “due,” as such term was used in determining what compensation the employee was entitled to through the effective date of the employee’s termination, summary judgment on the employee’s breach of contract claim regarding what amount of compensation the employee was to receive, was erroneously entered. *Reichman v. Southern Ear, Nose & Throat Surgeons, P.C.*, 266 Ga. App. 696, 598 S.E.2d 12 (2004).

Construction of word “payment”. — Under O.C.G.A. § 13-2-2, words in contracts, such as residential leases, are given their common definition, and payment is defined as the fulfillment of a promise, or the performance of an agreement; in a more restricted legal sense payment is the performance of a duty, promise, or obligation, or discharge of a debt or liability, by the delivery of money or other value by a debtor to a creditor, where the money or other valuable thing is tendered and accepted as extinguishing a debt or obligation in whole or in part. *Baker v. Hous. Auth. of Waynesboro*, 268 Ga. App. 122, 601 S.E.2d 350 (2004).

Construction of word “introduce.” — In construing a contract, words are given their common meaning, pursuant to O.C.G.A. § 13-2-2. “Introduce” means “to present to the public for the first time,” “to bring forward for consideration,” or “to provide someone with a beginning knowledge or first experience of something”; thus, an introduction does not require a great deal of action. *Snipes v. Marcene P. Powell & Assocs.*, 273 Ga. App. 814, 616 S.E.2d 152 (2005).

Because under O.C.G.A. § 13-2-2, contract words are given their exact meaning, the word “introduced,” as used in a real estate commission extension clause, did not require that a broker be the predominant or procuring cause of the sale; rather, it required only that the broker’s actions have at least some minimal causal connection with the sale, or be in the chain of causation leading to the sale. *Snipes v. Marcene P. Powell & Assocs.*, 273 Ga. App. 814, 616 S.E.2d 152 (2005).

According to usual signification of the word, an automobile is not a motorcycle. Both are motor-driven vehicles, but not all

Construction of Words (Cont'd)

motor-driven vehicles are automobiles, nor are all motorcycles. *Bullard v. Life & Cas. Ins. Co.*, 178 Ga. 673, 173 S.E. 855, answer conformed to 49 Ga. App. 27, 174 S.E. 256 (1934).

Term bodily injury not ambiguous, as it is term needing no explanation. *Cotton States Mut. Ins. Co. v. Crosby*, 244 Ga. 456, 260 S.E.2d 860 (1979).

Assumption that "either" was intended in technically accurate sense, not as meaning "both". — Although use of "either" to mean "both" is recognized in dictionaries and fairly common in the vernacular, this is not a technically accurate usage which would normally or correctly be employed in a legal document. The court will not assume that the less accurate usage of "either" was intended, but rather that usage which is distinctive and unique to the word. *Holcomb v. Word*, 239 Ga. 847, 238 S.E.2d 915 (1977).

Construction of word "fit." — For construction of the word "fit" in a lease providing that "Lessors represent that the premises are in fit condition for use by the Lessees," see *McDuffie v. Argroves*, 230 Ga. App. 723, 497 S.E.2d 5 (1998).

Phrase "local taxes," as used in contracts which excluded local taxes from the lump sum purchase price for advertising signs, did not include state sales taxes, where the phrase was at best an ambiguous phrase, admitting of no single, reasonable meaning, without resort to construction. *Outdoor Displays Welding & Fabrication, Inc. v. United States Enters., Inc.*, 84 Bankr. 260 (Bankr. S.D. Ga. 1988).

If telegram constitutes contract, testimony as to meaning of cipher code words admissible. — If contract consummated by letter or telegram, testimony as to meaning of cipher code words in telegram is admissible. *Allen, McIntosh & Co. v. Farmers & Traders Nat'l Bank*, 129 Ga. 748, 59 S.E. 813 (1907).

Meaning of "United States standard lint cotton" in ambiguous contract, subject to parol explanation. — Meaning of term "United States standard lint cotton" in ambiguous contract is subject to explanation by parol testimony. *Mays v. Hankinson & Hagler*, 31 Ga. App. 473, 120 S.E. 793 (1923).

Meaning of words "in the Savannah market" subject to parol explanation. — Mean-

ing of words, "in the Savannah market," being in dispute, and ambiguous, it was right to admit parol evidence to explain their true sense as originally used in Savannah. *Goodman v. Henderson*, 58 Ga. 567 (1877).

Tax rebate funds included within "all funds ..." provision of contract. See *Cowen v. Snellgrove*, 169 Ga. App. 271, 312 S.E.2d 623 (1983).

Promise to pay interest "per annum" is simply a promise to pay at an annual interest rate. This does not obligate the lender to use any particular method of interest computation; nor does it restrict the amount of interest that can be charged to the amount that accrues when interest is calculated daily for 365 days. *Kleiner v. First Nat'l Bank*, 581 F. Supp. 955 (N.D. Ga. 1984).

Term "sidetrack agreements," although not fully explained in an insurance policy, clearly referred to railroads. *Auto-Owners Ins. Co. v. Barnes*, 188 Ga. App. 439, 373 S.E.2d 217, cert. denied, 188 Ga. App. 911, 373 S.E.2d 217 (1988).

Construction of "and all renewals thereof" in insurance policy. — Within a viatical settlement agreement between an assigned beneficiary and the insured, the phrase in the assignment "and all renewals thereof" entitling the beneficiary to the insured's group life insurance proceeds and proceeds from renewal policies, did not apply to a subsequent replacement policy the insured obtained as that language clearly expressed the insured's intent and was not ambiguous. *Livoti v. Aycock*, 263 Ga. App. 897, 590 S.E.2d 159 (2003).

Words "notwithstanding" and "such as" in lease agreement given plain meaning. — A trial court erred in construing a lease amendment to require the tenant to pay additional monthly fees for utilities, because the unambiguous language of the amendment provided for payment of a minimum annual rent plus a percentage of annual gross sales and no other rent charges, notwithstanding the provisions of the original lease. The word "notwithstanding" meant that the terms of the amendment applied in spite of any language in the original lease to the contrary, and the words "such as" late charges did not include utility charges, which were dissimilar to late charges. *Record Town, Inc. v. Sugarloaf Mills L.P.*, 301 Ga. App. 367, 687 S.E.2d 640 (2009).

Construction of restrictive covenants. — Because a driveway was a “structure” within the common meaning of that term as well as the meaning of the restrictive covenants, pursuant to O.C.G.A. §§ 13-2-2(2) and 13-2-3, the trial court did not err in finding as a matter of law that a homeowner was required to seek the homeowner association’s approval before resurfacing a driveway; consequently, the trial court properly granted the homeowner association’s motion for an injunction requiring the homeowner to restore the driveway to the driveway’s original condition. *Mitchell v. Cambridge Prop. Owners Ass’n*, 276 Ga. App. 326, 623 S.E.2d 511 (2005).

Partial summary judgment for two owners was affirmed as “structure” was not defined in the restrictive covenants, so there was an ambiguity; using the rules of construction set forth in O.C.G.A. § 13-2-2, the restrictive covenants were construed as a whole. Under the restrictive covenants, a retaining wall was not prohibited within a setback line as: (1) “structure” had various meanings in various contexts; (2) “structure” was used in a limited sense to refer to a house, building, dwelling, or any above-ground or “erected” shelters for people or property; (3) when other improvements to land were addressed such as septic systems, sewage lines, wells, above-ground fuel and water tanks, and construction materials, they were discussed separately and only by their specific names; and (4) given the context, “structure” was not intended to have a broader meaning. *Skylake Prop. Owners Ass’n v. Powell*, 281 Ga. App. 715, 637 S.E.2d 51 (2006).

Trial court properly issued a permanent injunction against a homeowner based on that homeowner’s violation of a restrictive covenant by erecting a shed on the subject property because: (1) the shed was not constructed with the same material and color as the exterior of residence; (2) the structure clearly violated the covenant; and (3) enforcement of the covenant had not been waived. *Glisson v. IRHA of Loganville, Inc.*, 289 Ga. App. 311, 656 S.E.2d 924 (2008).

Paragraph (5) of O.C.G.A. § 13-2-2 applied to include insurance coverage for sexual abuse. — Construing the ambiguity of a sexual abuse exclusion provision in an insurance policy against an insurer, the policy was held not to exclude coverage for sexual

abuse perpetrated by some children residents of defendant’s shelter facility, such that the trial court erred in granting summary judgment for insurer and in denying summary judgment for defendant on the issues of coverage under the insurance policy. *Georgia Baptist Children’s Homes & Family Ministries, Inc. v. Essex Ins. Co.*, 207 Ga. App. 346, 427 S.E.2d 798, cert. denied, 263 Ga. 441, 435 S.E.2d 445 (1993).

Construction of total disability. — After determining that the definition of the term “total disability” in two of an insurer’s disability policies was ambiguous where the term stated only that an insured was totally disabled if the insured was unable to perform the major duties of the insured’s occupation, in accordance with the directive in O.C.G.A. § 13-2-2(2) to give words their ordinary and common meanings, the terms “duties” and “major” were construed to mean at least two duties that were greater in importance than other duties. Thus, the insured was not required to show that the insured was unable to perform all of the major duties of the insured’s occupation to qualify as being totally disabled. *Putnal v. Guardian Life Ins. Co. of Am.*, No. 5:04-CV-130 (HL), 2006 U.S. Dist. LEXIS 70931 (M.D. Ga. Sept. 29, 2006).

Terms “provision of lithotripsy services”. — Where a doctor, a minority shareholder in a corporation that ultimately had an interest in a partnership that operated to rent a lithotripter to hospitals, executed a noncomplete agreement as to the partnership business incident to one partner’s sale of its partnership interest, it was not necessary to consider parol evidence to adduce the meaning of the term “provision of lithotripsy services” for purposes of the noncomplete agreement under O.C.G.A. § 13-2-2(1) because the contractual language was not ambiguous in the context of the dispute as to whether the doctor breached such agreement. *West Coast Cambridge, Inc. v. Rice*, 262 Ga. App. 106, 584 S.E.2d 696 (2003).

Construction of “in-patient” and “out-patient”. — Given that the language in an insurance contract providing for catastrophic coverage only extended to inpatient, and not outpatient services, the trial court properly granted summary judgment as to the issue of the insurer’s coverage, as

Construction of Words (Cont'd)

the hospital bill for which the insured sought payment was for outpatient services. *Michna v. Blue Cross & Blue Shield of Ga., Inc.*, 288 Ga. App. 112, 653 S.E.2d 377 (2007), cert. denied, 2008 Ga. LEXIS 214 (Ga. 2008).

Solicitation of offer. — Solicitation and receipt of an offer to purchase is not a legally enforceable offer to sell. *Stephens v. Trust for Pub. Land*, 479 F. Supp. 2d 1341 (N.D. Ga. 2007).

“Limited warranty”. — Under O.C.G.A. § 13-2-2(7), preprinted “limited warranty” language on the back of a confirmation had no effect because that language directly contradicted the full warranty language that was typed on the front of the preprinted confirmation form; the court erred when the court relied on this warranty to bar a claim for lost profits or other special damages. *Authentic Architectural Millworks, Inc. v. SCM Group USA, Inc.*, 262 Ga. App. 826, 586 S.E.2d 726 (2003).

“Trade fixture.” — Trial court’s finding that a lease permitted a lessee to remove a canopy that was installed for purposes of carrying on the lessee’s trade at the leased premises, was proper under O.C.G.A. § 13-2-2(4) because the trial court’s application of the traditional meaning of the term “trade fixture” was consistent with sections of the lease providing that the lessee was required to surrender all buildings, structures, and improvements and that the lessee was permitted to demolish all improvements and to construct new buildings in place of the demolished ones. *Lay Bros., Inc. v. Golden Pantry Food Stores, Inc.*, 273 Ga. App. 870, 616 S.E.2d 160 (2005).

Custom and Usage of Trade

Code embodies substance of common law as to custom. *Wood v. Frank Graham Co.*, 91 Ga. App. 621, 86 S.E.2d 691 (1955).

Valid usages impliedly part of contract unless not within intent of parties. — General rule is that valid usages concerning subject matter of contract of which parties are chargeable with knowledge are by implication incorporated therein, if contract is subject to interpretation urged and if nothing within it excludes such interpretation as having been within intention of parties. *General Forms, Inc. v. Continental Cas. Co.*, 123

Ga. App. 52, 179 S.E.2d 522 (1970).

Ambiguity resolved by custom. — In face of ambiguity of documents comprising agreement of parties, the obligation to pay extra for extra work was of such compelling logic and was of such usual custom in the trade as to be necessarily implied in the contract. *Colonial Pipeline Co. v. Robert W. Hunt Co.*, 164 Ga. App. 91, 296 S.E.2d 633 (1982).

Custom may become part of contract by implication notwithstanding integration clause. — Where custom by implication becomes part of contract and does not constitute a parol agreement or undertaking between parties it may be established as part of contract, notwithstanding provision in contract that it contains all conditions and agreements, either oral or written, between parties. *Weems v. Des Portes*, 47 Ga. App. 546, 171 S.E. 182 (1933).

Custom of trade may be shown notwithstanding provision in contract that all conditions and agreements between parties thereto, either oral or written, are contained in contract. *Wood v. Frank Graham Co.*, 91 Ga. App. 621, 86 S.E.2d 691 (1955).

Trade usage and custom may be explained by parol proof. — Ambiguities in terms used in written contracts, and their meanings as understood in trade and by contracting parties, may be explained by parol proof of this trade usage and custom. *Pace Constr. Corp. v. Houdaille-Duvall-Wright Div.*, 247 Ga. 367, 276 S.E.2d 568 (1981); *Bemco Mattress Co. v. Southeast Bedding Co.*, 196 Ga. App. 509, 396 S.E.2d 238 (1990).

Absence of a definition for “patio home” or “cluster home” in a subdivision’s restrictive covenants created an ambiguity for resolution by the application of the rules of contract construction; parol evidence was properly considered that patio home and cluster home were words used in the trade and did not include town homes or condominiums. *Southland Dev. Corp. v. Battle*, 272 Ga. App. 211, 612 S.E.2d 12 (2005).

Office of custom or usage is to interpret otherwise indeterminate intentions of parties. *Citizens & S. Bank v. Union Whse. & Compress Co.*, 157 Ga. 434, 122 S.E. 327 (1924); *American Mut. Liab. Ins. Co. v. Curry*, 187 Ga. 342, 200 S.E. 150 (1938).

Office of custom or usage in trade is not to contradict contract, but to explain what

would otherwise be inexplicable in meaning and intention of parties, on theory that the parties knew of its existence and contracted with reference to it. *Burns Brick Co. v. Adams*, 106 Ga. App. 416, 127 S.E.2d 26 (1962).

Industry practice cannot be imposed upon unambiguous written terms of contract. — In a suit alleging breach of contract and civil conspiracy brought against insurance company, plaintiffs could not with parol evidence impose upon the unambiguous written terms of the contract, which did not require 30 days' advance notice of termination, an alleged industry practice of such notice. *Wood v. All Am. Assurance Co.*, 172 Ga. App. 655, 324 S.E.2d 483 (1984).

If there is no contract, custom or usage of trade will not make one. — Custom of trade may under certain conditions become by implication part of contract; and also evidence of known and established usage is admissible to aid in construction of contract, as well as to annex incidents. But these provisions by their very terms presuppose existence of contract, and where there is no contract, proof of usage will not make one. *Newark Fire Ins. Co. v. Smith*, 176 Ga. 91, 167 S.E. 79 (1932).

Usage and custom of trade binding if known, certain, uniform, reasonable, and not contrary to law. *Citizens & S. Bank v. Union Whse. & Compress Co.*, 157 Ga. 434, 122 S.E. 327 (1924); *American Mut. Liab. Ins. Co. v. Curry*, 187 Ga. 342, 200 S.E. 150 (1938).

Alleged usage which leaves some material element to discretion of individual is void for uncertainty; such usage would be void because useless. *Citizens & S. Bank v. Union Whse. & Compress Co.*, 157 Ga. 434, 122 S.E. 327 (1924); *American Mut. Liab. Ins. Co. v. Curry*, 187 Ga. 342, 200 S.E. 150 (1938).

Loose, variable, or discretionary practice does not arise to dignity of custom so as to control rights of parties to contract. *American Mut. Liab. Ins. Co. v. Curry*, 187 Ga. 342, 200 S.E. 150 (1938).

Individual habits of dealing do not make universal custom which by implication enters into contract and forms part thereof. *Petkas v. Wright Co.*, 87 Ga. App. 189, 73 S.E.2d 224 (1952).

Custom may not be invoked when it contravenes declared law. *Wood v. Frank Gra-*

ham Co., 91 Ga. App. 621, 86 S.E.2d 691 (1955).

Custom has no application to nonresidents, as nonresidents could not reasonably be charged with knowledge of custom prevailing in this state. *Wood v. Frank Graham Co.*, 91 Ga. App. 621, 86 S.E.2d 691 (1955).

In interpreting usage or custom, same rules apply as pertain to construction of other writings and documents. *Citizens & S. Bank v. Union Whse. & Compress Co.*, 157 Ga. 434, 122 S.E. 327 (1924).

Paragraph (3) of O.C.G.A. § 13-2-2 is rule for construction of contracts, not for determining tort liability. — Statute is rule for construction of contracts, not for determining liability in tort actions. *Wright v. Concrete Co.*, 107 Ga. App. 190, 129 S.E.2d 351 (1962).

Statute, which sanctions reliance on custom of trade or business universally practiced, is rule for construction of contracts, not for determining liability in tort actions. *Smith v. Godfrey*, 155 Ga. App. 113, 270 S.E.2d 322 (1980).

Custom may be established if not conflicting or inconsistent with written contract. — Rule that custom of business or trade may be binding upon parties to contract when it is of such universal practice as to justify conclusion that it became by implication part of contract, cannot make custom part of contract where alleged custom is inconsistent with expressed provisions of agreement. *Shellnut v. Federal Life Ins. Co.*, 41 Ga. App. 386, 153 S.E. 102 (1930); *Penn Mut. Life Ins. Co. v. Blount*, 41 Ga. App. 581, 153 S.E. 794 (1930).

Custom may be established as part of written contract where not in conflict or inconsistent with any provisions of it. *Weems v. Des Portes*, 47 Ga. App. 546, 171 S.E. 182 (1933).

Custom cannot be used to contradict express terms of contract itself and where language of contract does not exclude by its terms operation of proven universal custom, but is silent on question, custom becomes part of contract. *Shippen v. Folsom*, 200 Ga. 58, 35 S.E.2d 915 (1945).

Custom pleaded by defendant which was inconsistent with and repugnant to express terms of unambiguous contract could not be urged for purpose which would have altered the contract's provisions. *Church v.*

Custom and Usage of Trade (Cont'd)

Trailmobile, Inc., 99 Ga. App. 750, 109 S.E.2d 636 (1959).

Custom may not be shown to be a part of an unambiguous contract when it is inconsistent with or contrary to express or necessarily implied terms of contract. *Burns Brick Co. v. Adams*, 106 Ga. App. 416, 127 S.E.2d 26 (1962).

Contention that insurance contract consisted of application, medical report illustrating applicant's insurability, payment of first month's premium, plus alleged custom of interim coverage, was at variance with stated law of this state, as application contained stipulation that insurance applied for would not take effect until issued and delivered as custom or usage cannot be set up to vary written unambiguous provisions of contract, terms of which are at variance with alleged custom. *Peninsular Life Ins. Co. v. Downard*, 99 Ga. App. 509, 109 S.E.2d 279 (1959).

General rule is that valid usages concerning subject matter of contract of which parties are chargeable with knowledge are by implication incorporated therein, if contract is subject to interpretation urged and if nothing within it excludes such interpretation as having been within intention of parties. *Puritan Mills, Inc. v. Pickering Constr. Co.*, 152 Ga. App. 309, 262 S.E.2d 586 (1979).

Alleged custom inconsistent with express terms of unambiguous contract was not controlling. — Custom pleaded by defendant which was inconsistent with and repugnant to express terms of unambiguous contract could not be urged for purpose which would have altered the contract's provisions. *Church v. Trailmobile, Inc.*, 99 Ga. App. 750, 109 S.E.2d 636 (1959).

Admissibility of trade custom as to terms susceptible of more than one understanding. — While trade custom cannot be used to contradict express contract term, if there is possibility of understanding a term in more than one sense, parol evidence is admissible to show that parties contracted with intention that custom of trade as to such term should apply to their contract. *General Forms, Inc. v. Continental Cas. Co.*, 123 Ga. App. 52, 179 S.E.2d 522 (1970).

Custom or usage of trade inadmissible to contradict terms of written and unambigu-

ous contract. *Hubert v. Luden's, Inc.*, 92 Ga. App. 427, 88 S.E.2d 481 (1955).

If intent and meaning of parties are clear, evidence of usage to contrary is irrelevant and unavailing. *Newark Fire Ins. Co. v. Smith*, 176 Ga. 91, 167 S.E. 79 (1932).

Admissibility of established usage to annex incidents. — Evidence of known and established usage is admissible to aid in construction of contracts as well as to annex incidents. *Puritan Mills, Inc. v. Pickering Constr. Co.*, 152 Ga. App. 309, 262 S.E.2d 586 (1979).

Custom can only be proved by word of mouth from those engaged in the business, and evidence thereof is necessarily in parol. *Wood v. Frank Graham Co.*, 91 Ga. App. 621, 86 S.E.2d 691 (1955).

Qualified experts in a trade or industry may testify as to its customs and usages and as to meaning of words used in trade between persons dealing therein. *Taber Mill v. Southern Brighton Mills*, 49 Ga. App. 390, 175 S.E. 665 (1934).

Statutory requisite as to content of insurance contract, not subject to obliteration by custom. — While insurance companies are bound to know customs of places where they transact business, and are assumed to have made their contracts with reference thereto and, while custom of any business or trade is binding between contracting parties when it is of such universal practice as to justify conclusion that it became by implication part of contract, statutory requisite that contracts of insurance be in a writing or writings, setting forth all material elements of a contract of insurance before such contract is enforceable, may not be obliterated by custom. *Peninsular Life Ins. Co. v. Downard*, 99 Ga. App. 509, 109 S.E.2d 279 (1959).

When contract silent regarding weight of cotton bales, evidence of trade meaning of term admissible. *J. T. Stewart & Son v. Cook*, 118 Ga. 541, 45 S.E. 398 (1903).

Cotton trade custom that bales should average "around" certain amount, not void for uncertainty. — Custom in cotton trade that bales of cotton should average "around" or "about" or "in the neighborhood of 500 pounds per bale" is not void for uncertainty. *Citizens & S. Bank v. Union Whse. & Compress Co.*, 157 Ga. 434, 122 S.E. 327 (1924).

Construction of words "timber suitable for turpentine purposes" as to size of timber

intended. — Words “timber suitable for turpentine purposes,” as used in timber lease are not ambiguous and mean any timber of whatever size that is ordinarily used for turpentine purposes; size being determined by custom, if one is shown to be applicable. The same thing may be expressed in different words, with respect to size, by defining phrase as meaning timber of any size that may consistently with ordinary prudence be used for such purposes; this being in law the true criterion, whether shown by proof of custom or other proof. *Dorsey v. Clements*, 202 Ga. 820, 44 S.E.2d 783 (1947).

Construction of “square feet.” — Trial court properly refused to direct a verdict for a seller in a breach of contract claim, alleging that a developer and the companies failed to abide by restrictions in the contract between the parties requiring that homes built by the developer be no larger than a certain amount of square feet; parol evidence that the term “square feet” was commonly used and understood in the real estate industry to refer to heated square feet was properly admitted under O.C.G.A. § 13-2-2(2) as an explanation of trade usage and custom and showed that the homes in question were within the square footage limitation in the contract. *Brock v. King*, 279 Ga. App. 335, 629 S.E.2d 829 (2006), *aff’d*, 282 Ga. 56, 646 S.E.2d 206 (2007).

Construction of “downgrades.” — Because a participation agreement required the originating bank to notify the participating bank when it changed the credit ratings on a construction loan, which included material downgrades in the originating bank’s relationship with the borrower, and because the term “downgrades” was not defined in the agreement, the plain meaning of the term, as used in the banking industry, required the originating bank to advise the participating bank of its risk rating changes for the borrower. *Sun Am. Bank v. Fairfield Fin. Servs.*, No. 5:08-cv-341 (CAR), 2010 U.S. Dist. LEXIS 11004 (M.D. Ga. Feb. 9, 2010).

Instruction on section improper without evidence. — Trial court errs in charging the provisions of paragraph (3) of O.C.G.A. § 13-2-2, regarding the effect of certain business or trade customs upon contractual obligations, if there is no evidence of any such custom or practice in the case. *Amax, Inc. v.*

Fletcher, 166 Ga. App. 789, 305 S.E.2d 601 (1983) (holding error harmless).

Preference for Upholding Contracts

Contract as a whole to be considered in determining construction to be given any part. *Continental Cas. Co. v. Continental Rent-A-Car of Ga., Inc.*, 349 F. Supp. 666 (N.D. Ga.), *aff’d*, 468 F.2d 950 (5th Cir. 1972).

If the construction of any part of contract is doubtful, understanding of the contract’s meaning is to be sought in light afforded by meaning of all other parts of instrument. Even if one part of contract is somewhat repugnant to remaining portions, true meaning of contract as whole is to be ascertained and enforced. *Federal Rubber Co. v. King*, 12 Ga. App. 261, 76 S.E. 1083 (1913).

Lease agreement barring removal of improvements. — Pursuant to O.C.G.A. § 13-2-2(4), the court of appeals was bound to uphold a provision of a lease agreement between the parties barring the removal of certain improvements to the leasehold by the lessee originally installed by the lessor’s predecessor in interest, despite a request by the lessor that it be removed, without affirmative facts showing that the improvements were not likely to be usable by a successor tenant, and the lessor failed to meet the lessor’s burden of showing that the improvements were not likely to be used in the future. *Ranwal Props., LLC v. John H. Harland Co.*, 285 Ga. App. 532, 646 S.E.2d 730 (2007).

Rendering portion meaningless avoided. — A court should avoid an interpretation of a contract which renders portions of the language of the contract meaningless. *Board of Regents v. A.B. & E., Inc.*, 182 Ga. App. 671, 357 S.E.2d 100 (1987).

Contracts are to be construed so as to uphold and give effect to the agreement as lawful and not to render portions of the agreement meaningless; to construe the settlement agreement and promissory note as assigning an executor’s commission would have risked making the settlement agreement void ab initio under O.C.G.A. § 44-12-24, and the ambiguity was resolved by holding that the executor did not waive the executor’s right to a commission. In *re Estate of Sims*, 259 Ga. App. 786, 578 S.E.2d 498 (2003).

Preference for Upholding Contracts (Cont'd)

Trial court erred in holding a spouse in contempt of court and ordering the spouse to pay a tax lien on marital property from the spouse's proceeds from the sale of the property as the evidence did not show that the spouse willfully violated the divorce judgment, which evidenced an intent to share the burden equally. Therefore, requiring the spouse to bear the entire burden of the tax lien rendered certain provisions of the divorce agreement meaningless. *Knott v. Knott*, 277 Ga. 380, 589 S.E.2d 99 (2003).

Because a lienholder signed a subordination agreement that expressly stated that it subordinated a certain security deed held by the lienholder to the interests of another, the rules of contract construction in O.C.G.A. § 13-2-2(4) required that "or otherwise" language in the agreement be given effect, so another security deed the lienholder held regarding the same property was also subject to the subordination agreement, even though it was not specifically mentioned in the agreement. *VATACS Group, Inc. v. HomeSide Lending, Inc.*, 276 Ga. App. 386, 623 S.E.2d 534 (2005).

Where an insurance company sought contribution from a power line construction company, the insurance company's reading of the contract between the construction company and the insured, a power company, was contrary to O.C.G.A. § 13-2-2(4) that a contract should be construed, if possible, so as not to render any of its provisions meaningless. Under the terms of the contract that governed the construction of the power line that killed the deceased, the construction company's liability terminated when possession and control of the line were turned over to the power company. *Federated Rural Elec. Ins. Exch. v. R.D. Moody & Assocs.*, No. 07-13345, 2008 U.S. App. LEXIS 13960 (11th Cir. June 27, 2008) (Unpublished).

In event of conflict between contract provisions, first provision prevails. *Wilner's, Inc. v. Fine*, 153 Ga. App. 591, 266 S.E.2d 278 (1980).

Interpretation of conflicting clauses. — If two clauses be utterly inconsistent, former must prevail, but intentions of parties from whole instrument should, if possible, be

ascertained and carried into effect. The doctrine of repugnant clauses is not favored. *Maxwell v. Hoppie*, 70 Ga. 152 (1883).

Where two clauses are so repugnant that they cannot stand together, the first will be retained and the second rejected, unless inconsistency is so great as to void instrument for uncertainty. *Drake v. Wayne*, 52 Ga. App. 654, 184 S.E. 339 (1936).

If two clauses of contract are so totally repugnant to each other that the clauses cannot stand together, first shall be received and latter rejected. *Waxelbaum v. Carroll*, 58 Ga. App. 771, 199 S.E. 858 (1938).

Meaning to be given to all manifestations of intention by parties. — The law requires that in interpreting a contract, the court gives a reasonable, lawful, and effective meaning to all manifestations of intention by the parties rather than an interpretation which leaves a part of such manifestations unreasonable or of no effect. *Whitmire v. Colwell*, 159 Ga. App. 682, 285 S.E.2d 28 (1981).

Contract to be construed as whole and no part discarded if avoidable. — It is well settled and salutary rule of construction which requires not only that every contract shall be construed in *pari materia*, but that no portion shall be discarded if it can be avoided. *Candler Inv. Co. v. Cox*, 4 Ga. App. 763, 62 S.E. 479 (1908).

In determining the ownership of certain intellectual property developed by a claimant while in a debtor's employ, pursuant to the applicable rules of contract construction under O.C.G.A. § 13-2-2, a nondisclosure agreement executed by the claimant as a condition of employment rendered ownership of any development to the debtor; the fact that the debtor failed to pay part of the claimant's salary did not render the assignment clause unenforceable because the contract did not provide for rescission and the claimant had an adequate remedy at law for the unpaid salary. *Ponder v. Apyron Techs., Inc.* (In re Apyron Techs., Inc.), No. 02-74350-JEM, 2005 Bankr. LEXIS 569 (Bankr. N.D. Ga. Mar. 17, 2005).

All terms of contract, as far as practicable, must be given full effect. *Wellborn v. Estes*, 70 Ga. 390 (1883); *Myers v. Phillip Carey Co.*, 17 Ga. App. 535, 87 S.E. 825 (1916).

When terms of contract permit the con-

tract should be given construction which will advance the contract's beneficial purpose. *MacDougald Constr. Co. v. State Hwy. Dep't*, 59 Ga. App. 708, 2 S.E.2d 197, rev'd on other grounds, 189 Ga. 490, 6 S.E.2d 570 (1939); *Consolidated Freightways Corp. v. Williams*, 139 Ga. App. 302, 228 S.E.2d 230 (1976).

Law leans against destruction of contracts on ground of uncertainty, and contract will not be declared void on that ground, unless after reading the contract and interpreting the contract in light of circumstances under which the contract was made, and supplying or rejecting words necessary to carry into effect reasonable intention of the parties, their intention cannot be fairly collected and effectuated. *Leffler Co. v. Dickerson*, 1 Ga. App. 63, 57 S.E. 911 (1907).

If possible, courts construe contracts as binding upon both parties. — When possible without contravening any rule of law, courts will construe contract as binding on both parties, where, from language of contract, conduct of parties, and all attendant circumstances, it appears that intention of the parties was that both should be bound by sale, and substantial justice requires that contract be given effect. *Good Rds. Mach. Co. v. Neal & Son*, 21 Ga. App. 160, 93 S.E. 1018 (1917).

Contracts to be construed, if possible, to incur lawful obligations. — It is not to be presumed that people intend to violate the law, and language of their undertakings must, if possible, be so construed as to make obligation one which law would recognize as valid. *Lie-Nielsen v. Tuxedo Plumbing & Heating Co.*, 149 Ga. App. 502, 254 S.E.2d 729 (1979); *Potts v. Riddle*, 5 Ga. App. 378, 63 S.E. 253 (1908); *Luke v. Livingston*, 9 Ga. App. 116, 70 S.E. 596 (1911); *Palmer Brick Co. v. Woodward*, 138 Ga. 289, 75 S.E. 480 (1912).

If there is doubt as to whether purpose contract seeks to effectuate is legal or illegal, it will be construed as made for legal, rather than illegal purpose. *Virginia Bridge Iron Co. v. Crafts*, 2 Ga. App. 126, 58 S.E. 322 (1907); *Potts v. Riddle*, 5 Ga. App. 378, 63 S.E. 253 (1908); *Luke v. Livingston*, 9 Ga. App. 116, 70 S.E. 596 (1911); *Palmer Brick Co. v. Woodward*, 138 Ga. 289, 75 S.E. 480 (1912).

Forfeitures not favored in the law, and where there is legitimately a choice of constructions, that which will save contract is rather to be preferred than that which will

work forfeiture. *Aetna Ins. Co. v. Lipsitz*, 130 Ga. 170, 60 S.E. 531 (1908).

Ambiguous agreement capable of interpretation which will validate the agreement will be so interpreted. *Moore v. Hughey*, 133 Ga. App. 901, 212 S.E.2d 503 (1975).

Instrument construable as valid deed of gift or invalid testamentary disposition, construed as former. — Instrument, in form of a deed of gift, and will attested as such, but not legally attested as a will, so that it will wholly fail of effect if construed to be testamentary in its character, should, if very doubtful in its terms with reference to the time of vesting estate, be classed as deed and not as will. *Dismukes v. Parrott*, 56 Ga. 513 (1876).

Court will not give validating construction to instrument which would require changing maturity date completely. — Courts will not apply construction to loan contract to give effect to interpretation that would validate instrument rather than void the contract if such interpretation would require court to change maturity date in month, day, and year. *Sellers v. Alco Fin., Inc.*, 130 Ga. App. 769, 204 S.E.2d 478 (1974).

Title cannot be used to explain or vary unambiguous language in body of contract. — A title, not being in truth part of article, cannot be used to throw light on or to vary unambiguous language of body of contract. *Suggs v. Brotherhood of Locomotive Firemen & Enginemen*, 106 Ga. App. 563, 127 S.E.2d 827 (1962).

Contract generally not construed as giving debtor right to destroy it simply by refusing compliance. — Law will not construe contract to give the debtor the right to destroy it by simple refusal to comply with it, unless terms of contract are so clear and unambiguous as to make irresistible the conclusion that no other result could possibly be reached, and that such was intention of parties. *Finlay v. Ludden & Bates S. Music House*, 105 Ga. 264, 31 S.E. 180 (1898); *Milledgeville Cotton Co. v. Cary*, 9 Ga. App. 391, 71 S.E. 503 (1911); *Haag v. Rogers*, 9 Ga. App. 650, 72 S.E. 46 (1911).

Construing contract as whole, lender afforded status of mortgagee, not merely loss payee. — See *Business Dev. Corp. v. Hartford Fire Ins. Co.*, 747 F.2d 628 (11th Cir. 1984).

Construction Against Party Executing Instrument

Construction of contract is generally to be most strongly against party undertaking obligation. *Shiflett v. Anchor Rome Mills, Inc.*, 78 Ga. App. 428, 50 S.E.2d 853 (1948).

Construction against party with obligation.

— If construction of contract is doubtful, that which goes most strongly against party executing instrument or undertaking obligation is generally to be preferred. *Finlay v. Ludden & Bates S. Music House*, 105 Ga. 264, 31 S.E. 180 (1898); *Small Co. v. Claxton*, 1 Ga. App. 83, 57 S.E. 977 (1907); *Candler Inv. Co. v. Cox*, 4 Ga. App. 763, 62 S.E. 479 (1908); *Dewey v. Denson*, 31 Ga. App. 352, 120 S.E. 805 (1923); *Bridges v. Home Guano Co.*, 33 Ga. App. 305, 125 S.E. 872 (1924).

When construction necessary, contract to be construed most strongly against party who formulated the contract. *Western Contracting Corp. v. State Hwy. Dep't*, 125 Ga. App. 376, 187 S.E.2d 690 (1972).

Ambiguous terms of contract are to be interpreted against party which drafted the terms. *C.A. May Marine Supply Co. v. Brunswick Corp.*, 557 F.2d 1163 (5th Cir. 1977).

Court required to construe ambiguous contract against one who made the contract. *Float-Away Door Co. v. Continental Cas. Co.*, 372 F.2d 701 (5th Cir. 1966), cert. denied, 389 U.S. 823, 88 S. Ct. 58, 19 L. Ed. 2d 76 (1967).

Paragraph (5) of O.C.G.A. § 13-2-2 inapplicable to contract prepared by one undertaking no obligation under it. — Statute has no application when contract provides for obligation payable to one who prepares contract and who does not execute the contract or undertake any obligation in the contract. *Moorefield v. Fidelity Mut. Life Ins. Co.*, 135 Ga. 186, 69 S.E. 119 (1910).

Utilization of paragraphs (4) and (5) of O.C.G.A. § 13-2-2 together in construing contract. — While lease contracts, like other contracts, where construction is doubtful, must be construed against party drawing and executing the lease contracts, nevertheless, a contract should not be torn apart and construed in pieces, but the court should look to the entire instrument and so construe the contract as to reconcile the contract's different parts and reject construction which leads to contradiction, in order to ascertain true

intention of parties, which is real purpose of judicial construction of contracts. *Sachs v. Jones*, 83 Ga. App. 441, 63 S.E.2d 685 (1951).

In ascertaining intent, that construction will be favored which gives meaning and effect to all terms of contract over that which nullifies and renders meaningless part of language therein contained, and in cases of doubt, contract will be construed most strongly against one who prepared the contract. *Brooke v. Phillips Petro. Co.*, 113 Ga. App. 742, 149 S.E.2d 511 (1966).

Author of ambiguous contract bears burden of explanation if seeking favorable construction. — Party who wrote contract and was author of ambiguity has burden of explaining the ambiguity when the author seeks to take benefit of construction favorable to the author; and if the author does not clear up meaning beyond doubt, doubt must be given against the author. *Hill v. John P. King Mfg. Co.*, 79 Ga. 105, 3 S.E. 445 (1887).

Paragraph (5) of O.C.G.A. § 13-2-2 to be followed by federal courts as rule of decision. — Paragraph (5) is common law, but nonetheless a statute of Georgia which, together with construction of it by state courts, is to be followed in federal courts as rule of decision. *Davis v. Jefferson Std. Life Ins. Co.*, 73 F.2d 330 (5th Cir. 1934), cert. denied, 294 U.S. 706, 55 S. Ct. 352, 79 L. Ed. 1241 (1935).

Ambiguity in letter should be construed most strongly against author. *Stewart v. Finance Co.*, 49 Ga. App. 462, 176 S.E. 73 (1934).

Construction against party drafting instrument. — An omnibus agreement between the Chapter 11 debtor and the debtor's former officer before confirmation of the debtor's plan of reorganization sufficed as an informal proof of claim because it was contemplated in the plan, was critical to confirmation, and placed the debtor on notice of the officer's claim, and alternatively, under O.C.G.A. § 13-2-2(5), any ambiguity as to whether the debtor intended to waive the officer's filing of a proof of claim or any conflict between the terms of the omnibus agreement and the plan was resolved against the debtor's successor company, whose predecessor was the entity under whose direction the plan was written. In

re First Am. Health Care of Ga., Inc., 288 Bankr. 598 (Bankr. S.D. Ga. 2002).

Language in a contract between a contractor and a county was construed against the county because the county was the drafter of the contract. *Yates Paving & Grading Co. v. Bryan County*, 265 Ga. App. 578, 594 S.E.2d 756 (2004).

Contracts must be construed against the party drawing and executing the contract, pursuant to O.C.G.A. § 13-2-2(5); nevertheless, a contract should not be torn apart and construed in pieces; instead, the court should look to the entire instrument and so construe the contract as to reconcile the contract's different parts and reject construction which leads to contradiction. *Snipes v. Marcene P. Powell & Assocs.*, 273 Ga. App. 814, 616 S.E.2d 152 (2005).

Because a participation agreement required the originating bank to notify the participating bank when it changed the credit ratings on a construction loan, which included material downgrades in the originating bank's relationship with the borrower, and because the term "downgrades" was ambiguous, the ambiguity was construed against the originating bank, which had drafted the agreement. *Sun Am. Bank v. Fairfield Fin. Servs.*, No. 5:08-cv-341 (CAR), 2010 U.S. Dist. LEXIS 11004 (M.D. Ga. Feb. 9, 2010).

Ambiguous terms of suretyship or guaranty contract construed most strongly against maker of contract. *Polk v. Slaton*, 54 Ga. App. 328, 187 S.E. 846 (1936).

Uncertainty or ambiguity in lease construed in lessee's favor. — If there is life uncertainty or even ambiguity in a lease, it is lessee and not lessor who is to be favored, because lessor had power of stipulating in the lessor's own favor, though the lessor may have neglected to do so. *Farm Supply Co. v. Cook*, 116 Ga. App. 814, 159 S.E.2d 128 (1967).

If the language in a franchise agreement is uncertain and ambiguous, every rule of contract interpretation, landlord-tenant law, and summary judgment procedure requires a court to interpret the agreement in favor of the lessee and against the lessor who prepared the contract language. *Simmerman v. DOT*, 167 Ga. App. 383, 307 S.E.2d 4 (1983).

After a landlord undertook the obligation under the lease to rebuild and repair the

premises after destruction by fire, an interpretation of the extent of its duties should be made favoring the recipient, the tenant. *Promenade Assocs. v. Finish Line, Inc.*, 194 Ga. App. 741, 391 S.E.2d 714 (1990).

Language of note given by tenant for rent must be taken most strongly against tenant. *McBurney v. McIntyre*, 38 Ga. 261 (1868).

Ambiguity in lease with option to purchase. — An ambiguity in a lease of real property with an option to purchase was construed to mean that a "down payment" made at the time of execution of the lease was not intended as consideration for the option to purchase, but was to be applied as a down payment on the real property itself, upon the purchasers' exercise of the option. *Smith v. Persichetti*, 245 Ga. App. 357, 537 S.E.2d 441 (2000).

Insurance contracts to be strictly construed against insurer. *Lee v. Fidelity & Cas. Co.*, 567 F.2d 1340 (5th Cir. 1978).

Insurance policies are prepared and proposed by insurers; and, when such contract is capable of being construed in two ways, that interpretation must be placed upon the contract which is most favorable to insured. Especially is this true where construction insisted upon by company would work forfeiture of policy, while other will preserve obligations of both company and insured. *State Mut. Life Ins. Co. v. Forrest*, 19 Ga. App. 296, 91 S.E. 428 (1917), see also *Massachusetts Benefit Life Ass'n v. Robinson*, 104 Ga. 256, 30 S.E. 918, 42 L.R.A. 261 (1898); *Mutual Life Ins. Co. v. Durden*, 9 Ga. App. 767, 72 S.E. 295 (1911).

If insurance policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to insured. *American Cas. Co. v. Callaway*, 75 Ga. App. 799, 44 S.E.2d 400 (1947).

If any doubt should exist in regard to construction of contract of insurance, doubt should be resolved in favor of insured, and policy should be liberally construed in favor of validity of contract and against insurance company. *American Cas. Co. v. Callaway*, 75 Ga. App. 799, 44 S.E.2d 400 (1947).

In construing insurance contracts, any exception in policy of insurance altering terms of general liability is to be taken and construed most strongly against insurer. *American Cas. Co. v. Callaway*, 75 Ga. App. 799, 44 S.E.2d 400 (1947).

Construction Against Party Executing Instrument (Cont'd)

If language is ambiguous in an insurance policy, the language must be construed in a light favorable to the insured. *Nationwide Mut. Fire Ins. Co. v. Tomlin*, 181 Ga. App. 413, 352 S.E.2d 612 (1986); *Claussen v. Aetna Cas. & Sur. Co.*, 259 Ga. 333, 380 S.E.2d 686 (1989); *Bituminous Cas. Corp. v. Advanced Adhesive Tech., Inc.*, 73 F.3d 335 (11th Cir. 1996).

Any exclusion sought to be invoked by the insurer will be liberally construed in favor of the insured and strictly construed against the insurer unless it is clear and unequivocal. *First Ga. Ins. Co. v. Goodrum*, 187 Ga. App. 314, 370 S.E.2d 162 (1988).

Since the language on the first page of an insurance contract could be construed to provide accidental death benefits of \$15,000 and conflicted with a later provision providing for only \$10,000, the trial court erred when the court allowed the provision most favorable to the insurance company to control. *Cole v. Life Ins. Co.*, 236 Ga. App. 229, 511 S.E.2d 596 (1999).

Policy provision regarding the provision of liability coverage for a person "Using a vehicle without a reasonable belief that the person is entitled to do so" was ambiguous because it is susceptible of three logical and reasonable interpretations and, therefore, adoption of the interpretation least favorable to the insurer was required. *Georgia Farm Bureau Mut. Ins. Co. v. John Deere Ins. Co.*, 244 Ga. App. 546, 536 S.E.2d 258 (2000).

Insurance policy is to be construed most strongly against insurance company only in event meaning is doubtful or ambiguous, and contract is reasonably susceptible to meaning arrived at by construction against company. *American Aviation & Gen. Ins. Co. v. Georgia Telco Credit Union*, 223 F.2d 206 (5th Cir. 1955).

It is cardinal principle of insurance law that policy of insurance is to be construed liberally in favor of insured and strictly as against insurer. *Continental Cas. Co. v. Robertson*, 245 F.2d 604 (5th Cir. 1957).

When terms of policy are not clear and unambiguous, insurance policy to be construed liberally in favor of insured. *Float-Away Door Co. v. Continental Cas. Co.*,

372 F.2d 701 (5th Cir. 1966), cert. denied, 389 U.S. 823, 88 S. Ct. 58, 19 L. Ed. 2d 76 (1967).

When policy is ambiguous as to which parties were to be named insured, such ambiguity must be construed most strongly against insurer. *Greenbriar Shopping Ctr., Inc. v. Lorne Co.*, 310 F. Supp. 303 (N.D. Ga. 1969), aff'd, 424 F.2d 544 (5th Cir. 1970).

Any lack of clarity or ambiguity in insurance policy is considered responsibility of insurance company, for it is company that drafts policies and must be required to draft clearly. *Ranger Ins. Co. v. Culberson*, 454 F.2d 857 (5th Cir. 1971), cert. denied, 407 U.S. 916, 92 S. Ct. 2440, 32 L. Ed. 2d 691 (1972).

After determining that the definition of the term "total disability" in two of an insurer's disability policies was ambiguous where the term stated only that an insured was totally disabled if the insured was unable to perform the major duties of the insured's occupation, in accordance with the directive in O.C.G.A. § 13-2-2(5), the term "total disability" was construed against the insurer, such that the insured was not required to show that the insured was unable to perform all of the major duties of the insured's occupation to qualify as being totally disabled. *Putnal v. Guardian Life Ins. Co. of Am.*, No. 5:04-CV-130 (HL), 2006 U.S. Dist. LEXIS 70931 (M.D. Ga. Sept. 29, 2006).

Ambiguous insurance clause construed against drafter. — If an insurance clause is ambiguous as to coverage, the clause has to be most strongly construed against the party drafting the clause. *Giles v. National Union Fire Ins. Co.*, 578 F. Supp. 376 (M.D. Ga. 1984).

Paragraph (5) of O.C.G.A. § 13-2-2 applied to insurance policies so as to preserve company's and insured's obligations. — Insurance policies are prepared and proposed by insurers; therefore, if insurance contract is capable of being construed in two ways, that interpretation must be placed upon the contract which is most favorable to the insured. This rule applies where construction insisted upon by company would work forfeiture of policy, while other will preserve obligations of both company and insured. *Peachtree Roxboro Corp. v. U.S. Cas. Co.*, 101 Ga. App. 340, 114 S.E.2d 49 (1960).

Ambiguity in settlement agreement. — Settlement provision between the decedent

and his former wife, regarding whether or not decedent's estate was liable only for those medical expenses for which Medicare provided partial payment or reimbursement, is ambiguous, thereby requiring the court to interpret the contract against the decedent. *Franklin v. Franklin*, 262 Ga. 218, 416 S.E.2d 503 (1992).

Agreements by joint venture construed against drafter's interest. — Under O.C.G.A. § 13-2-2(5), an agreement drafted by a joint venture must be construed most strongly against its interests. The application of the rules of construction require a finding that there was no waiver of the executor's commissions; that the executor was entitled to collect the commissions prior to any payment of net proceeds to the joint venture; that the net proceeds of any recovery of the judgment against another party remained an asset of the estate, with sufficient sums limitedly assigned as security for payment to satisfy the promissory note and with a priority of payment of this debt; and that the balance of the net proceeds remaining after payment of the balance and interest on the promissory note was an asset of the estate. In *re Estate of Sims*, 259 Ga. App. 786, 578 S.E.2d 498 (2003).

When security deed note does not provide for automatic acceleration of indebtedness in the event of default nor does it provide for waiver of notice of such acceleration, but when the deed appears to contain such a waiver of notice of acceleration, construing the documents most strongly against the creditor as drafter thereof, in the event of default, there is no automatic acceleration of the indebtedness nor is there a waiver of notice of such acceleration. *First Fed. Sav. & Loan Ass'n v. Standard Bldg. Assocs.*, 85 Bankr. 644 (Bankr. N.D. Ga. 1988).

Grammatical Construction

Effectuation of intent may require transposition of words and sentences and ignoring of minor clauses. *McVay v. Anderson*, 221 Ga. 381, 144 S.E.2d 741 (1965).

Court may supply words "per annum" after interest stipulation in note. — Court may supply words *per annum* after words "with interest at 8%," appearing on note, in exercise of the court's duty of construing contract. *Brooks v. Boyd*, 1 Ga. App. 65, 57 S.E. 1093 (1907).

Punctuation of instrument may be considered when meaning is doubtful, but it cannot control if meaning otherwise plainly appears. *Bridges v. Home Guano Co.*, 33 Ga. App. 305, 125 S.E. 872 (1924).

Words control punctuation marks. — Punctuation is no part of the English language, and is a most fallible guide by which to interpret a writing. Words control punctuation marks, and not punctuation marks the words. *Bridges v. Home Guano Co.*, 33 Ga. App. 305, 125 S.E. 872 (1924).

Court may insert proper punctuation marks in construing contract. — In order to arrive at meaning of parties, proper punctuation marks may be inserted by court in construing instrument. *Bridges v. Home Guano Co.*, 33 Ga. App. 305, 125 S.E. 872 (1924).

Preference for Written over Printed Matter

Written provisions in contract will prevail over printed matter when the provisions conflict. *Batson-Cook Co. v. Poteat*, 147 Ga. App. 506, 249 S.E.2d 319 (1978); *Fort Oglethorpe Assocs. II v. Hails Constr. Co.*, 196 Ga. App. 663, 396 S.E.2d 585 (1990).

When interpreting any conflict in a contract, the handwritten portion prevails over the printed portion if the provisions cannot be reconciled. *Lester v. Crooms, Inc.*, 157 Ga. App. 377, 277 S.E.2d 751 (1981).

Written words control if in conflict with mere figures. *Bryant v. Georgia Fertilizer & Oil Co.*, 13 Ga. App. 448, 79 S.E. 236 (1913).

Words written with pen and ink are entitled to more consideration than printed words. *Hodsdon v. Whitworth*, 153 Ga. App. 783, 266 S.E.2d 561 (1980).

Handwritten limiting phraseology inserted after printed and typed material is worthy of special consideration. *Sims v. Bryan*, 140 Ga. App. 69, 230 S.E.2d 39 (1976).

Provisions specially inserted by parties are to take precedence over printed provisions of contract form. *Atlanta Baggage & Cab Co. v. Loftin*, 88 Ga. App. 98, 76 S.E.2d 92 (1953).

Typewritten provision must govern over conflicting printed one. *Aetna Life & Cas. Co. v. Charles S. Martin Distrib. Co.*, 120 Ga. App. 133, 169 S.E.2d 695 (1969); *Quinlan v. Bell*, 189 Ga. App. 8, 374 S.E.2d 823 (1988).

Generally, typewritten words of contract are entitled to more consideration than

Preference for Written over Printed Matter (Cont'd)

printed part. *Hodsdon v. Whitworth*, 153 Ga. App. 783, 266 S.E.2d 561 (1980).

Although typewritten words are generally entitled to more consideration than pre-printed items, that principle applies when a conflict exists between the specially-inserted provisions and the printed form, and in the absence of any conflict between the form and inserted provisions in the deed, the pre-printed language cannot be ignored, "boilerplate" arguments notwithstanding. *Safeco Title Ins. Co. v. Citizens & S. Nat'l Bank*, 190 Ga. App. 809, 380 S.E.2d 477 (1989); *Patellis v. 100 Galleria Parkway Assocs.*, 214 Ga. App. 154, 447 S.E.2d 113 (1994).

Because the contract was printed, the type-written portions of the contract prevailed over the printed language. *Asian Square Partners, L.P. v. Cuong Quynh Ly*, 238 Ga. App. 165, 518 S.E.2d 166 (1999).

Words not integral to contract. — If printed matter forming part of contract must yield to written terms inconsistent with words printed, a fortiori mere printed statement in letterhead, which does not form integral part of contract at all, cannot override or modify distinct terms of contract with which it conflicts. *Augusta Factory v. Mente & Co.*, 132 Ga. 503, 64 S.E. 553 (1909).

Clause written upon face of contract, inconsistent with one printed upon back, generally accepted as expressing intention of parties, rather than inconsistent clause printed upon back. *Surles v. Milikin*, 97 Ga. 485, 25 S.E. 322 (1895); *Caddick Milling Co. v. Moultrie Grocery Co.*, 22 Ga. App. 524, 96 S.E. 583 (1918).

Parties' intent is paramount consideration and preservation of whole contract preferred. — While it is well settled that when contract is partly written and partly printed, written portion is entitled to most consideration and if printed portions of contract cannot be reconciled with written portions, latter prevail, still cardinal rule of construction is to ascertain intention of parties, and construction which will uphold contract in whole and in every part is to be preferred, and whole contract should be looked to in arriving at construction of any part. *Capital Wall Paper Co. v. Callan Court Co.*, 38 Ga.

App. 428, 144 S.E. 135 (1928).

Written addition to a settlement agreement did not control where the printed major portion thereof was tailored to list the names of the parties to be released and the specific incident for which the release was to apply. *Campos v. Williams*, 217 Ga. App. 296, 457 S.E.2d 243 (1995).

When Time Is of the Essence

For time to be of essence, it should clearly appear that such was intent; as, for example, by provision that agreement shall be void unless act named be completed by certain day, or by other equivalent expression. *Ellis v. Bryant*, 120 Ga. 890, 48 S.E. 352 (1904).

In a suit by a buyer against a seller for breach of a real property sales contract, it was error to find that time was of the essence under O.C.G.A. § 13-2-2; the contract did not contain such a provision, and the parties' conduct of extending the closing date after the designated date passed did not show that time was of the essence. *Peachstate Developers, LLC v. Greyfield Res., Inc.*, 284 Ga. App. 501, 644 S.E.2d 324 (2007).

Time is of essence where expressly provided or where necessarily so from circumstances. — Time is of essence of contract when parties have expressly so treated it, or when it is necessarily so from nature and circumstances of contract. *Henry Cotton Mills v. Shoenig & Co.*, 33 Ga. App. 467, 127 S.E. 238 (1925).

Enforcement of commercial lease. — In a lessor's action to enforce the provisions of a commercial lease pursuant to O.C.G.A. § 13-1-11, because a lessee's predecessor-in-interest failed to strictly comply with a cancellation option in the lease, and time was of the essence, the trial court erred in ruling otherwise, resulting in an expiration of the option due to the failure to timely exercise the option; thus, on remand the lessor was entitled to summary judgment on the lessor's possession claim and to the past rent due under the lease for the term sought. *Piedmont Ctr. 15, LLC v. Aquent, Inc.*, 286 Ga. App. 673, 649 S.E.2d 733 (2007), cert. denied, 2007 Ga. LEXIS 749 (Ga. 2007).

Time is of essence of contract where nature of contract indicates such intent of parties. *Traylor, Spencer & Co. v. Brimbery*, 2 Ga. App. 84, 58 S.E. 371 (1907).

When time is of essence of contract, it may be waived; and when contract is not treated as at an end, but there is insistence as to performance on one side after date of maturity, and part performance accepted on the other, this amounts to a waiver. *King v. Lipsey*, 142 Ga. 832, 83 S.E. 957 (1914); *Lee v. Wilmington Sav. Bank*, 31 Ga. App. 327, 120 S.E. 689 (1923), cert. denied, 31 Ga. App. 812 (1924), and see *Jordan v. Rhodes*, 24 Ga. 478 (1858); *Moody v. Griffin*, 60 Ga. 459 (1878).

When no time specified for performance, presumption is that parties intended performance within reasonable time. *Cassville-White Assocs. v. Bartow Assocs.*, 150 Ga. App. 561, 258 S.E.2d 175 (1979).

If time fixed, but not stated to be of essence, issue open to construction. — If time is fixed, but there is no express statement that it is of essence of contract, it is open to construction to determine whether such is the case. *Alabama Constr. Co. v. Continental Car & Equip. Co.*, 131 Ga. 365, 62 S.E. 160 (1908).

In contracts for sale of personal property, wherein a time is named for delivery, it is a question of construction, in each particular case, as to whether or not time named is material part of contract, breach of which will give other party right of action therefor. *Gude & Walker v. J. B. Bailey Co.*, 4 Ga. App. 226, 61 S.E. 135 (1908); *Augusta Factory v. Mente & Co.*, 132 Ga. 503, 64 S.E. 553 (1909).

In a marital settlement agreement which provided that the former husband would remove the ex-wife's name from the mortgage on certain marital property within 12 months, and that the ex-wife would quitclaim ex-wife's interest in the property to the husband, time was not of the essence under O.C.G.A. § 13-2-2(9) because the agreement did not provide that it was void if the former husband's obligation was not performed within 12 months, and another provision requiring the husband to make mortgage payments on the property in the interim and to indemnify the ex-wife for any mortgage debt also showed time was not of the essence; therefore, it was error to find the ex-wife could retain an interest in the property because the husband's estate did not perform this obligation within 12 months. *Torgesen v. Torgesen*, 274 Ga. App. 298, 617 S.E.2d 223 (2005).

Contract term prescribing time for performance may be enlarged by agreement based on consideration. *Gude & Walker v. J. B. Bailey Co.*, 4 Ga. App. 226, 61 S.E. 135 (1908).

Parties to notes may make time of essence by provision for acceleration upon default.

— Although time is not generally of the essence of a contract, it may become so by express stipulation or reasonable construction, and it is competent for parties to series of promissory notes, maturing monthly through several years, to provide that in case of default in payment of any two of them, and continuation of such default for specified period, the entire series shall, at option of holder thereof, become due and collectible. *Cone v. Hunter*, 38 Ga. App. 45, 142 S.E. 468 (1928).

Partner competent to contract for firm may make time of essence of contract, and bind firm to abide legal consequence of so doing. *Van Winkle & Co. v. Wilkins*, 81 Ga. 93, 7 S.E. 644, 12 Am. St. R. 229 (1888).

Time of essence in contract for sale of land where such intent is clear. — Ordinarily in contract for sale of land time is not of essence of contract; courts lean against such construction for reason that it would result in enforcement of penalty, and because interest is ordinarily treated as full compensation for delay. *Ellis v. Bryant*, 120 Ga. 890, 48 S.E. 352 (1904); *Burkhalter v. Roach*, 142 Ga. 344, 82 S.E. 1059 (1914).

Time may be made of the essence of contract for sale of lands by express agreement or reasonable construction, but ordinarily courts lean against such construction. If time is of the essence it may be waived; and subsequent conduct of obligor may have that effect. *Eaton v. Harwood*, 198 Ga. 240, 31 S.E.2d 473 (1944).

For time to be treated as of the essence of contract for sale of land, it should clearly appear therefrom that such was intention of parties; as, for example, by provision that agreement shall be void unless act named be completed by certain day, or by other equivalent expression. *Mangum v. Jones*, 205 Ga. 661, 54 S.E.2d 603 (1949); *Scheer v. Doss*, 211 Ga. 7, 83 S.E.2d 612 (1954).

Contracts for purchase of real property. — General rule is that, in contracts for purchase of personal property, time is not of essence of contract unless parties have ex-

When Time Is of the Essence (Cont'd)

pressly so treated it, or when it is necessarily so from nature and circumstances of contract. *Sneed v. Wiggins*, 3 Ga. 94 (1847).

An option contract is peculiarly a contract of which time is of the essence. Because of one-sided nature of an option contract, time of election by optionee is of essence of contract in equity as well as in law, whether contract expressly so stipulates or not. *Hughes v. Holliday*, 149 Ga. 147, 99 S.E. 301 (1919).

As a general rule, time fixed by contract within which option may be exercised is to be regarded as of the essence. *Henry Cotton Mills v. Shoenig & Co.*, 33 Ga. App. 467, 127 S.E. 238 (1925).

An option is peculiarly an agreement of which time is of the essence. *Gulf Oil Corp. v. Willcox*, 211 Ga. 462, 86 S.E.2d 507 (1955); *Bowden v. Mews Dev. Corp.*, 247 Ga. 546, 277 S.E.2d 653 (1981).

Options appendant and options in gross. — Time is of the essence of options appendant to a lease contract as well as options in gross. *Bowden v. Mews Dev. Corp.*, 247 Ga. 546, 277 S.E.2d 653 (1981).

When contract stipulates time for shipment, parol evidence admissible to show time of essence. — When written contract for sale of personal property fixed time within which shipment should be made by vendor to purchaser, parol evidence was admissible to show that time was of essence of contract. *Van Winkle & Co. v. Wilkins*, 81 Ga. 93, 7 S.E. 644, 12 Am. St. R. 299 (1888); *Alabama Constr. Co. v. Continental Car & Equip. Co.*, 131 Ga. 365, 62 S.E. 160 (1908).

Time generally of essence when subject matter of contract of speculative or fluctuating value. — In contract for sale of articles of varying seasonal value, time for delivery is to be taken as an essential element of contract. *Beck & Gregg Hdwe. Co. v. Hall Hdwe. Co.*, 30 Ga. App. 224, 117 S.E. 271 (1923).

When subject matter of contract is of speculative or fluctuating value, it is generally held that parties have intended that time shall be of essence. *Henry Cotton Mills v. Shoenig & Co.*, 33 Ga. App. 467, 127 S.E. 238 (1925).

Time of essence where contract provides for immediate reversion to grantor upon default in payment. — Where deed by impli-

cation definitely fixed as times for performance dates prescribed by law for ultimate payment of taxes, and provided also that failure to comply with condition would cause title and remainder interest immediately to revert to grantor, only reasonable construction is that time should be treated as of essence of contract. *Evans v. Brown*, 196 Ga. 634, 27 S.E.2d 300 (1943).

Time fixed for performance of condition subsequent must ordinarily be complied with. — When no time is fixed for performance of a condition subsequent, it is generally to be performed within reasonable time; but if particular time is given, condition must ordinarily be performed within that time. *Evans v. Brown*, 196 Ga. 634, 27 S.E.2d 300 (1943).

Time of essence of contract stipulating time for payments and containing acceleration clause. — Contract to pay money, in which it is expressly stipulated that installments shall be paid at specified times, and that if one installment is not promptly paid, whole sum shall be due and payable, time is essence of contract, and if party agreeing to pay fails to do so, that party is not entitled to relief in equity. *Sneed v. Wiggins*, 3 Ga. 94 (1847).

Time of essence where builder knows building has been leased from time set for completion. — When builder agrees to erect building within certain time, knowing that it has been leased from time named for building's completion, and breaks stipulation as to time, the builder is ordinarily liable to owner for loss of rent. *Albany Phosphate Co. v. Hugger Bros.*, 4 Ga. App. 771, 62 S.E. 533 (1908).

Time probably of essence of contract for publication of advertisement in specified issues of newspaper. — It would seem that if contract is made for publication of advertisement in specified issues of newspaper, reasonable construction of contract would make time of essence. *Springfield Metallic Casket Co. v. Dunn*, 12 Ga. App. 8, 76 S.E. 644 (1912).

On facts, time was of essence of contract by reasonable construction. *Sewell v. C.I.T. Corp.*, 43 Ga. App. 676, 160 S.E. 99 (1931).

Construction that time is of the essence may be determined as a matter of law. — When a contract for sale clearly fixes by unambiguous language a time for perfor-

mance, and when there is no evidence tending to show that the parties did not intend that time should be of the essence of the contract, but the contract and the surrounding circumstances manifestly show that the parties intended that time should be of the essence, the court may so rule as matter of law. *Woodhull Corp. v. Saibaba Corp.*, 234 Ga. App. 707, 507 S.E.2d 493 (1998).

On facts, time of essence as to some provisions of contract but not to others. *Savannah Ice Delivery Co. v. American Refrigerator Transit Co.*, 110 Ga. 142, 35 S.E. 280 (1900); *Bearden Mercantile Co. v. Madison Oil Co.*, 128 Ga. 695, 58 S.E. 200 (1907).

Where set delivery date subject to change at will of vendee, time not of essence. — In contract where date named is not fixed as final and definite date for delivery, but time of shipment can be accelerated or deferred at will of vendee, it could not reasonably be said that shipment on particular date mentioned in agreement was intended by parties to be of very essence of contract. *Cobb Lumber Co. v. Sunny S. Grain Co.*, 36 Ga. App. 140, 135 S.E. 759 (1926).

Time not of essence of promise to return borrowed money in ten days. — Where one person borrowed money of another and promised to return the money in ten days or send lender note which the person held on third party, it was held that equity would relieve against such contract if satisfactorily proven, because ten days within which

money was to be returned was not of essence of contract. *Cock & Thompson v. Brown & Carmichael*, 30 Ga. 925 (1860).

Notice of condition making prompt performance impossible. — It is inequitable to allow an owner to reap the benefits of a contractor's work without reimbursing the owner for the cost of the performance where the owner authorized the work and then withdrew permission despite notice of a condition which made prompt performance impossible. *Anderson v. Golden*, 569 F. Supp. 122 (S.D. Ga. 1982).

Liquidated damages as remedy. — Time was of the essence in a contract for the sale of a motel, and the purchaser's failure to assume a loan and to close on the purchase entitled the vendor to retain the purchaser's pre-paid closing costs as liquidated damages, where the contract did not explicitly state that time was of the essence but its terms made that construction reasonable; even if the contract were construed to allow the sale to be closed in a reasonable time, the purchaser's delay of eight months was patently unreasonable. *Woodhull Corp. v. Saibaba Corp.*, 234 Ga. App. 707, 507 S.E.2d 493 (1998).

Recovery in quantum meruit. — Georgia follows the English rule which allows recovery in quantum meruit by a plaintiff who is in substantial breach of the contract as long as the breach is not willful or deliberate. *Anderson v. Golden*, 569 F. Supp. 122 (S.D. Ga. 1982).

OPINIONS OF THE ATTORNEY GENERAL

Meaning of term "qualified physical therapist" probably for judicial rather than jury determination. — In determining meaning of term "qualified physical therapist," court

would be inclined to decide question in favor of judicial construction rather than determination by jury. 1969 Op. Att'y Gen. No. 69-483.

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Contribution, § 1. 21 Am. Jur. 2d, Customs and Usages, §§ 16 et seq., 27, 28, 30. 74 Am. Jur. 2d, Time, § 4.

C.J.S. — 17A C.J.S., Contracts, §§ 296, 302, 305 et seq., 318, 358 et seq., 597.

ALR. — Construction of contract as regards services contemplated by it where at-

torney claims compensation in addition to amount named therein, 2 ALR 844.

Construction of provision for payment of premiums by insurer, 5 ALR 1643.

Custom or previous dealing as imposing an obligation upon party to contract to accept something else in lieu of cash, 8 ALR 1268.

Construction of provision for free gas in oil and gas lease, 9 ALR 89.

Competency of parol evidence to show a money consideration additional to that stipulated in a written contract, 12 ALR 354.

Meaning of "by" as fixing time for performance of an act or happening of an event, 12 ALR 1168; 21 ALR 1543.

What is "accident" within provision of bond or contract indemnifying against damage or injury to person or property by accident in performance of building or construction contract, 12 ALR 1409.

Admissibility of parol evidence to show that a bill or note was conditional, or given for a special purpose, 20 ALR 421; 54 ALR 702; 75 ALR 1519; 105 ALR 1346.

Meaning of phrase "in good standing" employed in contract of mutual benefit association with member, 23 ALR 340.

Construction of contract to pay commissions on all sales to customers obtained by other party, 23 ALR 451.

Validity and construction of contract for sale of season's output, 23 ALR 574.

Admissibility of parol evidence to vary or explain contract implied from the regular endorsement of a bill or note, 54 ALR 999; 92 ALR 721.

Meaning of phrase, "market price," or "current market price," as employed in contract, 55 ALR 268.

What amounts to settlement of action within contractual provisions in relation to compensation of attorney, 55 ALR 428.

Modification of sealed instrument by subsequent parol agreement, 55 ALR 685.

Waiver by parol of provision in sealed instrument, 55 ALR 700.

Validity, construction, and effect of provision reserving to seller the right to demand cash or satisfactory security in the event that buyer's credit or financial responsibility becomes impaired, 64 ALR 1117.

Admissibility of parol evidence to explain ambiguity in description of land in deed or mortgage, 68 ALR 4.

Parol-evidence rule as applicable to agreement for improvements or alterations by vendor of real property, 68 ALR 245.

Construction of contractual provisions as to interest as regards time from which interest is to be computed, 69 ALR 958.

Motorcycle as within contract, statute, or ordinance in relation to motor cars, motor-driven cars, etc., 70 ALR 1253.

May part performance of oral contract to convey be predicated upon possession or improvement by one spouse of real property of other, 74 ALR 218.

Parol or extrinsic evidence to show that the parties to a written contract of sale of personal property merely describing the property as a class or subject contemplated a particular quality or kind, within the descriptive terms, 75 ALR 1166.

Parol-evidence rule as affecting extrinsic evidence to show or to negative usury, 82 ALR 1199; 104 ALR 1261.

Contract granting timber rights as covering timber that becomes such, or reaches prescribed dimensions, after execution, but during period covered, 94 ALR 1420.

"Contractual" consideration as regards parol-evidence rule, 100 ALR 17.

Admissibility of parol evidence as to meaning of cryptic words, abbreviations, signs, symbols, or figures appearing in written contracts or other writings, 100 ALR 1465.

Contract of sale which calls for a definite quantity but leaves the quality, grade, or assortment optional with one of the parties as subject to objection of indefiniteness, 106 ALR 1284.

Parties or obligations to which time-of-essence clause in contract applies, 107 ALR 275.

Construction and application of provision of construction contracts as regards retention of percentage of current earnings until completion, 107 ALR 960.

Validity and construction of contract by labor unions to continue salary or wages in whole or part or pay benefits if other party loses employment or position because of joining union, 114 ALR 1300; 125 ALR 1260.

Validity, construction, and enforceability of provision of lease creating or reserving option or election for future enlargement, reduction, or other variation as regards the premises to be occupied by tenant, 129 ALR 772.

What taxes are within contemplation of contract, which provides for payment or assumption of taxes or varies consideration with reference to taxes, 140 ALR 517.

Parol evidence in relation to assumption of mortgage debt by grantee of mortgaged property, 143 ALR 548.

Conflict between provisions of note and of conditional sale instrument in connection with note is given, 143 ALR 591.

Parol evidence rule as applied to lease, 151 ALR 279.

Time for exercise of reserved option to terminate, cancel, or rescind contract, 164 ALR 1014.

Parol evidence rule as applied to question of easement by necessity or visible easement, 165 ALR 567.

Validity and construction of contract for exclusive representation of persons participating in, or connected with, entertainment enterprises, 175 ALR 617.

Factors and elements considered in fixing rental for extended or renewal term where renewal or extension clause leaves amount of rental for future determination, 6 ALR2d 448.

Parol evidence rule as applicable to agreement not to engage in competition with a business sold, 11 ALR2d 1227.

Contract by seller of business not to compete as affecting his lease of other property in restricted area to one who he knows will compete with purchaser, 14 ALR2d 1333.

Failure to object to parol evidence, or voluntary introduction thereof, as waiver of defense of statute of frauds, 15 ALR2d 1330.

Sufficiency of description in standing timber deed or contract, 35 ALR2d 1422.

Applicability of parol evidence rule to written listing agreement of real-estate broker, 38 ALR2d 542.

Parol evidence to show that lease of personality, absolute on its face, is conditional sale, 57 ALR2d 1076.

Conflict of laws as to usage and custom, with respect to interpretation or performance of a contract, 60 ALR2d 467.

Applicability of parol evidence rule to agreement between stockbroker and customer, 60 ALR2d 1135.

Admissibility of parol evidence with respect to reservations or exceptions upon conveyance of real property, 61 ALR2d 1390.

Construction of clause in building contract that structure will comply with regulations, plans, or standards of the Federal Housing Administration or the Veterans' Administration, 67 ALR2d 1017.

Time specified in real-estate contract for giving notice of exercise of option to purchase as of essence, 72 ALR2d 1127.

Admissibility of extrinsic evidence to identify person or persons intended to be designated by the name in which a contract is made, 80 ALR2d 1137.

Coverage and exclusions under hospital or medical service (Blue Cross-Blue Shield) contracts, 81 ALR2d 927; 94 ALR3d 990.

Admissibility of parol evidence as to limitation on cost structure in builder's action on written cost-plus-fee construction contract, 84 ALR2d 1324.

Admissibility of oral agreement as to specific time for performance where written contract is silent, 85 ALR2d 1269.

Admissibility of oral agreement respecting duration of employment or agency where written contract is silent, 85 ALR2d 1331.

Validity, construction, and effect of contract between grower of vegetable or fruit crops, and purchasing processor, packer, or canner, 87 ALR2d 732.

Effect of attempt to terminate employment or agency contract upon shorter notice than that stipulated in contract, 96 ALR2d 272.

Effect of stipulation, in private building or construction contract, that alterations or extras must be ordered in writing, 2 ALR3d 620.

Insurer's acceptance of defaulted premium payment or defaulted payment on premium note, as affecting liability for loss which occurred during period of default, 7 ALR3d 414.

Parol exception of fixtures from conveyance or lease, 29 ALR3d 1441.

Statements in promotional or explanatory literature issued by lessor to lessee as ground for relief from lease contract, 43 ALR3d 1386.

Private pension plans: statements in literature distributed to employees as controlling over provisions of general plan, 50 ALR3d 1270.

Liability of subcontractor upon bond or other agreement indemnifying general contractor against liability for damage to person or property, 68 ALR3d 7.

Application of parol evidence rule in action on contract for architect's services, 69 ALR3d 1353.

Construction contract provision excusing delay caused by "severe weather," 85 ALR3d 1085.

Timeliness of notice of exercise of option to purchase realty, 87 ALR3d 805.

Lease provisions allowing termination or forfeiture for violation of law, 92 ALR3d 967.

Construction and application of provision

in health or hospitalization policy excluding or postponing coverage of illness for which medical care or treatment was received within stated time preceding or following issuance of policy, 95 ALR3d 1290.

Division of opinion among judges on same court or among other courts or jurisdictions considering same question, as evi-

dence that particular clause of insurance policy is ambiguous, 4 ALR4th 1253.

Liability for injury or damage caused by snowplowing or snow removal operations and equipment, 83 ALR4th 5.

Liability for breach of employment severance agreement, 27 ALR5th 1.

13-2-3. Ascertainment and enforcement of intention of parties generally.

The cardinal rule of construction is to ascertain the intention of the parties. If that intention is clear and it contravenes no rule of law and sufficient words are used to arrive at the intention, it shall be enforced irrespective of all technical or arbitrary rules of construction. (Orig. Code 1863, § 2719; Code 1868, § 2713; Code 1873, § 2755; Code 1882, § 2755; Civil Code 1895, § 3673; Civil Code 1910, § 4266; Code 1933, § 20-702.)

Law reviews. — For article, “Limitations on the Meaning and Impact of DeGarmo v. DeGarmo,” see 4 Ga. St. B.J. 20 (1998).

For comment advocating liberal construction of indefinite employment contract, in light of Gray v. Aiken, 205 Ga. 649, 54 S.E.2d

587 (1949), see 1 Mercer L. Rev. 304 (1950). For comment on Rose City Foods, Inc. v. Bank of Thomas County, 207 Ga. 477, 62 S.E.2d 145 (1950), see 13 Ga. B.J. 471 (1951).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
ASCERTAINING INTENT OF PARTIES
VALIDATING CONSTRUCTION PREFERRED
APPLICATION

General Consideration

Intent of parties is cardinal rule of construction. — All agreements should be determined according to the usual rules for the construction of contracts; the cardinal rule in construing contracts is to ascertain the intention of the parties. Crawford v. Crawford, 158 Ga. App. 187, 279 S.E.2d 486 (1981).

After applying the rules of contract construction under O.C.G.A. §§ 13-2-2 and 13-2-3, summary judgment to a lessee was proper as it was not required to pay the lessee’s portion of security related costs under the terms of the lease, according to the Common Area Costs formula contained therein; hence, it was authorized to refuse to pay those costs without being in breach of the lease agreement. Covington Square Assocs., LLC v. Ingles Mkts., Inc., 283 Ga.

App. 307, 641 S.E.2d 266 (2007).

When cardinal rule applicable. — “Cardinal rule of construction” becomes applicable only upon determination that contract is ambiguous. Smith v. Freeport Kaolin Co., 687 F. Supp. 1550 (M.D. Ga. 1988).

Meeting of minds necessary. — A binding contract must be predicated upon a meeting of the minds. Dumas v. First Fed. Sav. & Loan Ass’n, 654 F.2d 359 (5th Cir. 1981).

Statute paramount to almost all other rules of construction. — Fundamental rule, which takes priority over almost all others in construing a contract, is to give the contract that meaning which will best carry into effect intent of parties. Paul v. Paul, 235 Ga. 382, 219 S.E.2d 736 (1975).

Cardinal rule of construction, both at common law and under our code, is, that instruments containing conditions, limita-

tions, and restrictions are to be construed in each case in such way as to carry into effect intent of parties as gathered from instrument as a whole. Emphasis is laid upon fact that technical rules of construction are to be disregarded when obedience to such rules would defeat intention of parties. *Wadley Lumber Co. v. Lott*, 130 Ga. 135, 60 S.E. 836 (1908).

Although there may be special rules of interpretation which would require that pledge contract be construed favorably to pledgor, or to maker of one of notes so pledged, and strictly against pledgee, ultimate and final criterion, as in all cases, is that real object of court should be to ascertain intention of parties; and that where such intention is clear and contravenes no rule of law, and sufficient words are used to arrive at intention, it shall be enforced, irrespective of all technical or arbitrary rules of construction. *Deen v. Bank of Hazlehurst*, 39 Ga. App. 633, 147 S.E. 909 (1929).

Every other rule is subservient to this one. *Shorter v. Methvin*, 52 Ga. 225 (1874); *Bridges v. Home Guano Co.*, 33 Ga. App. 305, 125 S.E. 872 (1924); *Paul v. Paul*, 235 Ga. 382, 219 S.E.2d 736 (1975).

Parties cannot by contract provision prevent construction in accordance with applicable laws. — Parties to a contract cannot by way of provision prevent interpretation of contract by courts in accordance with law applicable thereto. *McKie v. McKie*, 213 Ga. 582, 100 S.E.2d 580 (1957).

Where terms and conditions are left to future negotiations, the requisite meeting of the minds is absent and no contract is formed. *Dumas v. First Fed. Sav. & Loan Ass'n*, 654 F.2d 359 (5th Cir. 1981).

No agreement where parties contemplate that instrument is incomplete. — To be final an agreement must comprise all the terms which the parties intend to introduce in the agreement. If it is evident from a written instrument that the parties contemplated that it was incomplete, and that a binding agreement would be made subsequently, there is no agreement. *Hartrampf v. Citizens & S. Realty Investors*, 157 Ga. App. 879, 278 S.E.2d 750 (1981).

If intention is clear and contract contravenes no rule of law, contract will be enforced according to the contract's terms. *Budd Land Co. v. K & R Realty Co.*, 159 Ga.

App. 448, 283 S.E.2d 665 (1981).

Test of enforceability. — For a contract to be enforceable, the minds of the contracting parties must be in such agreement on the subject matter upon which the contract purports to operate that either party might support an action thereon. *Hartrampf v. Citizens & S. Realty Investors*, 157 Ga. App. 879, 278 S.E.2d 750 (1981).

Section applicable to conveyances of land. — There can be no good reason why provisions of this statute should not apply to conveyances of land. *Woodson v. Veal*, 60 Ga. 562 (1878).

Section applicable to insurance contracts. — A policy of life insurance is a contract. Cardinal rule for construction of which is to ascertain intention of parties. *Bullard v. Life & Cas. Ins. Co.*, 178 Ga. 673, 173 S.E. 855, answer conformed to, 49 Ga. App. 27, 174 S.E. 256 (1934).

Contracts of insurance, like other contracts, are subject to rule of law that intention of parties must be ascertained. *American Cas. Co. v. Fisher*, 195 Ga. 136, 23 S.E.2d 395 (1942).

A contract of insurance is construed to carry out intent of parties. *Morris v. Mutual Benefit Life Ins. Co.*, 258 F. Supp. 186 (N.D. Ga. 1966).

Insurance policies in Georgia are governed by the ordinary rules of construction. *Chicago Title Ins. Co. v. Citizens & S. Nat'l Bank*, 821 F. Supp. 1492 (N.D. Ga. 1993), *aff'd*, 20 F.3d 1175 (11th Cir. 1994).

Construction of unambiguous insurance contract is for court, main purpose being ascertaining parties' intent. — An insurance policy is simply a contract, the provisions of which should be construed as any other type of contract, and the construction of an unambiguous contract is a question of law for the court, with the cardinal rule of construction being to ascertain the intention of the parties. *Mutual Life Ins. Co. v. Davis*, 79 Ga. App. 336, 53 S.E.2d 571 (1949).

Alimony settlement between spouses subject to usual rules of construction, object being to ascertain intent. — When contract between husband and wife in divorce suit was entered into for purpose of settling question of alimony, the contract's meaning and effect should be determined according to usual rules for construction of contracts, cardinal rule being to ascertain intention of

General Consideration (Cont'd)

parties. *Brown v. Farkas*, 195 Ga. 653, 25 S.E.2d 411 (1943).

Construction of divorce settlement agreement with periodic alimony. — Summary judgment was properly granted to a former husband in his declaratory judgment action, seeking a determination that his obligation to make "periodic alimony" payments for his former wife's car payments pursuant to the parties' divorce settlement agreement ceased upon the wife's remarriage pursuant to O.C.G.A. § 19-6-5(b), as the settlement agreement was clear and unambiguous in its designation of certain payments as a form of periodic alimony rather than as equitable distribution; contract interpretation principles under O.C.G.A. §§ 13-2-2(4) and 13-2-3 supported that interpretation of the agreement. *Crosby v. Lebert*, 285 Ga. 297, 676 S.E.2d 192 (2009).

Contract, made part of divorce decree, providing for children's education, enforceable. — Contract which is later made part of divorce decree, providing for college education for child or children of divorced couple, would not be illegal but would be given full force and effect. *Goodrum v. Fuller*, 237 Ga. 833, 229 S.E.2d 639 (1976).

Interpretation of language in contract is generally question of law for court unless it is so ambiguous that ambiguity cannot be resolved by ordinary rules of construction. *Garner v. Metropolitan Life Ins. Co.*, 152 Ga. App. 242, 262 S.E.2d 544 (1979).

If language is plain, unambiguous, and capable of only one reasonable interpretation, no other construction is permissible. *Reuss v. Time Ins. Co.*, 177 Ga. App. 672, 340 S.E.2d 625 (1986).

When language unambiguous and only one reasonable construction possible, court must expound it as made. *Cutledge v. Aetna Life Ins. Co.*, 53 Ga. App. 473, 186 S.E. 208 (1936).

When contracts are unambiguous, it is error to submit the contract's construction to jury. *State Hwy. Dep't v. MacDougald Constr. Co.*, 102 Ga. App. 254, 115 S.E.2d 863 (1960).

Disagreement as to intent of parties is an evidentiary, factual matter for resolution by jury and not a matter of law for determination by court. *Crestlawn Mem. Park v. Scott*,

146 Ga. App. 715, 247 S.E.2d 175 (1978); *St. Charles Foods, Inc. v. America's Favorite Chicken Co.*, 198 F.3d 815 (11th Cir. 1999).

Contract construction not for jury unless intent uncertain after application of rules of construction. — Construction of contract, if needed, being a question of law for court, as well as a duty that rests upon the court, there can be no ambiguity so as to require submission to a jury, unless and until an application of pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents true intention of parties. *Goff v. Cooper*, 110 Ga. App. 339, 138 S.E.2d 449 (1964).

Construction of contract, if needed, being a question of law for court, as well as a duty that rests upon the court, there can be no ambiguity within rules as to admission of parol evidence to explain the contract's meaning unless and until application of pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents true intention of parties. *Maddox v. Life & Cas. Ins. Co.*, 79 Ga. App. 164, 53 S.E.2d 235 (1949), overruled on other grounds, *Etheridge v. Woodmen of World Life Ins. Soc'y*, 114 Ga. App. 807, 152 S.E.2d 773 (1966).

Courts to construe and enforce contracts as made, rather than make contracts for parties. *Sasser & Co. v. Griffin*, 133 Ga. App. 83, 210 S.E.2d 34 (1974).

Court is not at liberty to revise contract while professing to construe a contract. *Sasser & Co. v. Griffin*, 133 Ga. App. 83, 210 S.E.2d 34 (1974).

Terms of contract to extend only to matters as to which parties intended to contract. — No matter how broad or how general terms of contract may be, it will extend only to those matters with reference to which parties intended to contract. *Carter v. Marble Prods., Inc.*, 171 Ga. 49, 154 S.E. 891 (1930).

In construing contracts, the fundamental rule is to ascertain and give effect to intention of parties. *State Hwy. Dep't v. Knox-Rivers Constr. Co.*, 117 Ga. App. 453, 160 S.E.2d 641 (1968).

Intention of parties is prevailing consideration in construction of contracts. *Burden v. Thomas*, 104 Ga. App. 300, 121 S.E.2d 684 (1961).

If intention of parties at time of executing agreement is clear, the parties intent should

be enforced, even though parties disagree as to the agreement's meaning at time of litigation. *Paul v. Paul*, 235 Ga. 382, 219 S.E.2d 736 (1975).

When main purpose of contract can be enforced, it will be given effect. *Southern Airways Co. v. DeKalb County*, 102 Ga. App. 850, 118 S.E.2d 234 (1960).

Intention, when ascertained, to prevail over all other considerations in determining nature of agreement. *Goff v. Cooper*, 110 Ga. App. 339, 138 S.E.2d 449 (1964).

Greater regard to be afforded clear intent of parties than to any particular words which the parties may have used in expression of the parties' intent. *Carter v. Marble Prods., Inc.*, 171 Ga. 49, 154 S.E. 891 (1930).

When main purpose clear, ambiguity of collateral undertakings will not affect enforceability of contract. — When main purpose clearly appears to have been giving of usufruct of airport by defendant to plaintiff, while there may be some ambiguity as to collateral undertakings, even if these should be found to be indefinite rather than ambiguous and thus unenforceable, they will not affect enforceability of contract, but only that of collateral agreements. *Southern Airways Co. v. DeKalb County*, 102 Ga. App. 850, 118 S.E.2d 234 (1960).

Clear intention to be given effect regardless of mere literal repugnancies among clauses. — In construction of deeds, as well as other contracts, paramount, essential, and controlling rule is to ascertain intention of parties. If that intention is plain from language of deed, as a whole, and intention contravenes no rule of law, it should be given effect regardless of mere literal repugnancies in different clauses of conveyance. *Thurmond v. Thurmond*, 88 Ga. 182, 14 S.E. 198 (1891); *Keith v. Chastain*, 157 Ga. 1, 121 S.E. 233 (1923). See also *Gilreath v. Garrett*, 139 Ga. 688, 77 S.E. 1127 (1913).

Intent to be effectuated, although contract affects rights of strangers. — Contracts, even where rights of strangers are affected, will nevertheless be construed so as to effect manifest intention of contracting parties, when such construction contravenes no rule of law. *Brooks v. Folds*, 33 Ga. App. 409, 126 S.E. 554 (1925).

Intent to be ascertained and given effect whenever possible, even though instrument unskillfully prepared. — However unskill-

fully deed may be prepared, it is duty of courts to discover and give effect, if possible, to intent of parties. *Skinner v. Bearden*, 77 Ga. App. 325, 48 S.E.2d 574 (1948).

Mere clerical error not affecting relations of parties is relievable at law. — Any mistake in contract, consisting of some unintentional act or omission, and manifestly a mere clerical error, in no sense changing contract or relations of parties thereto, is relievable at law, and there is no necessity to resort to a court of equity for purpose of reforming contract. *Gaulding v. Baker*, 9 Ga. App. 578, 71 S.E. 1018 (1911).

Parties may provide for alternative forms of payment for realty if sufficiently definite for enforcement. — There is nothing inherently vague or improper in providing for alternative forms of payment in contract to sell realty as long as each alternative is sufficiently definite to be enforced. *Rhyne v. Garfield*, 236 Ga. 694, 225 S.E.2d 43 (1976).

Whether contract is one of suretyship or of guaranty, is governed by intention of parties. *Baggs v. Funderburke*, 11 Ga. App. 173, 74 S.E. 937 (1912); *McKibben v. Fourth Nat'l Bank*, 32 Ga. App. 222, 122 S.E. 891 (1924).

Cited in *Wellborn v. Estes*, 70 Ga. 390 (1883); *Gilreath v. Garrett*, 139 Ga. 688, 77 S.E. 1127 (1913); *United Cigar Stores Co. v. Mckenzie*, 140 Ga. 270, 78 S.E. 1006 (1913); *Mill Wood & Coal Co. v. Flint River Cypress Co.*, 16 Ga. App. 636, 85 S.E. 943 (1915); *Kiker v. Jones*, 20 Ga. App. 704, 93 S.E. 253 (1917); *Adams v. Walker*, 24 Ga. App. 646, 101 S.E. 815 (1920); *Horne & Ponder v. Evans*, 31 Ga. App. 370, 120 S.E. 787 (1923); *Miller v. First Nat'l Bank*, 35 Ga. App. 334, 132 S.E. 783 (1926); *Hill v. Smith*, 163 Ga. 71, 135 S.E. 423 (1926); *Lanier v. Register*, 163 Ga. 236, 135 S.E. 719 (1926); *Motors Mtg. Corp. v. Purchase-Money Note Co.*, 38 Ga. App. 222, 143 S.E. 459 (1928); *Atlanta & Lawry Nat'l Bank v. First Nat'l Bank*, 38 Ga. App. 768, 145 S.E. 521 (1928); *Carter v. Marble Prods., Inc.*, 171 Ga. 49, 154 S.E. 891 (1930); *Northwestern Mut. Life Ins. Co. v. Dean*, 43 Ga. App. 67, 157 S.E. 878 (1931); *Buffalo Forge Co. v. Southern Ry.*, 43 Ga. App. 445, 159 S.E. 301 (1931); *Shaw v. Musgrove*, 175 Ga. 806, 166 S.E. 196 (1932); *Henry & Co. v. Johnson*, 178 Ga. 541, 173 S.E. 659 (1934); *Tyus v. Duke*, 178 Ga. 800, 174 S.E. 527 (1934); *Taber Mill v. Southern*

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- Brighton Mills, 49 Ga. App. 390, 175 S.E. 665 (1934); Simmons v. Hall, 180 Ga. 492, 179 S.E. 98 (1935); Mitchell v. Federal Life Ins. Co., 57 Ga. App. 206, 194 S.E. 921 (1938); Trippe v. Crescent Farms, Inc., 58 Ga. App. 1, 197 S.E. 330 (1938); Beavers v. Le Sueur, 188 Ga. 393, 3 S.E.2d 667 (1939); Finn v. Dobbs, 188 Ga. 602, 4 S.E.2d 655 (1939); Daughtry v. Cobb, 189 Ga. 113, 5 S.E.2d 352 (1939); Armistead v. City of Atlanta, 61 Ga. App. 831, 7 S.E.2d 409 (1940); In re Cent. of Ga. Ry., 47 F. Supp. 786 (S.D. Ga. 1942); Hall v. Browning, 71 Ga. App. 835, 32 S.E.2d 424 (1944); Robinson v. Washington Nat'l Ins. Co., 72 Ga. App. 19, 32 S.E.2d 855 (1945); Etheridge v. Gillen, 199 Ga. 242, 34 S.E.2d 105 (1945); McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839 (1945); Wood v. Claxton, 199 Ga. 809, 35 S.E.2d 455 (1945); Hoffman v. Louis L. Battey Post No. 4 of Am. Legion, 74 Ga. App. 403, 39 S.E.2d 889 (1946); Dorsey v. Clements, 202 Ga. 820, 44 S.E.2d 783 (1947); Russell v. Smith, 77 Ga. App. 70, 47 S.E.2d 772 (1948); Sampson v. General Elec. Supply Corp., 78 Ga. App. 2, 50 S.E.2d 169 (1948); Shippen v. Georgia Better Foods, Inc., 79 Ga. App. 813, 54 S.E.2d 704 (1949); Garden City Cab Co. v. Fidelity & Cas. Co., 80 Ga. App. 850, 57 S.E.2d 683 (1950); Blanchard & Calhoun Realty Co. v. Fogel, 207 Ga. 602, 63 S.E.2d 382 (1951); Sachs v. Jones, 83 Ga. App. 441, 63 S.E.2d 685 (1951); Ramsay v. Sims, 209 Ga. 228, 71 S.E.2d 639 (1952); Moore v. Johnson, 89 Ga. App. 164, 78 S.E.2d 823 (1953); Sawan, Inc. v. American Cyanamid Co., 211 Ga. 764, 88 S.E.2d 152 (1955); American Aviation & Gen. Ins. Co. v. Georgia Telco Credit Union, 223 F.2d 206 (5th Cir. 1955); Pilot Life Ins. Co. v. Morgan, 94 Ga. App. 394, 94 S.E.2d 765 (1956); Smith v. Aggregate Supply Co., 214 Ga. 20, 102 S.E.2d 539 (1958); Trust Co. v. S. & W. Cafeteria, 97 Ga. App. 268, 103 S.E.2d 63 (1958); West End Cab Co. v. Stovall, 98 Ga. App. 724, 106 S.E.2d 810 (1958); Nikas v. Hindley, 99 Ga. App. 194, 108 S.E.2d 98 (1959); Dyal v. Union Bag-Camp Paper Corp., 263 F.2d 387 (5th Cir. 1959); Bridges v. Bridges, 216 Ga. 808, 120 S.E.2d 180 (1961); Gulbenkian v. Patcraft Mills, Inc., 104 Ga. App. 102, 121 S.E.2d 179 (1961); National Life & Accident Ins. Co. v. Wilson, 106 Ga. App. 504, 127 S.E.2d 306 (1962); King v. King, 218 Ga. 534, 129 S.E.2d 147 (1962); Liberty Mut. Ins. Co. v. Mead Corp., 219 Ga. 6, 131 S.E.2d 534 (1963); Moore v. Allstate Ins. Co., 108 Ga. App. 60, 131 S.E.2d 834 (1963); Johnson v. Atlanta Auto Auction, Inc., 108 Ga. App. 735, 134 S.E.2d 538 (1963); Henson v. Airways Serv., Inc., 220 Ga. 44, 136 S.E.2d 747 (1964); Peacock Constr. Co. v. West, 111 Ga. App. 604, 142 S.E.2d 332 (1965); Davis v. Ford, 112 Ga. App. 175, 144 S.E.2d 456 (1965); Holland v. Holland, 221 Ga. 418, 144 S.E.2d 753 (1965); Chambliss v. Hall, 113 Ga. App. 96, 147 S.E.2d 334 (1966); Louisville & N.R.R. v. Central of Ga. Ry., 113 Ga. App. 808, 149 S.E.2d 730 (1966); Village Enters., Inc. v. Georgia R.R. Bank & Trust Co., 117 Ga. App. 773, 161 S.E.2d 901 (1968); Kraft Foods v. Disheroon, 118 Ga. App. 632, 165 S.E.2d 189 (1968); Robert & Co. Assocs. v. Pinkerton & Laws Co., 120 Ga. App. 29, 169 S.E.2d 360 (1969); Tudor v. American Employers Ins. Co., 121 Ga. App. 240, 173 S.E.2d 403 (1970); Hardee's Food Sys. v. Bowers, 121 Ga. App. 316, 173 S.E.2d 439 (1970); Fidelity Bankers Life Ins. Co. v. Renew, 121 Ga. App. 883, 176 S.E.2d 103 (1970); Lovable Co. v. Honeywell, Inc., 431 F.2d 668 (5th Cir. 1970); Lunsford v. State Nat'l Sec., Inc., 124 Ga. App. 804, 186 S.E.2d 320 (1971); Ranger Ins. Co. v. Culberson, 454 F.2d 857 (5th Cir. 1971); Continental Cas. Co. v. Continental Rent-A-Car of Ga., Inc., 349 F. Supp. 666 (N.D. Ga. 1972); Redman Dev. Corp. v. Piedmont Heating & Air Conditioning, Inc., 128 Ga. App. 447, 197 S.E.2d 167 (1973); Twisdale v. Georgia R.R. Bank & Trust Co., 129 Ga. App. 18, 198 S.E.2d 396 (1973); Southeastern Fid. Ins. Co. v. Fluellen, 128 Ga. App. 877, 198 S.E.2d 407 (1973); Carsello v. Touchton, 231 Ga. 878, 204 S.E.2d 589 (1974); Pitman v. Griffeth, 131 Ga. App. 489, 206 S.E.2d 115 (1974); Crosby v. Bloomfield Developers, Inc., 232 Ga. 733, 208 S.E.2d 789 (1974); Rodgers v. Rodgers, 234 Ga. 463, 216 S.E.2d 322 (1975); Yancey Bros. Co. v. Sure Quality Framing Contractors, 135 Ga. App. 465, 218 S.E.2d 142 (1975); Nationwide Mut. Fire Ins. Co. v. Collins, 136 Ga. App. 671, 222 S.E.2d 828 (1975); Lindgren v. Dowis, 236 Ga. 278, 223 S.E.2d 682 (1976); Cincinnati Ins. Co. v. Gwinnett Furn. Mart, Inc., 138 Ga. App. 444, 226 S.E.2d 283 (1976); Indian Trail Village, Inc. v. Smith, 139 Ga. App. 691, 229 S.E.2d

508 (1976); Henderson Mill, Ltd. v. McConnell, 237 Ga. 807, 229 S.E.2d 660 (1976); Hemphill v. Taff, 242 Ga. 212, 248 S.E.2d 621 (1978); General Fin. Corp. v. Sprouse, 577 F.2d 989 (5th Cir. 1978); Glenn v. Maddux, 149 Ga. App. 158, 253 S.E.2d 835 (1979); Russell v. Fulton Nat'l Bank, 247 Ga. 556, 276 S.E.2d 641 (1981); Barkley-Cupit Enters., Inc. v. Equitable Life Assurance Soc'y, 157 Ga. App. 138, 276 S.E.2d 650 (1981); Lennon v. Aeck Assocs., 157 Ga. App. 294, 277 S.E.2d 289 (1981); Alley v. Great Am. Ins. Co., 160 Ga. App. 597, 287 S.E.2d 613 (1981); O.H. Carter Co. v. Buckner, 160 Ga. App. 627, 287 S.E.2d 636 (1981); Merrill Lynch, Pierce, Fenner & Smith v. Stidham, 506 F. Supp. 1182 (M.D. Ga. 1981); Head v. Hook, 248 Ga. 818, 285 S.E.2d 718 (1982); Southern Fed. Sav. & Loan Ass'n v. Lyle, 249 Ga. 284, 290 S.E.2d 455 (1982); City of Acworth v. John J. Harte Assocs., 165 Ga. App. 438, 301 S.E.2d 499 (1983); Rodgers v. Georgia Tech Athletic Ass'n, 166 Ga. App. 156, 303 S.E.2d 467 (1983); Saf-T-Green of Atlanta, Inc. v. Lazenby Sprinkler Co., 169 Ga. App. 249, 312 S.E.2d 163 (1983); Willis v. Farmers Fertilizer & Milling Co., 172 Ga. App. 610, 323 S.E.2d 829 (1984); Georgia Farm Bureau Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 173 Ga. App. 844, 328 S.E.2d 737 (1985); Smithloff v. Benson, 173 Ga. App. 870, 328 S.E.2d 759 (1985); Milner v. Bivens, 255 Ga. 49, 334 S.E.2d 288 (1985); Hubert v. Turner Outdoor Adv., Ltd., 178 Ga. App. 789, 344 S.E.2d 542 (1986); Capital Ford Truck Sales, Inc. v. United States Fire Ins. Co., 180 Ga. App. 413, 349 S.E.2d 201 (1986); Wilson v. Southern Gen. Ins. Co., 180 Ga. App. 589, 349 S.E.2d 544 (1986); McClintock v. Wellington Trade, Inc., 187 Ga. App. 898, 371 S.E.2d 893 (1988); Giddens Constr. Co. v. Fickling & Walker Co., 188 Ga. App. 558, 373 S.E.2d 792 (1988); Ouseley v. Foss, 188 Ga. App. 766, 374 S.E.2d 534 (1988); Holyoke Mut. Ins. Co. v. Cherokee Ins. Co., 192 Ga. App. 757, 386 S.E.2d 524 (1989); Rustin v. State, 192 Ga. App. 775, 386 S.E.2d 535 (1989); Buckeye Cellulose Corp. v. Sutton Constr. Co., 907 F.2d 1090 (11th Cir. 1990); McDowell v. Lackey, 200 Ga. App. 506, 408 S.E.2d 481 (1991); Progressive Preferred Ins. Co. v. Brown, 261 Ga. 837, 413 S.E.2d 430 (1992); Gray v. Higgins, 205 Ga. App. 52, 421 S.E.2d

341 (1992); Robert Half of Atlanta, Inc. v. Diversitech Corp., 208 Ga. App. 427, 430 S.E.2d 800 (1993); Hamilton v. Advance Leasing & Rent-A-Car, Inc., 208 Ga. App. 848, 432 S.E.2d 559 (1993); Donohue v. Green, 209 Ga. App. 381, 433 S.E.2d 431 (1993); Klein v. Williams, 212 Ga. App. 39, 441 S.E.2d 270 (1994); Watson v. Union Camp Corp., 861 F. Supp. 1086 (S.D. Ga. 1994); Westminster Group, Inc. v. Perimeter 400 Partners, 218 Ga. App. 293, 460 S.E.2d 827 (1995); Bituminous Cas. Corp. v. Advanced Adhesive Tech., Inc., 73 F.3d 335 (11th Cir. 1996); Park 'N Go of Ga., Inc. v. United States Fid. & Guar. Co., 266 Ga. 787, 471 S.E.2d 500 (1996); Johnson v. Oconee State Bank, 226 Ga. App. 617, 487 S.E.2d 369 (1997); Loyal v. Norfolk S. Corp., 234 Ga. App. 716, 507 S.E.2d 499 (1998); Dunn v. Royal Maccabees Life Ins. Co., 242 Ga. App. 903, 531 S.E.2d 761 (2000); Presidential Fin. Corp. v. Francis A. Bonanno, Inc., 244 Ga. App. 430 (2000); Malcom v. Newton County, 244 Ga. App. 464, 535 S.E.2d 824 (2000); BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., 97 F. Supp. 2d 1363 (N.D. Ga. 2000); Tucker Materials, Inc. v. Devito Contracting & Supply, Inc., 245 Ga. App. 309, 535 S.E.2d 858 (2000); Fontaine v. Sidelines IV, Inc., 245 Ga. App. 681, 538 S.E.2d 137 (2000); Choate Constr. Co. v. Ideal Elec. Contractors, 246 Ga. App. 626, 541 S.E.2d 435 (2000); Booker v. Hall, 248 Ga. App. 639, 548 S.E.2d 391 (2001); Balata Dev. Corp. v. Reed, 249 Ga. App. 528, 548 S.E.2d 668 (2001); Pfeiffer v. Georgia DOT, 250 Ga. App. 643, 551 S.E.2d 58 (2001); Sharple v. Airtouch Cellular of Ga., Inc., 250 Ga. App. 216, 551 S.E.2d 87 (2001); AMB Property, L.P. v. MTS, Inc., 250 Ga. App. 513, 551 S.E.2d 102 (2001); Hibbard v. P.G.A., Inc., 251 Ga. App. 68, 553 S.E.2d 371 (2001); Emanuel Tractor Sales, Inc. v. DOT, 257 Ga. App. 360, 571 S.E.2d 150 (2002); Weed Wizard Acquisition Corp. v. A.A.B.B., Inc., 201 F. Supp. 2d 1252 (N.D. Ga. 2002); Eckerd Corp. v. Alterman Real Estate, Ltd., 266 Ga. App. 860, 598 S.E.2d 510 (2004); Adeduntan v. Hosp. Auth. of Clarke County, No. 3:04-CV-65 (CDL), 2005 U.S. Dist. LEXIS 18281 (M.D. Ga. Aug. 25, 2005); Hardnett v. Ogundele, 291 Ga. App. 241, 661 S.E.2d 627 (2008); IP Co., LLC v. Cellnet Tech., Inc., No. 1:06-CV-03048-JEC, 2008 U.S. Dist. LEXIS 55222 (N.D. Ga. July 17,

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2008); *General Steel, Inc. v. Delta Bldg. Sys.*, 297 Ga. App. 136, 676 S.E.2d 451 (2009); *Owners Ins. Co. v. Smith Mech. Contrs., Inc.*, 285 Ga. 807, 683 S.E.2d 599 (2009).

Ascertaining Intent of Parties

Contract free from ambiguity is conclusively presumed to express intention of parties. *National Manufacture & Stores Corp. v. Dekle*, 48 Ga. App. 515, 173 S.E. 408 (1934).

Ambiguity in contract is resolved by determining intention of parties, which is question for jury. *Roberts v. Employers Ins. Co.*, 79 Ga. App. 611, 54 S.E.2d 465 (1949).

Substantial purpose of contract to be looked to rather than details for effectuating such purpose. — In construing contracts, it is important to look to substantial purpose which must be supposed to have influenced minds of parties, rather than at details of making such purpose effectual. *Illges v. Dexter*, 77 Ga. 36 (1886).

In ascertaining the intent of the parties, the court should ascertain the parties' intent after considering the whole agreement and interpret each of the provisions so as to harmonize with the others; in construing contracts, it is important to look to the substantial purpose which must be supposed to have influenced the minds of the parties, rather than at the details of making such purpose effectual. *Friedman v. Friedman*, 259 Ga. 530, 384 S.E.2d 641 (1989), overruled on other grounds, 268 Ga. 566, 492 S.E.2d 201 (1997).

Intention of parties is determined from consideration of entire contract. *Spooner v. Dykes*, 174 Ga. 767, 163 S.E. 889 (1932); *Romine, Inc. v. Savannah Steel Co.*, 117 Ga. App. 353, 160 S.E.2d 659 (1968).

Entire writing is to be taken into consideration in ascertaining intent of parties and, if the intention can be ascertained, that intention should govern. *Indian Trail Village, Inc. v. Smith*, 152 Ga. App. 301, 262 S.E.2d 581 (1979).

In construction of contract, cardinal rule is to ascertain intention of parties, and to this end the whole contract must be considered. *Hull v. Lewis*, 180 Ga. 721, 180 S.E. 599 (1935).

Two Chapter 13 debtors' objection to a creditor's claim, which lumped both a se-

cured amount and an unsecured amount into one claim, was well-taken; when the canons of construction that applied to such contracts, including that concerning ambiguity in O.C.G.A. § 13-2-3 and that concerning the parties' intent in O.C.G.A. § 13-2-2 were applied to the two agreements under which the creditor had financed the debtors' purchase of a house trailer and then extended additional credit to the debtors to allow them to move the trailer to a new location, it was clear that only the original transaction was intended to result in a secured obligation. *In re Toland*, No. 04-54126-JDW, 2005 Bankr. LEXIS 3139 (Bankr. M.D. Ga. Aug. 8, 2005).

Language of contract should be construed in its entirety, and should receive reasonable construction, and not be extended beyond what is fairly within the contract's terms. *Cutledge v. Aetna Life Ins. Co.*, 53 Ga. App. 473, 186 S.E. 208 (1936).

Language used by parties is of primary consideration in determining intention. *Romine, Inc. v. Savannah Steel Co.*, 117 Ga. App. 353, 160 S.E.2d 659 (1968).

Language which parties have used will be looked to for purpose of finding the parties' intention. *Goff v. Cooper*, 110 Ga. App. 339, 138 S.E.2d 449 (1964).

In determining intention of parties courts must first look to language of instrument and, if that language is clear, courts need look no further in ascertaining such intention. *Undercofler v. Whiteway Neon Ad, Inc.*, 114 Ga. App. 644, 152 S.E.2d 616 (1966).

To ascertain intent, court to take whole instrument together and consider with surrounding circumstances. — Contract to be construed as a whole, and in light of law and circumstances. *Oakland Motor Car Co. v. Rippey Motor Co.*, 41 Ga. App. 784, 154 S.E. 823 (1930).

Fundamental rule is to give instrument that meaning which will best carry into effect intent of parties. In doing this the court is to take whole of instrument together, and to consider this with surrounding circumstances. *Brooke v. Phillips Petro. Co.*, 113 Ga. App. 742, 149 S.E.2d 511 (1966).

To carry into effect intent of parties is object of rules of interpretation, and in doing this, court is to take whole of instru-

ment together and to consider this with surrounding circumstances. *Paul v. Paul*, 235 Ga. 382, 219 S.E.2d 736 (1975).

Language and facts and circumstances surrounding contract's execution considered in ascertaining intent. — To ascertain intention of parties, language of agreement should be considered in light of attendant and surrounding circumstances. Court should place itself as nearly as possible in situation of parties in seeking true meaning and correct application of language of contract. *Aetna Life Ins. Co. v. Padgett*, 49 Ga. App. 666, 176 S.E. 702 (1934).

All contracts are to be construed according to intention of parties, and that intention is to be arrived at by consideration of wording employed in contract in connection with all facts and circumstances surrounding parties at time of making of contract. *Griffin v. Burdine*, 89 Ga. App. 391, 79 S.E.2d 562 (1953).

Conduct as evidence of intent. — Where two individuals moved into the premises during the term of the former occupant's lease and the landlord openly elected to acknowledge the individuals as tenants occupying under the lease, at that point all became bound by the lease even though the landlord did not sign the document which expressed the agreement. *Allen v. Peachtree Airport Park Joint Venture*, 231 Ga. App. 549, 499 S.E.2d 690 (1998).

Although the parties in drafting Amendment 3 apparently did not contemplate that rezoning might be denied, it was apparent from the conduct of both parties that the parties intended that the amendment provide for an inspection period of 45 days after the county's action on the zoning request. *Ashkouti v. Widener*, 231 Ga. App. 539, 500 S.E.2d 337 (1998).

Consideration of correspondence proper. — In construing contract it is proper, in order to arrive at intention of parties, to consider correspondence between them leading up to and consummating contract. *Caddick Milling Co. v. Moultrie Grocery Co.*, 22 Ga. App. 524, 96 S.E. 583 (1918).

It is proper to consider correspondence between parties leading up to contract in ascertaining intention. *Romine, Inc. v. Savannah Steel Co.*, 117 Ga. App. 353, 160 S.E.2d 659 (1968).

Prior representations and negotiations are merged into written contract. — All perti-

nent representations and negotiations prior to the preparation and execution of a written contract are merged therein; and if the terms of the written contract are clear and unambiguous, the court will look to it and to it alone to find the intention of the parties with respect thereto. *Hartrampf v. Citizens & S. Realty Investors*, 157 Ga. App. 879, 278 S.E.2d 750 (1981).

Words susceptible of various interpretations construed as it is reasonable to suppose parties intended. — Words susceptible of more extensive or restrictive signification must be taken in sense which best effectuates what it is reasonable to suppose was intention of parties. *Strickland v. Georgia Cas. & Sur. Co.*, 224 Ga. 487, 162 S.E.2d 421 (1968).

Omitted form paragraphs are parts of written document and serve to explain intent of parties, just as typewritten or handwritten statements serve to clarify or to change sense of printed paragraphs. *Ranger Ins. Co. v. Culberson*, 454 F.2d 857 (5th Cir. 1971), cert. denied, 407 U.S. 916, 92 S. Ct. 2440, 32 L. Ed. 2d 691 (1972).

Unambiguous terms of insurance contract to be taken in plain, ordinary, and popular sense. — Contracts of insurance, like other contracts are to be construed according to sense and meaning of terms which parties have used, and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense. *Wallace v. Virginia Sur. Co.*, 80 Ga. App. 50, 55 S.E.2d 259 (1949).

Ambiguous terms of insurance contract. — After determining that the definition of the term "total disability" in two of an insurer's disability policies was ambiguous after applying the common and ordinary meanings of the words used in the definition to ascertain the intent of the parties pursuant to O.C.G.A. § 13-2-3 and construing the term against the insurer, the insured was not required to show that the insured was unable to perform all of the major duties of the insured's occupation to show that the insured was totally disabled. *Putnal v. Guardian Life Ins. Co. of Am.*, No. 5:04-CV-130 (HL), 2006 U.S. Dist. LEXIS 70931 (M.D. Ga. Sept. 29, 2006).

Insurance coverage of mobile boom truck. — Where the mobile boom truck was the only vehicle covered by an insurance policy

Ascertaining Intent of Parties (Cont'd)

it was logically inconsistent to consider that the vehicle was excluded from coverage by a clause which excepted vehicles maintained solely for transportation of special equipment. *U.S. Fid. & Guar. Co. v. Gillis*, 164 Ga. App. 278, 296 S.E.2d 253 (1982).

Corporation's general liability insurance policy. — Parties' clear and unambiguous intention was to exclude the type of injury that occurred to the fitness club's patron from coverage under their commercial general liability policy and since the language of the policy clearly expressed such an exclusion, the trial court erred in denying the insurance company's motion for summary judgment on the company's claim that it did not have a duty to defend and indemnify the fitness club in the patron's suit against the fitness club for an injury the patron sustained in using the club's exercise machine. *York Ins. Co. v. Houston Wellness Ctr., Inc.*, 261 Ga. App. 854, 583 S.E.2d 903 (2003).

Parties intended to name employer as additional insured. — As a renewal policy was issued while an independent contractor agreement was still in force, and that agreement obliged the insured to name an employer as an additional insured on the insured's commercial general liability policy, the court concluded as a matter of law that the parties intended that the employer be named as an additional insured on the renewal policy, even though it was not clearly named therein. *Grange Mut. Cas. Co. v. Snipes*, 298 Ga. App. 405, 680 S.E.2d 438 (2009).

Jury question. — In unique instances, an issue to resolve the ambiguity and to ascertain the true intent of the parties should be sent to the jury under proper instructions. *American Honda Motor Co. v. Williams & Assocs.*, 208 Ga. App. 636, 431 S.E.2d 437 (1993).

Validating Construction Preferred

Construction giving effect to all terms of contract favored over one which would nullify part. — In ascertaining intent, that construction will be favored which gives meaning and effect to all of terms of contract over that which nullifies and renders meaningless part of language therein contained; and in cases of doubt, contract will be construed

most strongly against one who prepared instrument. *Paul v. Paul*, 235 Ga. 382, 219 S.E.2d 736 (1975).

When contract susceptible of construction showing lawful or unlawful intent, former to be favored. — Intention contrary to law should not be read into contract by placing such construction upon provision therein, when provision is just as susceptible of construction that will show lawful intention. *Pollard v. Congress Fin. Corp.*, 153 Ga. App. 357, 265 S.E.2d 296 (1980).

Right of first refusal. — A right of first offer (RFO) did not require seller's notice to be sent upon plaintiff executrix's formation of a desire to sell the property at issue for two reasons: (1) a contrary interpretation was contrary to the obvious intent of the parties at the time the parties entered into the sale agreement at issue, O.C.G.A. § 13-2-3; and (2) a contrary construction would have rendered a portion of the contract meaningless, O.C.G.A. § 13-2-2(4). *Stephens v. Trust for Pub. Land*, 479 F. Supp. 2d 1341 (N.D. Ga. 2007).

Construction confining operation to facts and circumstances reasonably anticipated, favored over one rendering contract speculative. — If contract is subject to two constructions, one which would render it highly speculative and other which would confine its operation to facts and circumstances more reasonably to be anticipated, the latter should be adopted as the one more likely in harmony with the intention of the parties who presumably would not desire in the contract any element of chance that might reasonably be avoided, but would prefer to agree with reference to conditions about which an intelligent judgment might be exercised. *Allen v. Sams*, 31 Ga. App. 405, 120 S.E. 808 (1923), cert. denied, 31 Ga. App. 811, (1924).

Two inconsistent clauses in deed each to be given effect, if possible. — Trend of modern authorities is toward restriction of rule that where there are two utterly inconsistent clauses in deed, former must prevail, and each part of deed is given effect, if possible. *Skinner v. Bearden*, 77 Ga. App. 325, 48 S.E.2d 574 (1948).

Strictness of ancient rule as to repugnancy in deeds is much relaxed, so that in this, as in other cases of construction, if clauses or parts are conflicting or repugnant, intention

is gathered from whole instrument. *Collinsville Granite Co. v. Phillips*, 123 Ga. 830, 51 S.E. 666 (1905).

Courts to construe deeds, whenever possible, so no part or words are rejected. — One of the most important rules in construction of deeds is to so construe the deeds that no part or words shall be rejected. Courts lean to such construction as reconciles different parts, and reject construction which leads to contradiction. Of course, a deed or other contract should be construed as a whole, and in its entirety, in order to find true intention of parties. *Skinner v. Bearden*, 77 Ga. App. 325, 48 S.E.2d 574 (1948).

Application

Words construed in sense in which employed, irrespective of proper, logical meaning. — Words in contract to be construed in sense in which the words are apparently mutually employed by contracting parties, irrespective of their proper and logical meaning. *Brooks v. Folds*, 33 Ga. App. 409, 126 S.E. 554 (1925).

Language construed in accord with Supreme Court's construction, prior to contract's execution, of same language. — When deed in question, in suit involving its construction was executed after decision of Supreme Court construing same language used in same way in a deed, it should be assumed that parties in using identical provision there construed, did so in light of ruling there made, such construction of the provision is not thought to change or alter contract made by parties, even assuming that otherwise, terms used might normally have a different meaning. *Heist v. Dunlap & Co.*, 193 Ga. 462, 18 S.E.2d 837 (1942).

Absent clear expression of contrary intent, party not allowed advantage of party's own wrong. — Contract will not be construed to authorize party to take advantage of that party's own wrong, unless it is plain and manifest that such was intention of parties. *National Sur. Corp. v. Algernon Blair, Inc.*, 114 Ga. App. 30, 150 S.E.2d 256, rev'd, 222 Ga. 672, 151 S.E.2d 724 (1966).

Ambiguous terms required resort to ascertaining parties' intent. — Both the terms "approximately" and "firm order" in a sales contract were ambiguous in that their indistinctiveness made their meaning uncertain and capable of more than one reason-

able definition. These ambiguities rendered it appropriate for the trial court, and trier of fact, to consider parol evidence to determine the meaning of those material terms and thus the true agreement between the parties. *Wahnschaff Corp. v. O.E. Clark Paper Box Co.*, 166 Ga. App. 242, 304 S.E.2d 91 (1983).

Court erred in substituting court's own legal meaning of ambiguous term. — District court made a fact finding that a receiver orally agreed to study an interest claim of a note payee and orally agreed to pay the note if the interest obligation was a "valid non-contingent balance sheet liability." The court then erroneously substituted what the court deemed to be the legal meaning of that term, instead of determining that the term was ambiguous, and then determining what the parties intended. *Georgia R.R. Bank & Trust Co. v. FDIC*, 758 F.2d 1548 (11th Cir. 1985).

Formal power of attorney, executed with deliberation, subject to strict construction; general terms in the power of attorney are restricted to consistency with controlling purpose, and will not extend authority so as to add new and distinct powers different from special powers expressly delegated. *Martin v. McLain*, 51 Ga. App. 336, 180 S.E. 510 (1935).

Settlement agreement is a contract, the construction of which is a question of law for the court. *World Bazaar Franchise Corp. v. CCC Assocs. Co.*, 167 Bankr. 985 (Bankr. N.D. Ga. 1994).

Note stipulating payment of certain sum means payment in money. — Note in which it is stipulated that certain sum will be paid means that this sum will be paid in money, and neither maker nor endorser will be heard to plead or prove that there was parol agreement by which note was to be satisfied with nothing else than money. *Kerr v. Holder*, 13 Ga. App. 9, 78 S.E. 682 (1913).

Document entitled "security agreement." — Though a document was entitled, and, did in fact, constitute, a "security agreement", the language of the agreement combined with other admissible evidence, was sufficient indicia of a loan contract with such definite terms as to be held enforceable. *Nelson v. Nelson*, 176 Ga. App. 107, 335 S.E.2d 411 (1985).

Section limits on rule that will to be construed under law effective at testator's

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death. — A will is to be construed under the law in effect at testator's death, but this is only one of the rules of construction and is applicable only where no expression on subject was made by testator. *Carnegie v. First Nat'l Bank*, 218 Ga. 585, 129 S.E.2d 780 (1963).

Provision conditioning subcontractor's right to payment upon payment by owner valid if intention clearly expressed. — Provision in contract may make payment by owner condition precedent to subcontractor's right to payment if contract between general contractor and subcontractor should contain express condition clearly showing that to be intention of parties. *Sasser & Co. v. Griffin*, 133 Ga. App. 83, 210 S.E.2d 34 (1974).

Construction of incontestability clause in insurance contract. — See *Penn Mut. Life Ins. Co. v. Childs*, 65 Ga. App. 468, 16 S.E.2d 103 (1941).

Construction of railroad right of way grant. — See *Atlantic C.L.R.R. v. Sweat*, 177 Ga. 698, 171 S.E. 123 (1933).

Construction of restrictive covenants. — Because a driveway was a "structure" within the common meaning of that term as well as the meaning of the restrictive covenants, pursuant to O.C.G.A. §§ 13-2-2(2) and 13-2-3, the trial court did not err in finding as a matter of law that a homeowner was required to seek the homeowner association's approval before resurfacing a driveway; consequently, the trial court properly granted the homeowner association's motion for an injunction requiring the homeowner to restore the driveway to the driveway's original condition. *Mitchell v. Cambridge Prop. Owners Ass'n*, 276 Ga. App. 326, 623 S.E.2d 511 (2005).

Business liability policy. — Under a business liability policy, the parties are presumed to have in contemplation the nature and character of the business, and to have foreseen the usual course and manner of conducting the business. Thus, in construing a policy of insurance so as to arrive at the true intention of the parties, the ordinary legal and literal meaning of the words must be given effect, where it is possible to do so without destroying the substantial purpose and effect of the contract. *Travelers Indem.*

Co. v. Nix, 644 F.2d 1130 (5th Cir.), cert. denied, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

Indemnification clause. — Based on contractual rules of construction pursuant to O.C.G.A. § 13-2-3, because a purchase agreement between a retail store and a fan company indicated that the company was not obligated to indemnify the store for the store's negligent conduct, and a later purchase agreement was inapplicable to a prior purchase, the trial court properly granted partial summary judgment to the company and denied summary judgment to the store on the indemnification claim; the company had commenced a voluntary recall of one of the company's products that created a fire hazard, but the store had negligently failed to provide the company with the name of a particular purchaser, which resulted in no recall notice being sent to the purchaser and subsequently, a house fire which was caused by the product resulted in an individual's death. *Serv. Merch. Co. v. Hunter Fan Co.*, 274 Ga. App. 290, 617 S.E.2d 235 (2005).

Intent of parties to insurance contract determinative of sense in which terms employed are used. — An insurance policy is a contract of indemnity for loss, and intention of parties, if it can be ascertained, must determine sense in which terms employed are used. This intention of parties must be sought for in accordance with true meaning and spirit in which the agreement was made and expressed in written instrument, and ordinary and legal meaning of words employed must be taken into consideration. *Wallace v. Virginia Sur. Co.*, 80 Ga. App. 50, 55 S.E.2d 259 (1949).

Ambiguous insurance policy construed so as to effectuate intent of insured known to insurer. — Where evidence in suit by insured against insurance company indicates that intention of insured was to insure semi-trailer truck involved in accident, and that this intention was known to company through its agent who saw truck and took its motor number which was inserted in policy, insurance contract would be construed to include semi-trailer truck, since contract was ambiguous, even though company insisted the company's policy did not cover semi-trailer trucks. *American Cas. Co. v. Callaway*, 75 Ga. App. 799, 44 S.E.2d 400 (1947).

Insurance policy intended to cover insured using nonowned auto. — Despite the well-known maxim, “coverage follows the car,” the language in the insurance policy relating to the insured’s use of a nonowned auto (“... coverage does apply while you ... are using a private passenger auto ...”) clearly showed an intent to cover the insured in that regard, in addition to the protection existing where the person insured was using an insured auto. *Allstate Ins. Co. v. Estell*, 171 Ga. App. 773, 320 S.E.2d 631 (1984).

If insurance policy’s date of issue obliterated or illegible, jury to determine proper date. — When on trial of case it appears that date of issue written on policy of insurance has become so obscured or obliterated that it is illegible, it is for jury to determine from evidence introduced for that purpose on what date policy was issued. *Life & Cas. Ins. Co. v. Monday*, 85 Ga. App. 659, 69 S.E.2d 910 (1952).

Trial court erred in substituting a definition for one contained in insurance policy. — Since an insurance policy plainly defined the term “vacant,” the trial court was not authorized to substitute any other definition of that term for the one specified in the insurance policy. *Sorema N. Am. Reinsurance Co. v. Johnson*, 258 Ga. App. 304, 574 S.E.2d 377 (2002).

Insurance policies, each containing escape clauses in event other insurance available, to be read together. — Just as contract must be read as a whole, two or more insurance contracts from different companies applicable to single occurrence, each containing escape clauses in event of other insurance covering same occurrence, or each limited to excess of other policies covering same occurrence must be read together in order to arrive at true interpretation. *Southern Home Ins. Co. v. Willoughby*, 124 Ga. App. 162, 182 S.E.2d 910 (1971).

When insurance policies contain escape clauses in event other insurance available, liability of each prorated. — When two or more automobile liability insurance policies afford basic coverage, but each contains a clause attempting to either escape from liability or become merely excess coverage if there is other available insurance, complete and literal intent of each cannot be given effect, but general intent not to be liable for entire loss is achieved by prorating liability as

provided by respective policies. *Southern Home Ins. Co. v. Willoughby*, 124 Ga. App. 162, 182 S.E.2d 910 (1971).

Law of state where insurance agreements delivered applied. — When insurance agreements insuring properties in several states were delivered in Georgia and written choice of law provisions were not included in the agreements, Georgia law controlled interpretation of the agreements. *Boardman Petro., Inc. v. Federated Mut. Ins. Co.*, 926 F. Supp. 1566 (S.D. Ga. 1995).

Right to cancellation. — Since the final item in a contract was that the agreement would continue in effect with the right of either party to cancel by delivering to the other written notice at least 30 days prior to discontinuance of service, the contract contained a right for either party to cancel upon notice. *F & F Copiers, Inc. v. Kroger Co.*, 194 Ga. App. 737, 391 S.E.2d 711 (1990).

Construction of “and all renewals thereof” in insurance policy. — Within a viatical settlement agreement between an assigned beneficiary and the insured, the phrase in the assignment “and all renewals thereof” entitling the beneficiary to the insured’s group life insurance proceeds and proceeds from renewal policies, did not apply to a subsequent replacement policy the insured obtained, as that language clearly expressed the insured’s intent and was not ambiguous. *Livoti v. Aycok*, 263 Ga. App. 897, 590 S.E.2d 159 (2003).

Construction of surety contract. — Surety prevailed regarding a five year warranty on the roofs of certain newly constructed buildings because the plain language of the bond stated that the bond covered the roofs only for the five years after an architect issued a final certificate, and the architect had refused to issue a final certificate since the work had not been completed. *Ga. State Fin. v. XL Specialty Ins. Co.*, No. A10A0504, 2010 Ga. App. LEXIS 380 (Apr. 7, 2010).

Construction of real estate contract. — Grant of summary judgment for the realty company was error since the contract was ambiguous as to whether the real estate commission was refundable once the property sale failed to close, and a question of material fact existed as to the parties’ intent on that issue; the issue could not be resolved by application of the rules of contract construction, O.C.G.A. § 13-2-3, nor by parol

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evidence, O.C.G.A. § 13-2-2. *Krogh v. Pargar, LLC*, 277 Ga. App. 35, 625 S.E.2d 435 (2005).

In an action filed by a trust and its trustee against a school board alleging the breach of a real estate contract, or in the alternative, specific performance of the contract at a reduced purchase price, summary judgment in favor of the school board was reversed on the breach of contract claim; however, summary judgment on the specific performance claim was affirmed, as the trust failed to tender the full purchase price, which was a prerequisite to a specific performance demand, the trust was not excused from doing so, and a tender would not have been futile. *Peaches Land Trust v. Lumpkin County Sch. Bd.*, 286 Ga. App. 103, 648 S.E.2d 464 (2007).

Construction of rent increase in lease. — Intention of the parties to a lease was to provide for a rent increase, the amount being dependent on whether the property was rezoned, but nothing in the lease required the lessors to pursue rezoning; the lessee made an election between the two lease options addressing the rent increase when it started to pay rent in accordance with calculations provided for in the lease, and that option provided for a smaller rent increase but gave the lessors the right to terminate with 60 days notice. *J.W. Truck Sales, Inc. v. Hartrampf Outdoor, LLLP*, 279 Ga. App. 544, 631 S.E.2d 750 (2006).

Contemporaneous written agreements properly construed together. — In a breach of contract action arising from a guaranty agreement between a guarantor and a retail space owner, the trial court properly granted summary judgment in the owner's favor, as it properly construed contemporaneous written agreements, which were executed on the same date, at the same time, and at the same location, despite a misnomer contained therein, as such did not render the agreement unenforceable. Thus, it was not erroneous for the court to correct an obvious error in the agreement, specifically, the failure to substitute one entity's name for another as the parties intended, and interpret the guaranty accordingly. *C.L.D.F., Inc. v. Aramore, LLC*, 290 Ga. App. 271, 659 S.E.2d 695 (2008), cert. denied, 2008 Ga. LEXIS 668 (Ga. 2008).

In the bankruptcy claim action related to contract interpretation under O.C.G.A. § 13-2-3, the court determined that the Chapter 11 debtor's board of directors terminated the severance plan before the former employees' employment was terminated, and the bankruptcy court concluded that the former employees had no vested interests under the severance plan before it was terminated by the debtor's board of directors; the court determined the date that the debtor's severance plan was terminated and sustained the trustee's objection to the related claims. *In re Thomaston Mills, Inc.*, 301 B.R. 918 (Bankr. M.D. Ga. 2003).

Enforcement of promissory note. — The debtor's sister was entitled to enforce the debtor's promissory note, even though the note was prepared on a bank's form note, where the parties intended that the note be paid to the sister, as testified to by the bank employee who prepared the note, and as evidenced by the debtor's delivery of the note to the debtor's sister and the debtor's payment of interest on the note for more than nine years. *Heath v. Wheeler*, 234 Ga. App. 606, 507 S.E.2d 508 (1998).

Intent property be used for retail sales. — Trial court correctly ruled that ascertaining the intent of the parties, rather than restricting the use of implications to determine the parties' intent, was of paramount importance as document used by the original property owners to express their intent to build a shopping center clearly expressed their intent and the intent of the subsequent property owners that the shopping center property be used only for retail sales only and that the property could not also be leased for use as office space. *Yates v. Dublin Sir Shop*, 260 Ga. App. 369, 579 S.E.2d 796 (2003).

Divorce settlement agreement. — Trial court properly found that the term "gross income" in the parties' divorce settlement agreement was ambiguous, and, in construing the agreement against the father as the obligor, that the parties intended for child support to be based on Georgia's Child Support Guidelines, and that, by assigning earned income to the father's professional corporation, thereby substantially understating the father's gross income, the father wilfully violated the conditions of the settlement agreement; the father's "gross in-

come” significantly exceeded Form W-2 wages, and the father’s computation of child support based only on the father’s Form W-2 salary created a child support deficiency. *Pate v. Pate*, 280 Ga. 796, 631 S.E.2d 103 (2006).

Disability insurance policies. — An insurer’s interpretation that an employee was not totally disabled for purposes of a disability policy if the employee had only an inability to perform some material duties was correct; under O.C.G.A. §§ 13-2-2(4) and 13-2-3, in determining the parties’ intent from the whole contract, the use of “total” and “totally” showed the intent to define a state of whole, rather than partial, disability. However, a worker’s condition did not merely preclude the worker from doing as much in a day; there were duties of the occupation that the worker could not perform, and, although the worker could perform some light duties after the injury, whether the

worker was wholly disabled from performing the “material” duties of the occupation within 180 days of the injury was a jury question such that summary judgment was error. *Fountain v. Unum Life Ins. Co. of Am.*, 297 Ga. App. 458, 677 S.E.2d 334 (2009).

Trial court erred in granting summary judgment to a contractor on the contractor’s claim that the contractor had terminated a contract to build a wastewater treatment facility based on the failure to obtain a cold weather discharge permit specified in the contract. The purpose of the permitting conditions was to allow the parties to abort the contract at the outset, prior to commencing construction of the facility, and the contractor waived its right to terminate by completing construction and continuing to operate the plant. *Forsyth County v. Waterscape Servs., LLC*, No. A09A1964, 2010 Ga. App. LEXIS 250 (Mar. 16, 2010).

OPINIONS OF THE ATTORNEY GENERAL

Meaning of term “qualified physical therapist” probably for judicial rather than jury determination. — In determining meaning of term “qualified physical therapist,” court

would be inclined to decide question in favor of judicial construction rather than determination by jury. 1969 Op. Att’y Gen. No. 69-483.

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 1 et seq., 18 et seq.

C.J.S. — 17A C.J.S., Contracts, §§ 295, 300, 305, 346.

ALR. — Construction of contract for sale of commodity to the extent of the buyer’s requirements, 7 ALR 498.

Admissibility of parol evidence to show that a bill or note was conditional, or given for a special purpose, 20 ALR 421; 54 ALR 702; 75 ALR 1519; 105 ALR 1346.

Circumstances other than relationship of parties which repel inference of an agreement to pay for work performed at one’s request, or with his acquiescence, 54 ALR 548.

Admissibility of parol evidence to vary or explain contract implied from the regular endorsement of a bill or note, 54 ALR 999; 92 ALR 721.

Duty of lessee under oil or gas lease to drill “protection” wells, 60 ALR 950.

Contract granting timber rights as covering timber that becomes such, or reaches prescribed dimensions, after execution, but during period covered, 94 ALR 1420.

Construction and application of provision of construction contract as regards retention of percentage of current earnings until completion, 107 ALR 960.

Rights of buyer and seller inter se as affected by invalidity of, or subsequent changes or developments with respect to, tax, 115 ALR 667; 132 ALR 706.

Formal or written instrument as essential to completed contract where the making of such instrument is contemplated by parties to verbal or informal agreement, 122 ALR 1217; 165 ALR 756.

What taxes are within contemplation of contract which provides for payment or assumption of taxes or varies consideration with reference to taxes, 140 ALR 517.

Validity and construction of contract for

exclusive representation of persons participating in, or connected with, entertainment enterprises, 175 ALR 617.

Construction and effect of contract for sale of commodity to fill buyer's requirements, 26 ALR2d 1099.

Oil and gas as "minerals" within deed, lease, or license, 37 ALR2d 1440.

Employee's rights with respect to compensation or bonus where he continues in employer's service after expiration of contract for definite term, 53 ALR2d 384.

Size and kind of trees contemplated by contracts or deeds in relation to standing timber, 72 ALR2d 727.

Validity and effect of provision in contract against mechanic's lien, 76 ALR2d 1087; 75 ALR3d 505.

Admissibility of extrinsic evidence to identify person or persons intended to be designated by the name in which a contract is made, 80 ALR2d 1137.

What amounts to development or operation for oil or gas within terms of habendum clause extending primary term while the premises are being "developed or operated", 96 ALR2d 322.

Who, as between landlord and tenant, must make, or bear expense of, alterations, improvements, or repairs ordered by public authorities, 22 ALR3d 521.

Insurance on life of partner as partnership asset, 56 ALR3d 892.

Grant, lease, exception, or reservation of "oil, gas, and other minerals," or the like, as including coal or metallic ores, 59 ALR3d 1146.

Master and servant: regular payment of bonus to employee, without express contract to do so, as raising implication of contract for bonus, 66 ALR3d 1075.

Release or waiver of mechanic's lien by general contractor as affecting rights of subcontractor or materialman, 75 ALR3d 505.

Construction contract provision excusing delay caused by "severe weather," 85 ALR3d 1085.

Implied duty of oil and gas lessee to protect against drainage, 18 ALR4th 14.

Remedy for breach of implied duty of oil and gas lessee to protect against drainage, 18 ALR4th 147.

13-2-4. Ascertainment of intention of parties where meaning placed on contract by one party known to other.

The intention of the parties may differ among themselves. In such case, the meaning placed on the contract by one party and known to be thus understood by the other party at the time shall be held as the true meaning. (Orig. Code 1863, § 2720; Code 1868, § 2714; Code 1873, § 2756; Code 1882, § 2756; Civil Code 1895, § 3674; Civil Code 1910, § 4267; Code 1933, § 20-703.)

Law reviews. — For article, "The Parol Evidence Rule in Georgia," see 17 Ga. B.J. 49 (1954). For article discussing interpretation in Georgia of insurance policies containing evidentiary conditions, see 12 Ga. L. Rev. 783 (1978).

For comment advocating liberal construction of indefinite employment contract, in light of *Gray v. Aiken*, 205 Ga. 649, 54 S.E.2d 587 (1949), see 1 Mercer L. Rev. 304 (1950).

JUDICIAL DECISIONS

Every rule of construction is subordinate to intention of parties to contract. *Central R.R. & Banking Co. v. Mayor of Macon*, 43 Ga. 605 (1871); *Asa G. Candler, Inc. v. Georgia Theater Co.*, 148 Ga. 188, 96 S.E. 226, 1918F L.R.A. 389 (1918).

Contracts must always be construed with reference to intention of parties at time contract entered. *McNaughton v. Stephens*, 8 Ga. App. 545, 70 S.E. 61 (1911), and see *Pidcock v. Nace*, 15 Ga. App. 794, 84 S.E. 226 (1915).

Statute can have no application unless contract is ambiguous. *Holloway v. Brown*, 171 Ga. 481, 155 S.E. 917 (1930); *Hoffman v. Louis L. Battey Post No. 4 of Am. Legion*, 74 Ga. App. 403, 39 S.E.2d 889 (1946); *Lovable Co. v. Honeywell, Inc.*, 431 F.2d 668 (5th Cir. 1970) (see O.C.G.A. § 13-2-4).

Statute has no application if contract and terms involved are not ambiguous. *Village Enters., Inc. v. Georgia R.R. Bank & Trust Co.*, 117 Ga. App. 773, 161 S.E.2d 901 (1968); *Crown Constr. Co. v. Opelika Mfg. Corp.*, 343 F. Supp. 1266 (N.D. Ga. 1972), modified, 480 F.2d 149 (5th Cir. 1973) (see O.C.G.A. § 13-2-4).

When contracts are unambiguous it is error to submit construction to jury. *State Hwy. Dep't v. MacDougald Constr. Co.*, 102 Ga. App. 254, 115 S.E.2d 863 (1960).

In construction of ambiguous contracts, circumstances are subjects of proof. *National Manufacture & Stores Corp. v. Dekle*, 48 Ga. App. 515, 173 S.E. 408 (1934).

When contract ambiguous, parties may show meaning placed upon contract by parties at execution. — While it is true that unambiguous terms of complete written contract may not be added to, taken from, or varied by parol testimony, and that all negotiations between parties to such contract which either preceded or accompanied contract's execution are merged in the contract, where contract is ambiguous it is permissible for one or both parties to show meaning placed on contract by parties at time of contract's execution, and such construction will control. *Florence v. State Hwy. Bd.*, 57 Ga. App. 752, 196 S.E. 86 (1938).

O.C.G.A. § 13-2-4 contemplates expression of meaning contemporaneous with execution of contract, and the statute does not indicate that an expression of meaning by one party years after such execution imposes any obligation upon the other party to object to such an expression. *Smith v. Freeport Kaolin Co.*, 687 F. Supp. 1550 (M.D. Ga. 1988).

Silence as acquiescence in other party's construction. — When a letter from one party to a contract to the other party showed that the writer placed a different construction on a contract than did the other party, the latter's silence was acquiescence in such construction. *Salvatori Corp. v. Rubin*, 159 Ga. App. 369, 283 S.E.2d 326 (1981).

Correspondence between parties is admissible on intent. — Correspondence between the parties to a contract which tends to clarify or explain the intention of the parties is admissible to throw light on the meaning of the contract. *Salvatori Corp. v. Rubin*, 159 Ga. App. 369, 283 S.E.2d 326 (1981).

Contract free from ambiguity is conclusively presumed to express intention of parties. *Footte & Davies Co. v. Southern Wood Preserving Co.*, 11 Ga. App. 164, 74 S.E. 1037 (1912).

Application in suit for breach of express warranty. — Warranty being part of consideration of a contract, rule stated in this statute is applicable in suit for breach of express warranty. *Postell v. Boykin Tool & Supply Co.*, 86 Ga. App. 400, 71 S.E.2d 783 (1952).

Section inapplicable to assignee misled as to meaning of contract. — This statute has no application to assignee of contract, although one party sought to be bound by such understanding knew at time of contract's execution that such assignee would take assignment of contract under belief and expectation that contract had meaning different from that put upon contract by such party. *Citizens & S. Bank v. Union Whse. & Compress Co.*, 157 Ga. 434, 122 S.E. 327 (1924).

When legal effect produced by words, and effect intended differ, true intention shall prevail. Especially is this true when one party is mistaken and other party is aware of mistake. *White & Hamilton Lumber Co. v. Foster*, 157 Ga. 493, 122 S.E. 29 (1924).

Language susceptible of various interpretations to be taken in sense meant by parties at execution. — When language of written instrument may be fairly understood in more ways than one, the language should be taken in sense put upon the language by parties at time of instrument's execution, and court will hear evidence as to facts and surroundings. *National Manufacture & Stores Corp. v. Dekle*, 48 Ga. App. 515, 173 S.E. 408 (1934).

One party's understanding of contract terms is of no consequence unless other so understands. *Atlanta S.R.R. v. City of Atlanta*, 66 Ga. 104 (1880).

Testimony of one party as to that party's intent, undisclosed to other party, is incompetent. — Even if instrument is ambiguous,

testimony of one party as to that party's intent, undisclosed to the other, is not competent. *National Manufacture & Stores Corp. v. Dekle*, 48 Ga. App. 515, 173 S.E. 408 (1934).

Section applied when one acquiesces by silence to other party's stated interpretation. — See *Cason v. Duke*, 28 Ga. App. 170, 110 S.E. 684 (1922).

Lessee's construction of lease, known to lessor who fails to make known disagreement, controls. — When lessee informs lessor, by means of three annual letters, of construction lessee is placing on provision of lease agreement, and receives no reply from lessor, lessor is precluded from relying on different interpretation, since it is incumbent upon the lessor to advise lessee that the lessor disagrees with lessee's construction of agreement. *Wiggins v. Engelhard Minerals & Chems. Corp.*, 328 F. Supp. 33 (M.D. Ga. 1970), *aff'd*, 443 F.2d 1358 (5th Cir. 1971).

One party's understanding of trade, known to other party or that party's agent, is admissible. — It is competent to show understanding of one party to trade on which that party acts, with full knowledge thereof in other party or other party's agent in connection with contract. *Foley, Bro. & Co. v. Abbott & Bro.*, 66 Ga. 115 (1880).

Ambiguous insurance policy construed so as to effectuate intent of insured known to insurer. — When evidence, in suit by insured against insurance company, indicates that intention of insured was to insure semi-trailer truck involved in accident, and that this intention was known to company through the company's agent who saw truck and took the truck's motor number which was inserted in policy, insurance contract would be construed to include semi-trailer truck, since contract was ambiguous, even though company insisted the company's policy did not cover semi-trailer trucks. *American Cas. Co. v. Callaway*, 75 Ga. App. 799, 44 S.E.2d 400 (1947).

Author of misleading provision may be bound by interpretation placed upon provision by other party. — When written contract has apparent meaning at variance with contract's real meaning, the contract may bind author of ambiguity contrary to contract's real meaning, if this meaning was so obscurely expressed that other party was likely to be misled and was misled, and if

circumstances entitled author to timely notice of author's mistake, and notice was not given. *Hill v. John P. King Mfg. Co.*, 79 Ga. 105, 3 S.E. 445 (1887).

One acting as agent for principal who lacks legal status or existence becomes individually liable. — It is a general rule that one who assumes to act as agent for principal who has no legal status or existence renders oneself individually liable on contracts so made. *Hagan v. Asa G. Candler, Inc.*, 189 Ga. 250, 5 S.E.2d 739 (1939).

Where contract's subject matter regulated by federal law, parties cannot provide for interpretation otherwise. — In cases where subject matter of contract is exclusively one of national cognizance and Congress has enacted a law for the matter's complete regulation, parties must be presumed to have contracted to the Act of Congress and the Act's effect on the subject matter, and the parties cannot, by agreement or otherwise, make any other law applicable in determining either nature, validity, or interpretation of contract. *Federal Land Bank v. Shingler*, 174 Ga. 352, 162 S.E. 815 (1932).

Section applied to offer to enter contract. — See *Columbus Bagging & Tie Co. v. Empire Mills Co.*, 38 Ga. App. 793, 145 S.E. 886 (1928).

Cited in *Chambers & Co. v. Walker*, 80 Ga. 642, 6 S.E. 165 (1888); *Finlay v. Ludden & Bates S. Music House*, 105 Ga. 264, 31 S.E. 180 (1898); *Peninsular Naval Stores Co. v. Parrish*, 13 Ga. App. 779, 80 S.E. 28 (1913); *City of Albany v. Georgia-Alabama Power Co.*, 152 Ga. 119, 108 S.E. 528 (1921); *Bibb Realty Co. v. Fulghum & Co.*, 27 Ga. App. 378, 108 S.E. 554 (1921); *Morris-Forrester Oil Co. v. Taylor*, 158 Ga. 201, 122 S.E. 680 (1924); *Hall v. Wingate*, 159 Ga. 630, 126 S.E. 796 (1924); *Buckeye Cotton Oil Co. v. Malone*, 33 Ga. App. 519, 126 S.E. 913 (1925); *Reeves v. B.T. Williams & Co.*, 160 Ga. 15, 127 S.E. 293 (1925); *Slade v. Raines*, 161 Ga. 859, 132 S.E. 58 (1926); *Hall v. Vandiver*, 37 Ga. App. 656, 141 S.E. 332 (1928); *Googe v. York*, 38 Ga. App. 62, 142 S.E. 562 (1928); *Fireman's Fund Ins. Co. v. Davis*, 42 Ga. App. 49, 155 S.E. 105 (1930); *Fite v. Thweatt*, 46 Ga. App. 82, 166 S.E. 682 (1932); *Taber Mill v. Southern Brighton Mills*, 49 Ga. App. 390, 175 S.E. 665 (1934); *Atlanta Chem. Co. v. Hardin Bag Co.*, 49 Ga. App. 748, 176 S.E. 772 (1934); *Polk v. Slaton*,

54 Ga. App. 328, 187 S.E. 846 (1936); *Trippe v. Crescent Farms, Inc.*, 58 Ga. App. 1, 197 S.E. 330 (1938); *Shippen v. Georgia Better Foods, Inc.*, 79 Ga. App. 813, 54 S.E.2d 704 (1949); *Arnold v. Johnston*, 84 Ga. App. 138, 65 S.E.2d 707 (1951); *Bell v. Fitz*, 84 Ga. App. 220, 66 S.E.2d 108 (1951); *Moore v. Johnson*, 89 Ga. App. 164, 78 S.E.2d 823 (1953); *Whitley v. Wilson*, 90 Ga. App. 16, 81 S.E.2d 877 (1954); *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966); *Hardee's Food Sys. v. Bowers*, 121 Ga. App. 316, 173 S.E.2d 439 (1970); *Security Dev. & Inv. Co. v. Ben O'Callaghan Co.*, 125 Ga. App. 526, 188 S.E.2d 238 (1972); *Consolidated Freightways Corp. v. Williams*, 139 Ga. App. 302, 228 S.E.2d 230 (1976); *Riviera Equip., Inc. v.*

Omega Equip. Corp., 155 Ga. App. 522, 271 S.E.2d 662 (1980); *Wahnschaff Corp. v. O.E. Clark Paper Box Co.*, 166 Ga. App. 242, 304 S.E.2d 91 (1983); *Georgia Glass & Metal, Inc. v. Arco Chem. Co.*, 201 Ga. App. 15, 410 S.E.2d 142 (1991); *Eickhoff v. Eickhoff*, 263 Ga. 498, 435 S.E.2d 914 (1993); *McDuffie v. Criterion Cas. Co.*, 214 Ga. App. 818, 449 S.E.2d 133 (1994); *Lothridge v. First Nat'l Bank*, 217 Ga. App. 711, 458 S.E.2d 887 (1995); *Tyson v. McPhail Properties, Inc.*, 223 Ga. App. 683, 478 S.E.2d 467 (1996); *Dooley v. Dun & Bradstreet Software Servs., Inc.*, 225 Ga. App. 63, 483 S.E.2d 308 (1997); *Brown v. Blackmon*, 272 Ga. 435, 530 S.E.2d 712 (2000); *Harris v. Distinctive Bldrs., Inc.*, 249 Ga. App. 686, 549 S.E.2d 496 (2001).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 18 et seq., 45.

ALR. — Construction of contract for sale of commodity to the extent of the buyer's requirements, 7 ALR 498; 26 ALR2d 1099.

Circumstances other than relationship of parties which repel inference of an agreement to pay for work performed at one's request, or with his acquiescence, 54 ALR 548.

Construction and application of provision of construction contract as regards retention of percentage of current earnings until completion, 107 ALR 960.

Validity and construction of contract for exclusive representation of persons participating in, or connected with, entertainment enterprises, 175 ALR 617.

Construction and effect of contract for sale of commodity to fill buyer's requirements, 26 ALR2d 1099.

Size and kind of trees contemplated by contracts or deeds in relation to standing timber, 72 ALR2d 727.

Who, as between landlord and tenant, must make, or bear expense of, alterations, improvements, or repairs ordered by public authorities, 22 ALR3d 521.

CHAPTER 3

ELEMENTS AND FORMATION GENERALLY

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Sec.			trust funds for educational purposes.
13-3-1.	Essentials of contracts generally.	13-3-24.	Insane, mentally ill, mentally retarded, or mentally incompetent persons.
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Cross references. — Formation and construction of sales contracts, §§ 11-2-201 et seq., 11-2-301 et seq.

RESEARCH REFERENCES

ALR. — Validity and effect of stipulation in contract to effect that it shall be governed by law of particular state which is neither

place where contract is made nor place where it is to be performed, 16 ALR4th 967.

ARTICLE 1

GENERAL PROVISIONS

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Promise Made with Intent Not to Perform, 5 POF2d 727.

Offeree's Acceptance of Contract Offer, 27 POF2d 559.

Acts Constituting Rejection of Contract Offer, 27 POF2d 605.

Terms of Oral Contract with Decedent, 39 POF2d 91.

Act of God, 6 POF3d 319.

13-3-1. Essentials of contracts generally.

To constitute a valid contract, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate. (Orig. Code 1863, § 2682; Code 1868, § 2678; Code 1873, § 2720; Code 1882, § 2720; Civil Code 1895, § 3637; Civil Code 1910, § 4222; Code 1933, § 20-107.)

Cross references. — Formation of contracts under Uniform Commercial Code, § 11-2-204. Acceptance of offer under Uniform Commercial Code, §§ 11-2-206, 11-2-207. Consideration is essential to a contract, § 13-3-40. Correlation of capacity to contract with capacity to make will, § 53-2-21.

Law reviews. — For article discussing interpretation in Georgia of insurance policies containing evidentiary conditions, see 12 Ga. L. Rev. 783 (1978). For annual survey of law of business associations, see 56 Mercer L. Rev. 77 (2004).

For comment on Georgia Power Co. v. Roper, 73 Ga. App. 826, 38 S.E.2d 91 (1946), see 9 Ga. B.J. 89 (1946).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CONSIDERATION

CONSIDERATION SHOWN

CONSIDERATION NOT SHOWN

ASSENT TO TERMS

REQUISITE CERTAINTY

SUBJECT MATTER

General Consideration

Binding contract may consist of several consistent writings. — It is not essential that contract be contained in single document. Binding contracts may consist of several writings — provided there is no conflict between various parts. *Cassville-White Assocs. v. Bartow Assocs.*, 150 Ga. App. 561, 258 S.E.2d 175 (1979); *Dibrell Bros. Int'l v. Banca*

Nazionale Del Lavoro, 38 F.3d 1571 (11th Cir. 1994).

Multiple documents should comprise signed contemporaneous writings. — Multiple documents may be considered together as a single contract as long as all the necessary terms are contained in signed contemporaneous writings. *Board of Regents v. Tyson*, 261 Ga. 368, 404 S.E.2d 557 (1991).

General Consideration (Cont'd)

Hospital records, including a "consent to care" form, did not contain the necessary terms of a contract, since there were no signed contemporaneous writings establishing the essential term of "consideration moving to the contract". Board of Regents v. Tyson, 261 Ga. 368, 404 S.E.2d 557 (1991).

To be enforceable a contract must be sufficiently definite as to subject matter and time. King v. State Farm Mut. Auto. Ins. Co., 117 Ga. App. 192, 160 S.E.2d 230 (1968).

Consideration and subject matter are separate essentials of contract. — Among essentials of a contract consideration is one thing, while subject matter is another and different thing. McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839 (1945).

Requirement of capacity to contract refers not to voidable contracts, but to valid binding contracts. Georgia Power Co. v. Roper, 201 Ga. 760, 41 S.E.2d 226 (1947).

Novation or accord and satisfaction is itself a contract and must have all essential elements of a de novo contract. Mayer v. Turner, 142 Ga. App. 63, 234 S.E.2d 853 (1977); Slappey Bldrs., Inc. v. FDIC, 157 Ga. App. 343, 277 S.E.2d 328 (1981).

An insurance policy is a contract and has the same attributes and requirements as any other contract. Grange Mut. Cas. Co. v. King, 174 Ga. App. 716, 331 S.E.2d 41 (1985).

There can be no recovery upon incomplete contract of insurance. Thurmond v. Sovereign Camp, W.O.W., 171 Ga. 446, 155 S.E. 760 (1930).

Generally, intention of parties must relate to something of monetary value in eyes of law. — To constitute a valid contract, intention of parties must refer to legal relations, so that courts may take cognizance of the contract, and it is generally said that the test of this quality of the contract is that intention of parties must relate to something which is of monetary value in eyes of the law. Huckleby v. Smith, 42 Ga. App. 719, 157 S.E. 234 (1931).

One may contract to sell property not owned by oneself, taking one's chances on obtaining title prior to the date of consummation of the sale or responding in damages if one fails to do so. Whether or not the seller could have delivered good title on the closing date is not a question which ad-

resses itself to the validity of the contract. Horn v. Wright, 157 Ga. App. 408, 278 S.E.2d 66 (1981).

Contracts of agency must, like other agreements, involve assumption of legal rights and duties, as opposed to engagements of mere civic or social character, or of such other nature as to exclude monetary values. Huckleby v. Smith, 42 Ga. App. 719, 157 S.E. 234 (1931).

One seeking enforcement bears burden of proof as to essentials of contract. — Burden to show that there had been contract between itself and defendants as basis of indebtedness is upon plaintiff, and to carry this burden, it is necessary for plaintiff to show, by preponderance of evidence, every necessary essential of a valid contract, which, includes acceptance of policies of insurance by defendants after the defendant had unconditionally assented to all terms of the contracts. Associated Muts., Inc. v. Pope Lumber Co., 200 Ga. 487, 37 S.E.2d 393 (1946).

No burden of disproving any essentials of valid contracts rests on defendant. Associated Muts., Inc. v. Pope Lumber Co., 200 Ga. 487, 37 S.E.2d 393 (1946).

Parties must be legal entities. — A valid contract requires parties who are legal entities. Horn v. Wright, 157 Ga. App. 408, 278 S.E.2d 66 (1981).

Presumption, as against general demurrer of parties' capacity and assent to terms of contract by parties execution thereof. Martell v. Atlanta Biltmore Hotel Corp., 114 Ga. App. 646, 152 S.E.2d 579 (1966).

Mental disparity between parties and absence of consideration as grounds for equitable relief. — Great inadequacy of consideration, joined with great disparity of mental ability in contracting a bargain, may justify equity in setting aside a sale or other contract. Under that principle, a deed may be set aside in equity, on proof of two elements stated, without proof of anything else as to fraud. A fortiori, same rule would apply with at least equal force in case of such mental disparity and total absence of consideration. Stow v. Hargrove, 203 Ga. 735, 48 S.E.2d 454 (1948).

Contract between a patient and professional corporation of physicians was formed because the parties were able to contract, payment and medical services to be ren-

dered constituted consideration, and medical treatment was a subject matter upon which the contract could operate. *Atakpa v. Perimeter OB-GYN Assocs., P.C.*, 912 F. Supp. 1566 (N.D. Ga. 1994).

Breach of oral contract proven. — Evidence was sufficient to support a jury's verdict finding a breach of contract in a real estate development dispute as there was no requirement for the agreement to be in writing since the agreement did not directly involve the sale or conveyance of an interest in land; plaintiff proved all of the essential elements of the breach of contract claim through plaintiff's testimony and that of another person. *Cline v. Lee*, 260 Ga. App. 164, 581 S.E.2d 558 (2003).

Partial performance as supplying mutuality and consideration. — Even if a contract might not be enforceable on the ground that the contract was without consideration and mutuality, partial performance of the contract supplies the lack of mutuality and renders the contract enforceable. *Hill Aircraft & Leasing Corp. v. Planes, Inc.*, 158 Ga. App. 151, 279 S.E.2d 250 (1981).

Elements to create a contract were met. — Promissory note was enforceable against an accountant where the accountant and the other contracting party were able to contract, both signed the document, and the agreement was sufficiently definite for the ascertainment of the agreement's terms and conditions. Specifically, through the agreement, the accountant avoided having to account to a teacher for the apparent disappearance of the teacher's money by not having to provide a full refund and the teacher agreed to forego any claims to the full amount the teacher had given the accountant. *Hayes v. Alexander*, 264 Ga. App. 815, 592 S.E.2d 465 (2003).

There was a valid contract between a creditor and a debtor when the debtor signed a check that indicated on both the front and the back that by endorsing the check, the debtor was entering into a credit agreement, which included terms regarding the interest rate, how payments were to be calculated, when payments were to be made, and what constituted a default. *Gerben v. Beneficial Ga., Inc.*, 283 Ga. App. 740, 642 S.E.2d 405 (2007).

Documents exchanged between consumer and utility created contract. — Large load

electrical consumer's request-for-services form, together with an electric utility company's publicly available rates, rules, and regulations were sufficiently definite to comprise a contract. Further, the exchange of documents and correspondence between the parties demonstrated that the parties intended to be bound and that a contract was formed. *Jackson Elec. Mbrshp. Corp. v. Ga. PSC*, 294 Ga. App. 253, 668 S.E.2d 867 (2008), cert. denied, No. S09C0356, 2009 Ga. LEXIS 201 (Ga. 2009).

Contract existence was question of fact for a jury. — Summary judgment was improperly granted to an insurance broker in a contract dispute because there was conflicting testimony regarding the course of dealings between the party relating to whether or not a contract existed under O.C.G.A. §§ 13-3-1 and 13-3-2; the question of fact should have been decided by a jury instead. *Terry Hunt Constr., Inc. v. AON Risk Servs.*, 272 Ga. App. 547, 613 S.E.2d 165 (2005).

Receipt for cash bond did not constitute contract. — As a surety did not sign a bond contract, and the receipt the surety received for a cash bond did not set forth any understanding between the parties, nor indicate the terms under which the bond would be subject to forfeiture, the surety did not prove the existence of a written contract with the city. Thus, the surety's breach of contract claim against the city failed. *Watts v. City of Dillard*, 294 Ga. App. 861, 670 S.E.2d 442 (2008).

Documents did not comprise written contract. — A document and blueprints did not create a written contract under O.C.G.A. § 13-3-1 and thus the parties' construction agreement was an oral/parol one and the limitations period of O.C.G.A. § 9-3-25 applied; the documents could not be read together as the documents did not reference each other and were not contemporaneous, and moreover even if the documents could be read together, the documents did not identify the subject matter of the contract or the specific parties to the contract, and neither was signed, thus failing to reflect the parties' assent. *Harris v. Baker*, 287 Ga. App. 814, 652 S.E.2d 867 (2007).

Cited in *Mason v. Terrell*, 3 Ga. App. 348, 60 S.E. 4 (1908); *Queen Ins. Co. v. Peters*, 10 Ga. App. 289, 73 S.E. 536 (1912); *Good Rds. Mach. Co. v. Neal & Son*, 21 Ga. App. 160, 93

General Consideration (Cont'd)

S.E. 1018 (1917); *Garrett v. Wall*, 29 Ga. App. 642, 116 S.E. 331 (1923); *Mendel v. Converse & Co.*, 30 Ga. App. 549, 118 S.E. 586 (1923); *Helmer v. Helmer*, 159 Ga. 376, 125 S.E. 849, 37 A.L.R. 1137 (1924); *Ocean Lake & River Fish Co. v. Dotson*, 70 Ga. App. 268, 28 S.E.2d 319 (1943); *Beazley v. Allen*, 61 F. Supp. 929 (M.D. Ga. 1945); *Russell v. Smith*, 77 Ga. App. 70, 47 S.E.2d 772 (1948); *Lawson v. O'Kelley*, 81 Ga. App. 883, 60 S.E.2d 380 (1950); *Reid v. Hemphill*, 82 Ga. App. 391, 61 S.E.2d 201 (1950); *Flatauer v. Goodman*, 84 Ga. App. 881, 67 S.E.2d 794 (1951); *City of Moultrie v. Colquitt County Rural Elec. Co.*, 211 Ga. 842, 89 S.E.2d 657 (1955); *Collins v. Burchfield*, 215 Ga. 322, 110 S.E.2d 368 (1959); *Burden v. Thomas*, 104 Ga. App. 300, 121 S.E.2d 684 (1961); *Lee v. Green*, 217 Ga. 860, 126 S.E.2d 417 (1962); *Crown Carpet Mills, Inc. v. C.E. Goodroe Co.*, 108 Ga. App. 327, 132 S.E.2d 824 (1963); *Bonnett v. Cherokee Timber Corp.*, 222 Ga. 199, 149 S.E.2d 104 (1966); *Apollo Homes, Inc. v. Knowles*, 119 Ga. App. 239, 166 S.E.2d 644 (1969); *Weikert v. Logue*, 121 Ga. App. 171, 173 S.E.2d 268 (1970); *Stone v. Reinhard*, 124 Ga. App. 355, 183 S.E.2d 601 (1971); *Pickett v. Paine*, 230 Ga. 786, 199 S.E.2d 223 (1973); *Wallace v. Adamson*, 129 Ga. App. 792, 201 S.E.2d 479 (1973); *Dowis v. Lindgren*, 132 Ga. App. 793, 209 S.E.2d 233 (1974); *Rivers v. Rice*, 233 Ga. 819, 213 S.E.2d 678 (1975); *Duval & Co. v. Malcom*, 233 Ga. 784, 214 S.E.2d 356 (1975); *Dalton Am. Truck Stop, Inc. v. Adbe Distrib. Co.*, 136 Ga. App. 606, 222 S.E.2d 61 (1975); *Georgia-Pacific Corp. v. Corbin*, 137 Ga. App. 37, 222 S.E.2d 862 (1975); *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691 (1976); *Peacock v. Gibson*, 237 Ga. 600, 229 S.E.2d 347 (1976); *Pine Valley Apts. Ltd. Partnership v. First State Bank*, 143 Ga. App. 242, 237 S.E.2d 716 (1977); *American Fletcher Mtg. Co. v. First Am. Inv. Corp.*, 463 F. Supp. 186 (N.D. Ga. 1978); *Stubbs v. Tattnell Bank*, 244 Ga. 212, 259 S.E.2d 466 (1979); *Classic Restorations, Inc. v. Bean*, 155 Ga. App. 694, 272 S.E.2d 557 (1980); *Whelchel v. Smith*, 155 Ga. App. 901, 273 S.E.2d 619 (1980); *Lavine v. General Mills, Inc.*, 519 F. Supp. 332 (N.D. Ga. 1981); *Georgia Cas. & Sur. Co. v. Tennille Banking Co. (In re Smith)*, 51 Bankr. 904 (Bankr.

M.D. Ga. 1985); *Nelson v. State Farm Life Ins. Co.*, 178 Ga. App. 670, 344 S.E.2d 492 (1986); *Panfel v. Boyd*, 186 Ga. App. 214, 367 S.E.2d 54 (1988); *Murawski v. Roland Well Drilling, Inc.*, 188 Ga. App. 760, 374 S.E.2d 207 (1988); *Charania v. Ramada Inns, Inc.*, 192 Ga. App. 1, 383 S.E.2d 603 (1989); *Kal-O-Mine Indus., Inc. v. Camp (In re Lumpkin Sand & Gravel, Inc.)*, 104 Bankr. 529 (Bankr. M.D. Ga. 1989); *Wallace v. Triad Sys. Fin. Corp.*, 212 Ga. App. 665, 442 S.E.2d 476 (1994); *Workman v. McNeal Agency, Inc.*, 217 Ga. App. 686, 458 S.E.2d 707 (1995); *Nolley v. Maryland Cas. Ins. Co.*, 222 Ga. App. 901, 476 S.E.2d 622 (1996); *Owens v. American Refuse Sys., Inc.*, 244 Ga. App. 780, 536 S.E.2d 782 (2000); *Legg v. Stovall Tire & Marine, Inc.*, 245 Ga. App. 594, 538 S.E.2d 489 (2000); *Merritt v. State Farm Mut. Auto. Ins. Co.*, 247 Ga. App. 442, 544 S.E.2d 180 (2000); *Baldwin Rental Ctrs. Inc. v. Case Credit Corp.*, 277 Bankr. 152 (Bankr. S.D. Ga. 2000); *Kerr v. Cohen*, 249 Ga. App. 392, 548 S.E.2d 17 (2001); *Harris v. Distinctive Bldrs., Inc.*, 249 Ga. App. 686, 549 S.E.2d 496 (2001); *Ades v. Werther*, 256 Ga. App. 8, 567 S.E.2d 340 (2002); *Waugh v. Waugh*, 265 Ga. App. 799, 595 S.E.2d 647 (2004); *Mitchell v. Ga. Dept. of Cmty. Health*, 281 Ga. App. 174, 635 S.E.2d 798 (2006); *Kennedy v. Ga. Dep't of Human Res. Child Support Enforcement*, 286 Ga. App. 222, 648 S.E.2d 727 (2007); *McKenna v. Capital Res. Partners, IV, L.P.*, 286 Ga. App. 828, 650 S.E.2d 580 (2007); *Eastview Healthcare, LLC v. Synertx, Inc.*, 296 Ga. App. 393, 674 S.E.2d 641 (2009); *Imps. Serv. Corp. v. GP Chems. Equity, LLC*, 652 F. Supp. 2d 1292 (N.D. Ga. 2009).

Consideration

Agreement to do what one is already legally bound to do lacks consideration. — Agreement on part of one to do what one is already legally bound to do is not sufficient consideration for promise of another. *Robert Chuckrow Constr. Co. v. Gough*, 117 Ga. App. 140, 159 S.E.2d 469 (1968); *Hiers-Wright Assocs. v. Manufacturers Hanover Mtg. Corp.*, 182 Ga. App. 732, 356 S.E.2d 903 (1987).

Promoter's contract with an exhibition supplier was not enforceable because the promoter did not supply any consideration since the promoter had only promised to undertake an obligation which the promoter

already owed. *Stefano Arts v. Sui*, 301 Ga. App. 857, 690 S.E.2d 197 (2010).

Promissory note, negotiable or otherwise, is a contract, and consideration is essential to the note's enforceability. *Citizens' Bank v. Hall*, 179 Ga. 662, 177 S.E. 496 (1934).

Contract of guaranty is separate contract, requiring consideration directly to guarantor. — Contract of guaranty, whether entered into on same or another instrument as that of original obligation, whether executed at same or different time, and whether or not purporting to be separate obligation of signer, must, to be enforceable, show consideration flowing directly to guarantor. This is because it is a separate contract, and any contract, to be enforceable, must have consideration. *Bearden v. Ebcap Supply Co.*, 108 Ga. App. 375, 133 S.E.2d 62 (1963).

Contract lacking essential element when parties fail to agree upon consideration. — When parties to contract for sale of land never agreed on consideration to be paid for property, one essential element of contract was lacking. *Scott v. Gillis*, 202 Ga. 220, 43 S.E.2d 95 (1947).

Insurer's pre-policy letter stating that an insured's umbrella policy would be renewed for three years was unenforceable under the statute of frauds, O.C.G.A. § 13-5-30(5), because, due to the three-year term, it could not be performed within one year, and the letter did not state, as required by O.C.G.A. § 13-3-1, what separate consideration was being paid by the insured for the three-year guarantee separate and apart from the policy premium. *Werner Enters. v. Markel Am. Ins. Co.*, 448 F. Supp. 2d 1375 (N.D. Ga. 2006).

Consideration Shown

Implied promise may be sufficient consideration for express promise, and when it appears that defendants, sued as sureties, had requested of creditor an indulgence to principal, such as a certain and definite extension of time in which the sureties might pay debt, request being embodied in contract tendered by sureties for creditor's acceptance, and it further appears that contract was thereupon accepted by creditor, a promise on the creditor's part to grant indulgence was implied, and contract was not objectionable for lack of mutuality or consideration. *Loewenherz v. Weil*, 33 Ga. App.

760, 127 S.E. 883 (1925).

Promise to pay debts of deceased spouse.

— Promise by widow to assume payment of debt owing by estate of her deceased husband is supported by valid consideration, if it was expressly or impliedly within minds of contracting parties that any benefit might thereby accrue to her as promisor, or any detriment might be suffered by him to whom the promise is made. *McLain v. Heard*, 162 Ga. App. 480, 291 S.E.2d 781 (1982).

Consideration not Shown

Hospital bylaws. — Hospital bylaws, by themselves, do not constitute a contract per se between the hospital and the doctors because there is no mutual exchange of consideration which brought them into existence. *Robles v. Humana Hosp. Cartersville*, 785 F. Supp. 989 (N.D. Ga. 1992).

University course catalog. — State university's undergraduate catalog was not a contract that could support a state university student's claim of breach of contract by the university in suspending the student for theft, since there was no indication of any signed contemporaneous writings between the parties indicating consideration moving to the contract. *Carr v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 07-10126, 2007 U.S. App. LEXIS 22715 (11th Cir. Sept. 24, 2007) (Unpublished).

Settlement agreement without adequate consideration. — Purported settlement agreement between the employee's counsel and the hospital for less than the full amount was unenforceable as the agreement lacked consideration given that there was no dispute that the hospital was owed the money. *Lamb v. Fulton-DeKalb Hosp. Auth.*, 297 Ga. App. 529, 677 S.E.2d 328 (2009).

Promise to provide brokerage services. — Defendant's theft by deception conviction, based upon a promise to provide brokerage services, was reversed on appeal as the state, which elected to base the state's accusation on a promise for brokerage services, failed to show any consideration for the services; as a result, no brokerage contract existed, and absent such, no theft by deception based upon a promise of brokerage services resulted. *Campbell v. State*, 286 Ga. App. 72, 648 S.E.2d 684 (2007).

Consideration not Shown (Cont'd)

Condition precedent not fulfilled. — Because a heart center entered into a group sales agreement for reservation of a certain number of rooms at a resort over a two-day period, but it never confirmed the reservation with the non-refundable deposit, the resort should not have been granted summary judgment in the resort's action to recover money owed as liquidated damages under the agreement as there was no consideration under O.C.G.A. § 13-3-1 until the deposit was made; as the condition precedent of paying the deposit had not occurred, the agreement was not an enforceable contract. *Athens Heart Ctr., P.C. v. Brasstown Valley Resort, Inc.*, 275 Ga. App. 607, 621 S.E.2d 565 (2005).

Assent to Terms

Meeting of minds of parties is necessary. *Taylor Lumber Co. v. Clark Lumber Co.*, 33 Ga. App. 815, 127 S.E. 905 (1925).

Parties must assent to all terms in same sense. — Valid contract is never complete until parties assent to all terms of proposed contract in same sense. *Associated Muts., Inc. v. Pope Lumber Co.*, 200 Ga. 487, 37 S.E.2d 393 (1946).

Parties must assent to all essential terms of the contract, and since the timber buyer and the timber seller did not agree on the essential element of the length of the "cutting term," no contract was formed between the parties and the timber seller was required to return the timber buyer's option purchase money. *Peace v. Dominy Holdings, Inc.*, 51 Ga. App. 654, 554 S.E.2d 314 (2001).

No agreement means no liability. — Since there was never an agreement as to how much developer would be paid for the leasing of apartment, real estate agent was not liable for breach of contract. *Green v. Johnston Realty, Inc.*, 212 Ga. App. 656, 442 S.E.2d 843 (1994).

Professional basketball player was not liable to inexperienced businessmen who invested and lost money by hosting sports event-related parties based on an oral agreement with two men claiming to act as the player's agents. Because the player had never met the businessmen and did not consent to the agreement, a valid contract did not arise; thus, a claim for breach of contract under

O.C.G.A. § 13-3-1 failed. *J'Carpc, LLC v. Wilkins*, 545 F. Supp. 2d 1330 (N.D. Ga. 2008).

Agreement shown in guaranty contract. — Where an agent for a limited liability company and a builder's vice president testified that the parties negotiated and agreed on the terms of a construction contract, including price, time, and the form of the contract, and the limited liability company authorized the builder to begin, the facts showed that the parties entered into an enforceable contract, and since a contract existed, the members' personal guaranties of the construction contract were valid. *Marett v. Brice Bldg. Co.*, 268 Ga. App. 778, 603 S.E.2d 40 (2004).

Automobile rental agreement. — Driver of rented automobile, who was listed as an additional driver but not as an additional renter and who did not sign or cosign the rental agreement, was not a party to the agreement, and therefore the driver's insurance provider was not liable for costs arising out of an accident. *A. Atlanta AutoSave, Inc. v. Generali - U.S. Branch*, 230 Ga. App. 887, 498 S.E.2d 278 (1998).

Who may accept. — An offer can be accepted only by the person or persons to whom the offer is made. *Gainesville Glass Co. v. Don Hammond, Inc.*, 157 Ga. App. 640, 278 S.E.2d 182 (1981).

What constitutes assent of parties to terms of contract. — While contract can be made by correspondence through mails or by telegrams, offer of seller must be accepted by purchaser unequivocally, unconditionally, and without variance of any sort, must be a mutual assent of parties, and both parties must assent to same thing in same sense. *Associated Muts., Inc. v. Pope Lumber Co.*, 200 Ga. 487, 37 S.E.2d 393 (1946).

Acceptance of offer must be unconditional, unequivocal, and without variance of any sort; otherwise, there can be no meeting of the minds and mutual assent necessary to formation of a contract. *Panfel v. Boyd*, 187 Ga. App. 639, 371 S.E.2d 222 (1988).

Acceptance of an offer must be unconditional, unequivocal, and without variance of any sort; otherwise, there can be no meeting of the minds and mutual assent necessary to contract formation. Accordingly, a subsequent communication by one party to the alleged contract that varies even one term of the original offer is a counteroffer. *Lamb v.*

Decatur Fed. Sav. & Loan Ass'n, 201 Ga. App. 583, 411 S.E.2d 527 (1991).

Acceptance of bilateral contract requires communication. Gainesville Glass Co. v. Don Hammond, Inc., 157 Ga. App. 640, 278 S.E.2d 182 (1981).

Assent to terms of contract may be given other than by signatures. Rogin v. Dimensions S. Realty Corp., 153 Ga. App. 75, 264 S.E.2d 555 (1980).

Contract of insurance is not complete until both parties have agreed to all the contract's terms, and burden of proving that policies of insurance were not accepted is on plaintiff. Associated Muts., Inc. v. Pope Lumber Co., 200 Ga. 487, 37 S.E.2d 393 (1946).

Premium to be charged on policy of insurance is one essential term of contract, and until agreement is reached with respect to the premium no contract exists. Associated Muts., Inc. v. Pope Lumber Co., 200 Ga. 487, 37 S.E.2d 393 (1946).

Alleged contract on which there is no firm agreement as to cost is unenforceable. Charter Inv. & Dev. Co. v. Urban Medical Servs., Inc., 136 Ga. App. 297, 220 S.E.2d 784 (1975); Bellsouth Adv. & Publishing Corp. v. McCollum, 209 Ga. App. 441, 433 S.E.2d 437 (1993).

Renewal policy delivered to insured without insured's request requires acceptance before contract arises. — Rule as to right of insured to reject renewal policy is that delivery of policy by insurer to insured, upon expiration of policy, without request by insured, is offer or proposal which must be accepted by insured before contract of insurance is effected. Associated Muts., Inc. v. Pope Lumber Co., 200 Ga. 487, 37 S.E.2d 393 (1946).

Delay in rejecting offered policy renewal not acceptance as will continue policy in force. — Offer by letter to renew policy does not effect contract unless accepted by insured, and mere delay in rejecting renewal policy does not amount to acceptance which will continue policy in force. Associated Muts., Inc. v. Pope Lumber Co., 200 Ga. 487, 37 S.E.2d 393 (1946).

No contract to buy book of business between insurance agent and retiring agent because not memorialized. — Insurance agent's claim for tortious interference with contractual and business relations failed because there was no evidence that the agent

entered into a contract with a retiring agent to buy the book of business in the absence of anything in writing to memorialize any assent to terms, agreement, deal, or contemplated contract. Lockett v. Allstate Ins. Co., 364 F. Supp. 2d 1368 (M.D. Ga. 2005).

Salary term needed for employment contract. — Plaintiff failed to show the existence of a valid employment contract when plaintiff could not provide evidence of a definite, enforceable salary term. Laverson v. Macon Bibb County Hosp. Auth., 226 Ga. App. 761, 487 S.E.2d 621 (1997).

Employment contract must be accepted unconditionally, unequivocal, and without variance. — There was no mutual assent necessary for the formation of a contract because an applicant's response to an e-mail offering an employment contract contained different terms than the offer, and thus, it constituted a counteroffer and not an acceptance. Reindel v. Mobile Content Network Co., LLC, 652 F. Supp. 2d 1278 (N.D. Ga. 2009).

No meeting of the minds. — Record supported the trial court's finding that there was no meeting of the minds in the execution of a note, where the maker struck three significant provisions in the proposed note before the maker signed the note, but there was no indication that the payee accepted the changes; there was evidence that the parties did not agree that settlement of a lawsuit would provide consideration for the note and there was no written settlement agreement to memorialize the terms of the parties' agreement. Drake v. Wallace, 259 Ga. App. 111, 576 S.E.2d 87 (2003).

Trial court did not err in denying judgment notwithstanding the verdict as to the sellers' claim for promissory estoppel because: (1) the promise to purchase was to be performed within a reasonable time based upon clear and unambiguous terms, and the closing date was set for a day certain in the immediate future; (2) all actions necessary for the sale, except the actual closing, occurred prior to the first closing date, including audits, examination of financial records, change in inventory code, and delivery of additional inventory; (3) all the basic terms of the promise were clear and certain so as to be enforceable; and (4) the sellers established reasonable reliance to their detriment based on their rejection of another potential

Assent to Terms (Cont'd)

purchaser's bona fide offer to purchase, change in value of the property, sale of inventory later needed, and other harm shown by the evidence. *Rental Equip. Group, LLC v. Maci, LLC*, 263 Ga. App. 155, 587 S.E.2d 364 (2003).

As the parties did not reach a meeting of the minds as to what type of trust was contemplated for purposes of a former business partner's deposit of insurance proceeds into a trust for the benefit of the deceased partner's minor daughter, there was no enforceable contract under O.C.G.A. § 13-3-1 and the trial court's denial of a directed verdict to the former business partner was error pursuant to O.C.G.A. § 9-11-50. *Oldham v. Self*, 279 Ga. App. 703, 632 S.E.2d 446 (2006).

Developer which claimed that a mayor and council had breached a contract by delaying the provision of water to a subdivision had not shown the existence of a contract that would preclude the need for ante litem notice; the town had voted to construct a water line, but had not committed to a specific date for completion, and there was no other evidence that the parties had reached a meeting of the minds as to the time for installation. *King v. Comfort Living, Inc.*, 287 Ga. App. 337, 651 S.E.2d 484 (2007).

Triable issues as to contract terms remained. — Summary judgment for a company in a suit to collect payment for services rendered was reversed as there were triable issues as to whether the parties mutually assented to the terms of a contract for clearing golf course land at the hourly rates stated in an e-mail sent to a third party, as to whether a developer ratified the purported contract, and as to the accuracy of the amounts billed and the reasonableness of those charges. *Governor's Towne Club, Inc. v. Caffrey Constr. Co.*, 273 Ga. App. 284, 614 S.E.2d 892 (2005).

Summary judgment was inappropriate in a breach of fiduciary duty action which centered around a verbal settlement agreement as material fact issues remained as to whether: (1) a company's offer to buy the minority shareholders' stock required a written purchase agreement; (2) the parties agreed to all material terms; and (3) a note

signed by one of the minority shareholders had been cancelled. *McKenna v. Capital Res. Partners, IV, L.P.*, 286 Ga. App. 828, 650 S.E.2d 580 (2007), cert. denied, 2007 Ga. LEXIS 752, 763 (Ga. 2007).

Member's motion for summary judgment on a manager's complaint for breach of a contract for the sale of a car dealership was denied because the member filed no statement of uncontested facts as required by M.D. Ga. R. 7056-1(a) and the filings showed a dispute of material fact as to whether there was mutual assent to the contract under O.C.G.A. § 13-3-1. *Smith v. Marray Auto., LLC* (In re Marray Auto., LLC), No. 06-50035-JDW, 2007 Bankr. LEXIS 2047 (Bankr. M.D. Ga. June 8, 2007).

Subcontractor's motion for summary judgment was denied as to a general contractor's breach of oral contract claim because whether the parties established an oral contract was a factual question that would turn on the credibility of the witnesses, and a court could not say that it was impossible for the general contractor to provide clear and convincing evidence that the parties came to an oral agreement because: (1) the general contractor contended that the parties orally agreed to all the terms and conditions of the arrangement, shook on it, and planned simply to memorialize that agreement in writing; and (2) the subcontractor maintained that its representatives departed from the general contractor's offices that afternoon believing negotiations were ongoing and that both parties believed no contract could have been formed without a signed written agreement. *Apac-Southeast, Inc. v. Coastal Caisson Corp.*, 514 F. Supp. 2d 1373 (N.D. Ga. 2007).

Agreement shown. — Parties' verbal expressions and conduct demonstrated an intent to be bound by an oral agreement for the sale of two sports teams and the operating rights to a sports arena because the oral agreement concerned all material terms of the sale, and agreement was reached prior to the seller's announcement that the seller had completed a sale to another entity. *Turner Broad. Sys. v. McDavid*, No. A09A2314, 2010 Ga. App. LEXIS 317 (Mar. 26, 2010).

Requisite Certainty

Requirement of certainty extends to all essentials of contract. — Requirement of

certainty extends not only to subject matter and purpose of contract, but also to parties, consideration, and even time and place of performance where these are essential. *Peachtree Medical Bldg., Inc. v. Keel*, 107 Ga. App. 438, 130 S.E.2d 530 (1963); *Gill v. B & R Int'l, Inc.*, 234 Ga. App. 528, 507 S.E.2d 477 (1998).

Copyright owner entitled to breach of contract claim. — Copyright owner was entitled to summary judgment on a breach of contract claim under O.C.G.A. § 13-3-1 because the terms of a contract between the owner and a customer was not ambiguous in that the plain language of the contract prohibited reproducing or copying the owner's materials by any means and the customer's employees admitted that the employees reproduced portions of the owner's manual. *SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc.*, 455 F. Supp. 2d 1347 (N.D. Ga. 2006).

Indefiniteness such as renders contract void. — Indefiniteness in subject matter so extreme as not to present anything upon which contract may operate in definite manner renders contract void. *Jones v. Ely*, 95 Ga. App. 4, 96 S.E.2d 536 (1957); *Peachtree Medical Bldg., Inc. v. Keel*, 107 Ga. App. 438, 130 S.E.2d 530 (1963).

Employment contract unenforceable. — Employment contract was unenforceable because of the indefinite statement in the employment contract of the employee's duties, the term of the employee's employment, and the employee's salary. *Key v. Naylor, Inc.*, 268 Ga. App. 419, 602 S.E.2d 192 (2004).

Contract must be certain and complete enough that either party may have right of action. — To allege agreement, petition must set forth contract of such certainty and completeness that either party may have right of action upon the contract, and building contract, to be valid, must have the necessary element of certainty just as other contracts. *Peachtree Medical Bldg., Inc. v. Keel*, 107 Ga. App. 438, 130 S.E.2d 530 (1963).

Uncertainty of rental term rendered contract unenforceable. — Contract for sale provision that the seller would be allowed to remain in the house for rent not to exceed \$300 per month as long as necessary until seller finds new home was uncertain and unenforceable and rendered the entire con-

tract unenforceable. *Farmer v. Argenta*, 174 Ga. App. 682, 331 S.E.2d 60 (1985).

Use of parol evidence to proof certainty. — Employer's motion for a directed verdict, pursuant to O.C.G.A. § 9-11-50, was properly denied in an employee's breach of employment agreement claim, where it was found that the elements of breach of contract were proved pursuant to O.C.G.A. § 13-3-1; although the services to be provided were ambiguous in the contract, the use of parol evidence resolved the parties' intention on that issue. *ISS Int'l Serv. Sys. v. Widmer*, 264 Ga. App. 55, 589 S.E.2d 820 (2003).

Contract may be made sufficiently certain by reference to other documents or plans and specifications. — Although insertion of detailed plans and specifications is not necessary to validity of building contract, a contract may be made sufficiently certain by reference to other documents, or to plans and specifications. But such reference must be sufficient to identify document or plans to which reference is made. *Peachtree Medical Bldg., Inc. v. Keel*, 107 Ga. App. 438, 130 S.E.2d 530 (1963).

Certainty amongst insureds, insurers, and third parties. — Insurer did not show with the requisite certainty that insurer's insured, the company, and the vehicle owner contracted to have the vehicle owner provide the primary insurance coverage on the vehicle it rented to the company's employee; thus, under Georgia statutory law, the insurer's coverage was the primary insurance in a case where the company's employee was in a collision, the injured victim settled with the insurer, and the insurer argued that the vehicle owner had contracted to provide the primary insurance coverage on the vehicle it rented to the company's employee. *Zurich Am. Ins. Co. v. Gen. Car & Truck Leasing Sys.*, 258 Ga. App. 733, 574 S.E.2d 914 (2002).

Subject Matter

Clear subject matter description not subject to limitation by subsequent, general recital of consideration. — In contract for cutting of timber, where subject matter had been clearly and specifically described, it could not properly be diminished or limited by mere general recital of consideration in some other part of agreement. *McCann v.*

Subject Matter (Cont'd)

Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839 (1945).

Parties bound by agreement although subject matter not in existence at time of contracting. — If contract amounts to executory agreement for bona fide sale of property of character such as under circumstances and under law can be legally made subject matter

of a sale, and is not merely speculative in character, parties may be bound, although subject matter of sale has no existence at time agreement is entered upon, and seller expects to comply with the contract by subsequently acquiring property thus agreed to be conveyed. *Parks v. Washington & L.R.R.*, 35 Ga. App. 635, 133 S.E. 634, cert. denied, 35 Ga. App. 808 (1926).

OPINIONS OF THE ATTORNEY GENERAL

Required waivers by environmental protection division personnel of liability for injuries lack consideration. — Requiring environmental protection division personnel to sign waivers of liability for injuries to person or property sustained while on pre-

mises for purpose of carrying out their duties of inspection constitutes unreasonable restriction on state's police power and any such waiver is not binding on EPD personnel because of lack of valid consideration. 1976 Op. Att'y Gen. No. 76-121.

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 18 et seq., 73, 77, 80 et seq., 276 et seq. 29 Am. Jur. 2d, Evidence, §§ 359, 517. 77 Am. Jur. 2d, Vendor and Purchaser, § 18 et seq.

C.J.S. — 17 C.J.S., Contracts, §§ 25 et seq., 70 et seq., 133.

ALR. — Acceptance of offer with condition which law would imply, 1 ALR 1508.

Acknowledging receipt of order for goods as an acceptance completing the contract, 10 ALR 683.

Necessity and sufficiency of consideration for modification of real estate broker's contract, 42 ALR 987.

Validity and mutuality of agreement to buy where there is no express agreement to sell, 60 ALR 215.

Liability on the contract of one who without authority assumes to contract for another, 60 ALR 1348.

Validity of agreement to make loans or advances as affected by objection of uncertainty or indefiniteness, 89 ALR 1364.

Validity of contract which leaves amount to be paid in performance thereof to promisor's determination, 92 ALR 1396.

Character and validity of written instrument as a contract for sale of goods as affected by election or option in respect of subject-matter, 105 ALR 1100.

Formal or written instrument as essential to completed contract where the making of such instrument is contemplated by parties

to verbal or informal agreement, 122 ALR 1217; 165 ALR 756.

Validity and effect of contract or deed which purports to cover or convey an undivided interest in land without specifying the amount of the interest, 123 ALR 912.

Creditor's statement or assurance to debtor, not supported by a consideration, that payment need not be made at time due, as binding upon creditor by way of estoppel, 124 ALR 1248.

Attempted revocation of offer by letter mailed or telegram filed before, but not received until after, letter or telegram of acceptance was mailed or filed, 125 ALR 989.

Necessity of conscious acceptance as a consideration, when alleged contract was made, of what is relied upon in that regard, 139 ALR 1036.

Validity and enforceability of provision for renewal of lease at rental not determined, 166 ALR 1237.

Validity and construction of contract for exclusive representation of persons participating in, or connected with, entertainment enterprises, 175 ALR 617.

Provision for post-mortem payment or performance as affecting instrument's character and validity as a contract, 1 ALR2d 1178.

Validity of contractual waiver of statute of limitations, 1 ALR2d 1445.

Obligations as between applicant for ad-

mission to charitable home, and home, respecting compensation to home, and property rights of applicant, 10 ALR2d 864.

Validity, construction, and effect of contract between grower of vegetable or fruit crops, and purchasing processor, packer, or canner, 87 ALR2d 732.

Right to reward of furnisher of information leading to arrest and conviction of offenders, 100 ALR2d 573.

Requisite definiteness of price to be paid in event of exercise of option for purchase of property, 2 ALR3d 701.

Recovery against physician on basis of breach of contract to achieve particular result or cure, 43 ALR3d 1221.

Effect, as between stockbroker and customer, of broker's mistaken sale of security other than that intended by customer, 48 ALR3d 513.

Enforceability of voluntary promise of additional compensation because of unforeseen difficulties in performance of existing contract, 85 ALR3d 259.

Requirements as to certainty and completeness of terms of lease in agreement to lease, 85 ALR3d 414.

Knowledge of reward as condition of right thereto, 86 ALR3d 1142.

13-3-2. Contract incomplete without assent of parties to terms thereof; withdrawal of bid or proposition by party.

The consent of the parties being essential to a contract, until each has assented to all the terms, there is no binding contract; until assented to, each party may withdraw his bid or proposition. (Orig. Code 1863, § 2689; Code 1868, § 2685; Code 1873, § 2727; Code 1882, § 2727; Civil Code 1895, § 3645; Civil Code 1910, § 4230; Code 1933, § 20-108.)

History of Code section. — The language of this Code section is derived in part from the decision in *Prior v. Hilton & Dodge Lumber Co.*, 141 Ga. 117, 80 S.E. 559 (1913).

Cross references. — Formation of contracts under Uniform Commercial Code, § 11-2-204. Offer and acceptance under Uniform Commercial Code, §§ 11-2-206, 11-2-207.

Law reviews. — For article discussing interpretation in Georgia of insurance policies

containing evidentiary conditions, see 12 Ga. L. Rev. 783 (1978). For article discussing the anachronistic nature of the Georgia Contracts Code as dramatized by comparing the doctrine of consideration as it is formulated in the Restatements of Contracts and in Code 1933, Title 20 (now this title), and the interpretative approach Georgia courts have taken in dealing with such Code, see 13 Ga. L. Rev. 499 (1979). (But see amendments by Ga. L. 1981, p. 876.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
MUTUALITY OF ASSENT
OFFER AND ACCEPTANCE

General Consideration

One seeking enforcement bears burden of proof as to essentials of contract. — Burden to show that there had been contract between itself and defendants as basis of indebtedness is upon plaintiff, and to carry this burden, it is necessary for plaintiff to

show, by preponderance of evidence, every necessary essential of a valid contract, which includes acceptance of policies of insurance by defendants after defendants had unconditionally assented to all terms of the contracts. *Associated Muts., Inc. v. Pope Lumber Co.*, 200 Ga. 487, 37 S.E.2d 393 (1946).

General Consideration (Cont'd)

No burden of disproving any essentials of valid contracts rests on defendant. *Associated Muts., Inc. v. Pope Lumber Co.*, 200 Ga. 487, 37 S.E.2d 393 (1946).

When no identification of subject matter, nor agreement on price, there is no valid contract. *North Ga. Lumber Co. v. Lawson*, 40 Ga. App. 680, 150 S.E. 865 (1929).

When contract void for uncertainty, receipt, and retention thereunder renders defect immaterial. *Jones v. Ely*, 95 Ga. App. 4, 96 S.E.2d 536 (1957).

One able to read executing contract without reading contract is bound though ignorant of contents. — One able to read, who executed written contract without reading the contract, cannot avoid liability thereon because one signed without knowing contents of contract, when one's so doing was not induced by any action or representation amounting to fraud on part of person with whom one was dealing. *Georgia Medicine Co. v. Hyman & Co.*, 117 Ga. 851, 45 S.E. 238 (1903); *Harrison & Garrett v. Wilson Lumber Co.*, 119 Ga. 6, 45 S.E. 730 (1903); *Branan v. Warfield & Lee*, 3 Ga. App. 586, 60 S.E. 325 (1908).

Business owner's argument that the owner did not assent to the terms of a contract for workers' compensation insurance as required by O.C.G.A. § 13-3-2 because the owner could not read well enough failed; the owner had a tenth-grade education and had experience with contracting and insurance policies, the owner's spouse was available to read the contents to the owner, and the owner did not present any evidence to show that the owner was induced to sign the agreement by any action or representation amounting to fraud. *Brewer v. Royal Ins. Co. of Am.*, 283 Ga. App. 312, 641 S.E.2d 291 (2007).

Paper in form of note ineffective to create obligation when not delivered for such purpose. — Paper in form of note was not effective as creating obligation of insured to defendant insurer or to its general agent when paper was never delivered for purpose of giving paper effect as note or other written obligation to pay money. *Progressive Life Ins. Co. v. Reeves*, 89 Ga. App. 900, 81 S.E.2d 519 (1954).

Letter confirming dates discussed in connection with proposed use of auditorium not

a contract. — Municipal auditorium manager has no authority to contract by parol and any contract executed by manager on behalf of city must be in writing. Where letter shows nothing more than confirmation of dates discussed in connection with proposed use of auditorium for antique show, at most, it is a letter showing intention of parties to contract and is not confirmation of a contract. *Russell v. City of Atlanta*, 103 Ga. App. 365, 119 S.E.2d 143 (1961).

Child not 10 years old, incapable of making gift of land; attempt to make, not subject of affirmance at majority. *Burt v. Gooch*, 37 Ga. App. 301, 139 S.E. 912 (1927).

No valid contract if incomplete agreement on amount of annual payment. — If a contract is fully executed by a city and the only remaining obligations are payments owed to the city by the other party to the contract, but there is no agreement as to the annual sum to be paid beyond a certain year, no contract exists; the fact that the other party expects to pay some amount to be agreed upon, and does pay a certain amount annually for several years, does not show an agreement by that party to pay, or by the city to accept, that amount. *City of Decatur v. Georgia Presbyterian Homes, Inc.*, 251 Ga. 290, 304 S.E.2d 908 (1983).

Settlement agreement must satisfy general contract rules for formation and enforcement. — Under Georgia law, an agreement alleged to be in settlement and compromise of a pending lawsuit must meet the same requisites of formation and enforceability as any other contract. First, there must be a meeting of the minds between the parties concerning all of the essential terms of the agreement. *Blum v. Morgan Guar. Trust Co.*, 709 F.2d 1463 (11th Cir. 1983).

Settlement agreement not enforceable. — Although there was clear authority for an attorney to enter into a settlement agreement, no enforceable agreement arose out of a conference between the attorneys in a divorce action since the husband had not agreed to all the items under discussion. *Bridges v. Bridges*, 256 Ga. 348, 349 S.E.2d 172 (1986).

Contract in futuro ineffective. — Unless all the terms and conditions are agreed on, and nothing is left to future negotiations, a contract to enter into a contract in the future is of no effect. *Southern Bell Tel. &*

Tel. Co. v. John Hancock Mut. Life Ins. Co., 579 F. Supp. 1065 (N.D. Ga. 1982).

Oral agreement unenforceable for vagueness. — Oral agreement between renovator and partner was too vague to enforce where parties did not discuss the time each renovation should take, the length of time the property would be held until the property was resold, how the houses were selected, or how the renovator would be compensated if the partner lost money on a house. *Razavi v. Shackelford*, 260 Ga. App. 603, 580 S.E.2d 253 (2003).

Cited in *Johnson v. Latimer*, 71 Ga. 470 (1883); *Jones v. Gilbert*, 93 Ga. 604, 20 S.E. 48 (1894); *McDonald v. Pearre Bros. & Co.*, 5 Ga. App. 130, 62 S.E. 830 (1908); *Hines v. Cureton-Cole Co.*, 9 Ga. App. 778, 72 S.E. 191 (1911); *Chickamauga Mfg. Co. v. Augusta Grocery Co.*, 23 Ga. App. 163, 98 S.E. 114 (1919); *Dunson & Bros. Co. v. Smith Seed Co.*, 26 Ga. App. 585, 106 S.E. 914 (1921); *Manget v. Carlton*, 34 Ga. App. 526, 130 S.E. 604 (1925); *Davis v. Farmers & Traders Bank*, 36 Ga. App. 415, 436 S.E. 816 (1927); *Federal Farm Mtg. Corp. v. Dixon*, 185 Ga. 466, 195 S.E. 414 (1938); *Trippe v. Crescent Farms, Inc.*, 58 Ga. App. 1, 197 S.E. 330 (1938); *Pita v. Whitney*, 190 Ga. 810, 10 S.E.2d 851 (1940); *Milner Hotels v. Black*, 196 Ga. 686, 27 S.E.2d 402 (1943); *Denton v. Etheridge*, 73 Ga. App. 221, 36 S.E.2d 365 (1945); *Gettier-Montanye, Inc. v. Davidson Granite Co.*, 75 Ga. App. 377, 43 S.E.2d 716 (1947); *National Life & Accident Ins. Co. v. Hamby*, 81 Ga. App. 463, 59 S.E.2d 278 (1950); *Lawson v. O'Kelley*, 81 Ga. App. 883, 60 S.E.2d 380 (1950); *Flatauer v. Goodman*, 84 Ga. App. 881, 67 S.E.2d 794 (1951); *Almand v. Northern Assurance Co.*, 92 Ga. App. 480, 88 S.E.2d 717 (1955); *Bregman v. Rosenthal*, 212 Ga. 95, 90 S.E.2d 561 (1955); *Barnes v. Didschuneit*, 94 Ga. App. 661, 96 S.E.2d 216 (1956); *Crown Carpet Mills, Inc. v. C.E. Goodroe Co.*, 108 Ga. App. 327, 132 S.E.2d 824 (1963); *Weikert v. Logue*, 121 Ga. App. 171, 173 S.E.2d 268 (1970); *Dowis v. Lindgren*, 132 Ga. App. 793, 209 S.E.2d 233 (1974); *Georgia-Pacific Corp. v. Corbin*, 137 Ga. App. 37, 222 S.E.2d 862 (1975); *Royal Mfg. Co. v. Denard & Moore Constr. Co.*, 137 Ga. App. 650, 224 S.E.2d 770 (1976); *Peacock v. Gibson*, 237 Ga. 600, 229 S.E.2d 347 (1976); *Mayer v. Turner*, 142 Ga. App. 63, 234 S.E.2d 853 (1977); *Siegel v. Codner*, 153

Ga. App. 438, 265 S.E.2d 287 (1980); *Jones v. Barnes*, 170 Ga. App. 762, 318 S.E.2d 164 (1984); *Farmer v. Argenta*, 174 Ga. App. 682, 331 S.E.2d 60 (1985); *Beckworth v. Beckworth*, 255 Ga. 241, 336 S.E.2d 782 (1985); *Moore v. Farmers Bank*, 184 Ga. App. 86, 360 S.E.2d 640 (1987); *Poulos v. Home Fed. Sav. & Loan Ass'n*, 192 Ga. App. 501, 385 S.E.2d 135 (1989); *Wallace v. Triad Sys. Fin. Corp.*, 212 Ga. App. 665, 442 S.E.2d 476 (1994); *Moore v. Emery (In re Am. Steel Prod., Inc.)*, 203 Bankr. 504 (Bankr. S.D. Ga. 1996); *Morrison v. Trust Co. Bank*, 229 Ga. App. 145, 493 S.E.2d 566 (1997); *Meadows Motor, Inc. v. United Servs. Auto. Ass'n*, 230 Ga. App. 387, 496 S.E.2d 355 (1998); *Legg v. Stovall Tire & Marine, Inc.*, 245 Ga. App. 594, 538 S.E.2d 489 (2000); *McKenna v. Capital Res. Partners, IV, L.P.*, 286 Ga. App. 828, 650 S.E.2d 580 (2007).

Mutuality of Assent

Mutuality of intention or assent is of essence of contract. *Daly v. Harris*, 33 Ga. 38 (1864).

Meeting of minds of parties is necessary. *Taylor Lumber Co. v. Clark Lumber Co.*, 33 Ga. App. 815, 127 S.E. 905 (1925).

Essence of mutual assent is the meeting of the minds of the parties, and both parties must concur in all terms of the proposed contract, agreeing to the same thing in the same sense. *Complete Concepts, Ltd. v. General Handbag Corp.*, 880 F.2d 382 (11th Cir. 1989).

Contract is not complete and enforceable until there is a meeting of the minds as to all essential terms. *Clark v. Schwartz*, 210 Ga. App. 678, 436 S.E.2d 759 (1993).

In a case in which a steel company signed a purchase order from a general contractor after it had rejected the terms of the purchase order and had submitted a counter-offer to the general contractor, summary judgment was correctly entered in favor of the general contractor where there was no material fact in dispute; no reasonable jury could find that the general contractor and the steel company agreed to terms of a steel supply contract for the construction project. The requirement for a meeting of the minds necessary under O.C.G.A. § 13-3-2 had not been met, and there was no agreement between the parties under O.C.G.A. § 11-2-204. *South Cent. Steel, Inc.*

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v. McKnight Constr. Co., No. 07-11292, 2008 U.S. App. LEXIS 1771 (11th Cir. Jan. 25, 2008) (Unpublished).

Agreement as to essential terms. — Oral settlement agreement, which was read into the court's record and which allowed defendants to set a certain property value based on two appraisals, was an enforceable contract under O.C.G.A. § 13-3-2 because the parties had agreed to the essential terms of the settlement, as evidenced by the fact that the judge had given the parties the opportunity to add other terms, but plaintiff merely reiterated that the appraisers just had to be certified and based in the local area. Thus, a subsequent written settlement agreement requiring that the appraisals, which had already been conducted, be done by general appraisers instead of residential appraisers, was not enforceable. *Clough Mktg. Servs. v. Main Line Corp.*, No. 1:07-CV-0173-RLV, 2007 U.S. Dist. LEXIS 81692 (N.D. Ga. Nov. 2, 2007), *aff'd*, 2008 U.S. App. LEXIS 12352 (11th Cir. Ga. 2008).

Trial court properly found that no contract had been formed as a matter of law because the parties failed to assent to the contract's essential terms. The parties never agreed on a lender's rate of return on the investment and on the structure of the transaction; these terms were inherently material, as the terms would define the consideration for the investment. *Gardner v. Marcum*, 292 Ga. App. 369, 665 S.E.2d 336 (2008), *cert. denied*, 2008 Ga. LEXIS 938 (Ga. 2008).

Parties' verbal expressions and conduct demonstrated an intent to be bound by an oral agreement for the sale of two sports teams and the operating rights to a sports arena because the oral agreement concerned all material terms of the sale, and agreement was reached prior to the seller's announcement that the seller had completed a sale to another entity. *Turner Broad. Sys. v. McDavid*, No. A09A2314, 2010 Ga. App. LEXIS 317 (Mar. 26, 2010).

No contract arises if parties have not agreed to same thing. — If, from mistake or otherwise, both parties have not agreed to same thing, no contract has been made, and there is nothing to enforce. *Singer v. Grand Rapids Match Co.*, 117 Ga. 86, 43 S.E. 755 (1903).

If there was no evidence that the parties to an option contract had agreed to be bound by exactly the same terms and no consideration had been given for the alleged offer, there was no complete and legally sufficient contract. *Firstline Corp. v. Valdosta-Lowndes County Indus. Auth.*, 236 Ga. App. 432, 511 S.E.2d 538 (1999).

Parties must assent to all essential terms of the contract, and since the timber buyer and the timber seller did not agree on the essential element of the length of the "cutting term," no contract was formed between the parties and the timber seller was required to return the timber buyer's option purchase money. *Peace v. Dominy Holdings, Inc.*, 51 Ga. App. 654, 554 S.E.2d 314 (2001).

Record supported the trial court's finding that there was no meeting of the minds in the execution of a note, where the maker struck three significant provisions in the proposed note before the maker signed the note, but there was no indication that the payee accepted the changes; there was evidence that the parties did not agree that settlement of a lawsuit would provide consideration for the note and there was no written settlement agreement to memorialize the terms of the parties' agreement. *Drake v. Wallace*, 259 Ga. App. 111, 576 S.E.2d 87 (2003).

Meeting of minds as to subject matter necessary for definiteness required to maintain action. — For contract to be sufficiently definite so that action may be maintained thereon, it is necessary to show that minds of parties are in agreement as to subject matter upon which contract purports to operate. *Jones v. Ely*, 95 Ga. App. 4, 96 S.E.2d 536 (1957).

To be enforceable minds of contracting parties must be in such agreement on subject matter upon which contract purports to operate that either party might support action thereon. *Ethridge v. Quality Hatchery, Inc.*, 101 Ga. App. 76, 112 S.E.2d 778 (1960).

Meeting of minds shown. — Because nothing remained to negotiate in the terms of the forms necessary to effectuate a settlement, the trial court erred in concluding there was no meeting of the minds as to every essential term of the agreement, due to an alleged lack of agreement as to the forms required. *Capitol Materials, Inc. v. Kellogg & Kimsey, Inc.*, 242 Ga. App. 584,

530 S.E.2d 488 (2000).

Unresolved on summary judgment. — Claims of breach of implied contract, quantum meruit, and unjust enrichment survived summary judgment because there were issues of fact as to whether the defendant asked the plaintiff to help place its synthetic oil as a factory fill in certain manufacturer's cars, and as to whether the plaintiff was adequately paid for that service. *Morrison v. Exxonmobil Corp. Constr. Millwright, Inc.*, No. 1:03-CV-140(WLS), 2005 U.S. Dist. LEXIS 36117 (M.D. Ga. Sept. 28, 2005).

Summary judgment for a corporation on an investor's claims for money had and received and for conversion was error under circumstances in which the issue was whether the investor entered into a binding contract for the payment, and, although the investor had signed a subscription agreement and sent the agreement to the corporation, the investor claimed that the investor revoked that offer before the offer was accepted by the corporation; the date on which the corporation accepted the offer was a genuine issue of material fact, requiring proof. An exhibit which purported to show the handwritten date of acceptance was unauthenticated and was not competent evidence. *Fernandez v. WebSingularity, Inc.*, 299 Ga. App. 11, 681 S.E.2d 717 (2009).

What constitutes assent of parties to terms of contract. — Mutual assent is assent to same thing in same sense, under common understanding of stipulations agreed to. *Martin v. Thrower*, 3 Ga. App. 784, 60 S.E. 825 (1908).

While contract can be made by correspondence through mails or by telegrams, offer of seller must be accepted by purchaser unequivocally, unconditionally, and without variance of any sort, must be a mutual assent of parties, and both parties must assent to same thing in same sense. *Associated Muts., Inc. v. Pope Lumber Co.*, 200 Ga. 487, 37 S.E.2d 393 (1946).

In order to make any sort of a contract, the offer of the seller must be accepted by the purchaser, unequivocally, unconditionally, and without variance of any sort. An absolute acceptance of a proposal, coupled with a condition, will not be a complete contract, because there does not exist the requisite mutual assent to the same thing in the same sense. Both parties must assent to

the same thing in order to make a binding contract between the parties. *Harry Norman & Assocs. v. Bryan*, 158 Ga. App. 751, 282 S.E.2d 208 (1981).

Assent to terms of contract may be given other than by signatures. *Rogin v. Dimensions S. Realty Corp.*, 153 Ga. App. 75, 264 S.E.2d 555 (1980).

Assent to oral agreement shown by witnesses testimony. — Trial court erred by granting partial summary judgment to an executrix on a counterclaim brought by two stepchildren of the decedent asserting breach of an oral contract to make a will as the alleged contract predated the written will mandate of O.C.G.A. § 53-4-30 and testimony was provided that the oral agreement was witnessed and that the decedent assented to the agreement. Therefore, the executrix was not entitled to summary judgment on the breach of contract claim. *Rushin v. Ussery*, 298 Ga. App. 830, 681 S.E.2d 263 (2009).

Mutuality of assent may be given by agents or letters as well as personally. — Mutuality of assent to certain and definite proposition required to consummate contract may be given not only personally where parties are present, but by means of agents or letters where parties are at a distance from each other. *Jernigan, Lawrence & Co. v. Wimberly*, 1 Ga. 220 (1846); *Levy v. Cohen*, 4 Ga. 1 (1848).

Contract resting in parol must be assented to by both parties in same sense. *Martin v. Thrower*, 3 Ga. App. 784, 60 S.E. 825 (1908).

Contract of insurance is not complete until both parties have agreed to all contract's terms, and burden of proving that policies of insurance were not accepted is on plaintiff. *Associated Muts., Inc. v. Pope Lumber Co.*, 200 Ga. 487, 37 S.E.2d 393 (1946).

Construction of words in insurance contract. — Term "landslide" as used in the coverage provisions of an insurance policy did not apply only to natural occurring events, when no such restriction was contained within the policy language and since, *inter alia*, other clauses listing perils insured against placed specific restrictions on broad terms; to the extent there was any ambiguity in the use of the term landslide, it was interpreted against the insurance company. *Auto-Owners Ins. Co. v. Parks*, 278 Ga. App. 444, 629 S.E.2d 118 (2006).

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Price. — As price is an essential element of a valid contract, an alleged contract on which there is no firm agreement as to the price is unenforceable. *Bellsouth Adv. & Publishing Corp. v. McCollum*, 209 Ga. App. 441, 433 S.E.2d 437 (1993).

Insertion of provision after one party has signed. — When provision was written into contract after it was signed by one party and was not subsequently resubmitted to that party, contract was incomplete, as it was never agreed to by both parties, and could be rescinded since there was no meeting of minds of parties on all terms. *Vlass v. Walker*, 86 Ga. App. 742, 72 S.E.2d 464 (1952).

Blank note signed and delivered without understanding as to completion. — Blank note signed and delivered by insured to defendant insurer's general agent without any understanding or agreement between them as to amount note was to be filled in for, or as to due date to be inserted therein, was not binding and enforceable obligation of insured, and could not be asserted by beneficiary as having constituted payment of premium on policy of insurance in question. *Progressive Life Ins. Co. v. Reeves*, 89 Ga. App. 900, 81 S.E.2d 519 (1954).

To bind one to unsigned written contract, prima facie assent to terms must be shown. — When one party seeks to bind another by unsigned written contract, it is incumbent upon the party to show prima facie assent of the other to its terms, before the party can introduce it in evidence against him. *Kidd v. Huff*, 105 Ga. 209, 31 S.E. 430 (1898).

Assent implied on facts. — When it appeared that defendants, sued as sureties, had requested of creditor an indulgence to principal, such as certain and definite extension of time in which sureties might pay debt, request being embodied in contract tendered by sureties for creditor's acceptance, upon creditor's acceptance and retention of papers, creditor assented to terms thereof; and even though creditor did not promise indulgence in express words, such a promise, or undertaking on creditor's part was implied by law. *Loewenherz v. Weil*, 33 Ga. App. 760, 127 S.E. 883 (1925).

Contract existence was question of fact for a jury. — Summary judgment was improperly granted to an insurance broker in a

contract dispute because there was conflicting testimony regarding the course of dealings between the party relating to whether or not a contract existed under O.C.G.A. §§ 13-3-1 and 13-3-2; the question of fact should have been decided by a jury instead. *Terry Hunt Constr., Inc. v. AON Risk Servs.*, 272 Ga. App. 547, 613 S.E.2d 165 (2005).

Summary judgment was inappropriate in a breach of fiduciary duty action which centered around a verbal settlement agreement as material fact issues remained as to whether: (1) a company's offer to buy the minority shareholders' stock required a written purchase agreement; (2) the parties agreed to all material terms; and (3) a note signed by one of the minority shareholders had been cancelled. *McKenna v. Capital Res. Partners, IV, L.P.*, 286 Ga. App. 828, 650 S.E.2d 580 (2007), cert. denied, 2007 Ga. LEXIS 752, 763 (Ga. 2007).

General release provision implied from failure to object to oral settlement. — An oral settlement agreement as to damages for injuries suffered in an accident was enforceable with a general release provision where the plaintiff's attorney did not discover the need for inclusion of language to preserve the plaintiff's right to claim under insurance benefits pursuant to the policy insuring the driver of the car in which plaintiff was a passenger until after they orally agreed to settle the case; counsel's assent to inclusion of a general release could be implied from counsel's failure to object when counsel agreed to settle the case. *Wong v. Bailey*, 752 F.2d 619 (11th Cir. 1985).

Offer and Acceptance

If there is a proposition but the proposition is not accepted, no binding contract results. *Sheffield v. Whitfield*, 6 Ga. App. 762, 65 S.E. 807 (1909).

Acceptance before withdrawal or termination of continuing offer results in contract. *Prior v. Hilton & Dodge Lumber Co.*, 141 Ga. 117, 80 S.E. 559 (1913).

Acceptance means assent. *Loewenherz v. Weil*, 33 Ga. App. 760, 127 S.E. 883 (1925).

Acceptance must be unconditional and identical with terms of offer. — Answer to offer will not amount to acceptance, so as to result in binding contract, unless it be unconditional and identical with terms of offer.

Winder Mfg. Co. v. Pendleton Co., 27 Ga. App. 476, 108 S.E. 823 (1921).

To constitute a contract, offer must be accepted unequivocally and without variance of any sort. *Gray v. Lynn*, 139 Ga. 294, 77 S.E. 156 (1913); *Dillin-Morris Co. v. Gillespie*, 15 Ga. App. 210, 82 S.E. 812 (1914); *Anderson, Clayton & Co. v. Mangham*, 32 Ga. App. 152, 123 S.E. 159 (1924).

If there is variance between offer and answer, there is no acceptance, but a counter-offer, which, to result in contract, must be accepted by original proposer. *Winder Mfg. Co. v. Pendleton Co.*, 27 Ga. App. 476, 108 S.E. 823 (1921).

Since the defendant's letter showed in clear and unmistakable terms that the defendant was proposing to sell the defendant's shares to the plaintiff at a certain price, neither that letter nor another, subsequent one triggered provisions in the shareholder's agreement which only came into play through the selling shareholder's transmittal of copies of a written offer containing certain required information, and the plaintiff could therefore not force the defendant to part with the defendant's shares at a different price than that set forth in the defendant's offer because plaintiff's responding letter was a counteroffer, rather than an acceptance. *Destag of N. Am., Inc. v. LAN Int'l, Inc.*, 236 Ga. App. 476, 512 S.E.2d 365 (1999).

Offer may contemplate acceptance by act. — Offer may contemplate acceptance by doing of an act; and if act be performed while offer is in life, a binding contract is created, and person making offer must abide by offer's terms. *Anderson, Clayton & Co. v. Mangham*, 32 Ga. App. 152, 123 S.E. 159 (1924).

When offer requires express acceptance, private uncommunicated assent insufficient.

— While an offer may contemplate acceptance by doing of an act, when an express acceptance is required by the offer in order to establish a contract, acceptance must be communicated to offerer, and a mere private uncommunicated assent would not effect an agreement. *Federal Farm Mtg. Corp. v. Dixon*, 185 Ga. 466, 195 S.E. 414 (1938); *National Fire Ins. Co. v. Farris*, 63 Ga. App. 479, 11 S.E.2d 427 (1940).

Offer, once rejected, loses legal force and cannot thereafter be accepted unless re-

newed. — Offer, when once rejected, loses its legal force and cannot be accepted thereafter so as to create binding agreement unless the offer is renewed after rejection by original offerer. No revocation of offer is, therefore, necessary to prevent its subsequent acceptance after it has once been rejected. *Winder Mfg. Co. v. Pendleton Co.*, 27 Ga. App. 476, 108 S.E. 823 (1921).

Continuing offer. — When under the clear and unambiguous terms of letters to a shipper, a carrier offered to ship any goods presented by the shipper at certain prices and on certain terms, this was a continuing offer and became a contract with regard to each separate shipment only when the shipper accepted the offer and engaged the carrier's services. *Esquire Carpet Mills, Inc. v. Kennesaw Transp., Inc.*, 186 Ga. App. 367, 367 S.E.2d 569 (1988).

Continuing offer or option becomes contract itself if consideration given. — If two parties contract upon consideration that option given or offer made by one to other shall remain open and subject to acceptance of latter until stated time, this makes a binding contract to that effect. But mere proposition or offer, based on no consideration, though continuing in character, or though stated to be subject to acceptance until given time, may be withdrawn before actual acceptance or assent thereto by other party. *Prior v. Hilton & Dodge Lumber Co.*, 141 Ga. 117, 80 S.E. 559 (1913); *Amwest Surety Ins. Co. v. RA-LIN & Assocs.*, 216 Ga. App. 526, 455 S.E.2d 106 (1995).

Owner may withdraw owner's property from auction any time before hammer falls. *Jackson v. L.S. Brown Co.*, 86 Ga. App. 310, 71 S.E.2d 521 (1952).

Retention of contract without signing contract. — After an attorney drafted a contract personally and delivered the contract, signed by the attorney and a brother, to their mother, who kept the contract with her personal papers, the fact that she did not sign the contract did not negate her assent to the contract's terms. *Warthen v. Moore*, 258 Ga. 198, 366 S.E.2d 666 (1988).

Renewal policy delivered to insured without insured's request requires acceptance before contract arises. — Rule as to right of insured to reject renewal policy is that delivery of policy by insurer to insured, upon expiration of policy, without request by in-

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sured, is an offer or proposal which must be accepted by insured before contract of insurance is effected. *Associated Muts., Inc. v. Pope Lumber Co.*, 200 Ga. 487, 37 S.E.2d 393 (1946).

Delay in rejecting offered policy renewal not acceptance as will continue policy in force. — Offer by letter to renew policy does not effect contract unless accepted by insured, and mere delay in rejecting renewal policy does not amount to acceptance which will continue policy in force. *Associated Muts., Inc. v. Pope Lumber Co.*, 200 Ga. 487, 37 S.E.2d 393 (1946).

Application for policy of insurance unless accepted within reasonable time, may be considered as rejected. *Home Ins. Co. v. Swann*, 34 Ga. App. 19, 128 S.E. 70 (1924), later appeal, 35 Ga. App. 358, 133 S.E. 280 (1926), later appeal, 36 Ga. App. 601, 137 S.E. 304 (1927).

When insurance company failed to respond to application for six months, rejection conclusively presumed. — While period constituting reasonable time for acceptance of insurance application may, as a general rule, be a matter for determination by jury, where insurance company appears to have remained silent for approximately six months after receipt of application, presumption that the application was rejected

becomes conclusive. *Home Ins. Co. v. Swann*, 34 Ga. App. 19, 128 S.E. 70 (1924), later appeal, 35 Ga. App. 358, 133 S.E. 280 (1926), later appeal, 36 Ga. App. 601, 137 S.E. 304 (1927).

Proof of acceptance in action for broker's commission. — While in every action for broker's commissions, proof of acceptance of an offer might not be required, where the action is predicated upon the broker's having procured a buyer ready, willing, and able to buy on terms stipulated by the owner, the proof of an offer by the proposed purchaser to buy on terms not stipulated by the owner will not entitle the plaintiff broker to the broker's commissions. *Harry Norman & Assocs. v. Bryan*, 158 Ga. App. 751, 282 S.E.2d 208 (1981).

Listing of contractor as "potential minority subcontractor" not acceptance of subcontractor's bid. — Company A's listing of Company B as a "potential minority subcontractor" in Company A's bid on the prime contract did not constitute acceptance by Company A of Company B's bid on the subcontracting job. *Southeast Grading, Inc. v. City of Atlanta*, 172 Ga. App. 798, 324 S.E.2d 776 (1984).

Purported settlement agreement concerning interests in real estate was unenforceable because no agreement to settle was formed as required by O.C.G.A. § 13-3-2. *Newcomer v. Newcomer*, 278 Ga. 776, 606 S.E.2d 238 (2004).

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Contracts, § 30.

ALR. — Acceptance of offer with condition which law would imply, 1 ALR 1508.

Acknowledging receipt of order for goods as an acceptance completing the contract, 10 ALR 683.

Silence when offer is made or failure to reject it as an acceptance which will consummate a bilateral contract, 77 ALR 1141.

Revocation of offer of reward, 107 ALR 1085.

What amounts to acceptance by owner of work done under contract for construction, or repair of building which will support a recovery on quantum meruit, 107 ALR 1411.

Implied obligation of one to pay for services or goods which another at his request has rendered or furnished to a third person, 125 ALR 1428.

Circumstances supporting inference of original offerer's acceptance of counteroffer or assent to conditions attached by offeree to his acceptance, 135 ALR 821.

Acceptance of offer of contract predicated upon reply which contemplates third person as party to the contract, 170 ALR 996.

Difference between offer and acceptance as regards place of payment or of delivery as variance preventing consummation of contract, 3 ALR2d 256.

Rights and remedies arising out of delay in passing upon application for insurance, 32 ALR2d 487.

Ratification of contract voidable for duress, 77 ALR2d 426.

Validity, construction, and effect of contract between grower of vegetable or fruit

crops, and purchasing processor, packer, or canner, 87 ALR2d 732.

Nature, construction, and effect of "lay away" or "will call" plan or system, 10 ALR3d 456.

Variance between offer and acceptance in regard to title as affecting consummation of contract for sale of real property, 16 ALR3d 1424.

Validity and construction of "no damage" clause with respect to delay in building or construction contract, 74 ALR3d 187.

Sufficiency of notice of modification in terms of compensation of at-will employee who continues performance to bind employee, 69 ALR4th 1145.

13-3-3. When written acceptance of offer made by letter takes effect; acceptance of offer containing alternative propositions.

If an offer is made by letter, an acceptance by written reply takes effect from the time it is sent and not from the time it is received; hence, withdrawal of the offer by the offeror after that time is ineffective. If an offer contains alternative propositions, the party receiving the offer may elect between the alternative propositions. (Orig. Code 1863, § 2690; Code 1868, § 2686; Code 1873, § 2728; Code 1882, § 2728; Civil Code 1895, § 3646; Civil Code 1910, § 4231; Code 1933, § 20-114.)

History of Code section. — This Code section is derived from the decision in *Woolbright v. Sneed*, 5 Ga. 167 (1848).

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Section applies only where proposition and reply are communicated in same way. *W. & H.M. Goulding, Ltd. v. Hammond*, 54 F. 639 (5th Cir. 1893), rev'g 49 F. 443 (S.D. Ga. 1892).

Method for creating binding contract through correspondence. — Complete and binding contract may be made by means of epistolary correspondence, but this result is not accomplished until there has been a definite offer by one correspondent and an unequivocal acceptance of it by the other, without condition or variance of any kind. Parties must mutually assent to same thing in same sense. *Robinson v. Weller*, 81 Ga. 704, 8 S.E. 447 (1888); *Harris v. Amoskeag Lumber Co.*, 97 Ga. 465, 25 S.E. 519 (1895).

Offer by mail adopts mail as agency for acceptance unless specified otherwise. — Person who by mail sends to another an offer or proposal which requires only latter's acceptance or confirmation to create valid contract, and who says nothing as to how answer of acceptance or confirmation shall be communicated, nor that it shall take effect only upon actual receipt of acceptance

by offerer, impliedly adopts mails as one's agency, and authorizes its use in transmission to one of acceptance. *Rowntree Bros. v. Bush*, 28 Ga. App. 376, 111 S.E. 217 (1922).

One making by mail an offer requiring only acceptance to create valid contract, without stating how acceptance shall be communicated, adopts the mails as one's agency, and authorizes transmission of acceptance by mail. *E. Frederics, Inc. v. Felton Beauty Supply Co.*, 58 Ga. App. 320, 198 S.E. 324 (1938).

Contract for the construction of an underground piping system is "made" when the offer is accepted, because the acceptance, not delivery, constitutes the last act essential to the completion of the contract. *General Tel. Co. v. Trimm*, 706 F.2d 1117 (11th Cir. 1983).

When mail is agency for acceptance, contract complete upon mailing acceptance, although acceptance never received. *E. Frederics, Inc. v. Felton Beauty Supply Co.*, 58 Ga. App. 320, 198 S.E. 324 (1938).

When offeree deposits the offeree's acceptance in mail, in envelope properly stamped

and addressed to offerer, contract thereupon becomes complete and binding, without reference to whether or not acceptance actually reaches addressee. *Rowntree Bros. v. Bush*, 28 Ga. App. 376, 111 S.E. 217 (1922).

Presumption of receipt of letter properly addressed, stamped, and mailed is rebuttable. — Rule that, where letter is written, properly addressed, stamped, and mailed, presumption arises that the letter was received by addressee, is merely *prima facie*, and may be successfully rebutted by uncontradicted evidence of addressee that addressee did not in fact receive the letter. *Rowntree Bros. v. Bush*, 28 Ga. App. 376, 111 S.E. 217 (1922).

Cited in *Bryant v. Booze*, 55 Ga. 438 (1875); *Georgia R.R. & Banking Co. v. Smith*, 83 Ga. 626, 10 S.E. 235 (1889); *Home Ins. Co. v. Chattahoochee Lumber Co.*, 126 Ga. 334, 55 S.E. 11 (1906); *City of Royston v. Littrell Eng'r Co.*, 87 Ga. App. 903, 75 S.E.2d 678 (1953); *Borg-Warner Health Prods., Inc. v. May*, 154 Ga. App. 482, 268 S.E.2d 770 (1980); *Amwest Surety Ins. Co. v. RA-LIN & Assocs.*, 216 Ga. App. 526, 455 S.E.2d 106 (1995); *Moore v. Emery (In re Am. Steel Prod., Inc.)*, 203 Bankr. 504 (Bankr. S.D. Ga. 1996).

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Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 25, 29, 31, 35, 48 et seq., 57, 60, 67.

C.J.S. — 17 C.J.S., Contracts, §§ 33, 36, 52, 57, 17A C.J.S., Contracts, §§ 356, 374, 580, 592, 597, 624.

ALR. — Time and place of consummation of contract on acceptance by telegraph of offer, 47 ALR 159.

Time when offer or proposition is mailed, or when it is received through mail as commencement of period allowed for acceptance, 72 ALR 1214.

Withdrawal of, or right to withdraw, letter

from mail as affecting consummation of contract, 92 ALR 1062.

Character and validity of written instrument as a contract for sale of goods as affected by election or option in respect of subject-matter, 105 ALR 1100.

Attempted revocation of offer by letter mailed or telegram filed before, but not received until after, letter or telegram of acceptance was mailed or filed, 125 ALR 989.

Applicability and application, in civil case, of presumption of addressee's receipt of telegram, 24 ALR3d 1434.

13-3-4. Effect of conditions precedent or subsequent upon rights of parties under contracts.

Conditions may be precedent or subsequent. A condition precedent must be performed before the contract becomes absolute and obligatory upon the other party. The breach of a condition subsequent may destroy the party's rights under the contract or may give a right to damages to the other party, according to a true construction of the intention of the parties. (Orig. Code 1863, § 2684; Code 1868, § 2680; Code 1873, § 2722; Code 1882, § 2722; Civil Code 1895, § 3639; Civil Code 1910, § 4224; Code 1933, § 20-110.)

Law reviews. — For article surveying developments in Georgia contracts law from

mid-1980 through mid-1981, see 33 Mercer L. Rev. 67 (1981).

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Condition precedent must be performed before contract becomes absolute and obligatory upon other party. *Roush v. Dan Vaden Chevrolet, Inc.*, 155 Ga. App. 372, 270 S.E.2d 902 (1980).

Condition precedent requires performance before estate vests. *Winn v. Tabernacle Infirmary*, 135 Ga. 380, 69 S.E. 557, 32 L.R.A. (n.s.) 512 (1910).

No recovery allowed on contract containing conditions precedent unless such conditions have been complied with. *Thurmond v. Sovereign Camp, W.O.W.*, 171 Ga. 446, 155 S.E. 760 (1930).

Plaintiff cannot recover upon express contract, entire and indivisible, unless plaintiff has performed all obligations. *Sellers v. City of Summerville*, 208 Ga. 361, 67 S.E.2d 137 (1951).

Condition precedent requires performance before performance by other party. *Daniel v. Dalton News Co.*, 48 Ga. App. 772, 173 S.E. 727 (1934); *Mutual Benefit Health & Accident Ass'n v. Hulme*, 57 Ga. App. 876, 197 S.E. 85 (1938).

Triable issues of fact did not remain on a counterclaim by a former son-in-law (SIL) for breach of contract because the SIL had failed to meet the condition precedent of completing the construction of a home before the former father-in-law could purchase the home; thus, even if a valid contract existed, the contract was not enforceable under O.C.G.A. § 13-3-4. *Hunt v. Thomas*, 296 Ga. App. 505, 675 S.E.2d 256 (2009).

Pleading and proof requirements relating to conditions precedent, O.C.G.A. §§ 9-11-9 and 13-3-4, inapplicable to contractual claim. See *Cowen v. Snellgrove*, 169 Ga. App. 271, 312 S.E.2d 623 (1983).

Mutual covenants must go to whole consideration on both sides when one is precedent to other. *Jordan Realty Co. v. Chambers Lumber Co.*, 176 Ga. 624, 168 S.E. 601 (1933).

Statutory law recognizes that a right may be lost or destroyed by breach of condition. *Franklin v. Mayor of Savannah*, 199 Ga. 426, 34 S.E.2d 506 (1945).

Condition subsequent may cause forfeiture of vested estate. *Winn v. Tabernacle Infirmary*, 135 Ga. 380, 69 S.E. 557, 32 L.R.A. (n.s.) 512 (1910).

Forfeiture provisions in contracts are not favored, and the law inclines to construe such conditions as remediable by damages rather than by forfeiture. *J.G.T., Inc. v. Brunswick Corp.*, 119 Ga. App. 719, 168 S.E.2d 847 (1969).

Preference for conditional subsequent rather than precedent, and for remedy by damages rather than forfeiture. — Law inclines to construe conditions to be subsequent rather than precedent, and to be remediable by damages, rather than forfeiture. *Doe v. Roe*, 39 Ga. 202 (1869); *Winn v. Tabernacle Infirmary*, 135 Ga. 380, 69 S.E. 557, 32 L.R.A. (n.s.) 512 (1910).

Performance of condition precedent may be waived. *Heitmann v. Commercial Bank*, 6 Ga. App. 584, 65 S.E. 590 (1909).

Condition precedent did not exist. — Condition precedent requiring performance under O.C.G.A. § 13-3-4 did not exist in a guaranty as the provision at issue regarding invoices being mailed to the surety on a monthly basis employed no explicit words of condition and there were no expressions in the entirety of the guaranty to the effect that the cited provision was to be construed as a condition precedent; as the provision was not ambiguous, the surety could not introduce parol evidence under O.C.G.A. § 13-2-2(1) that the guaranty was only effective if the surety received monthly billings. *General Steel, Inc. v. Delta Bldg. Sys.*, 297 Ga. App. 136, 676 S.E.2d 451 (2009).

Party for whose benefit condition precedent operates may be estopped from complaining of nonperformance. *Heitmann v. Commercial Bank*, 6 Ga. App. 584, 65 S.E. 590 (1909), later appeal, 7 Ga. App. 740, 68 S.E. 51 (1910).

Forfeitures resulting from breach of condition may be expressly released, or waived, and waiver may result from circumstances as well as express language to that effect. *Jones v. Williams*, 132 Ga. 782, 64 S.E. 1081 (1909).

Plaintiff must allege and prove performance or excuse for nonperformance of condition precedent. — When plaintiff's right to recover on contract depends on condition precedent to be performed by plaintiff, the plaintiff must allege and prove performance of such condition precedent, or allege a sufficient legal excuse for the

condition's nonperformance. *Daniel v. Dalton News Co.*, 48 Ga. App. 772, 173 S.E. 727 (1934); *Mutual Benefit Health & Accident Ass'n v. Hulme*, 57 Ga. App. 876, 197 S.E. 85 (1938); *Irvindale Farms, Inc. v. W.O. Pierce Dairy, Inc.*, 78 Ga. App. 670, 51 S.E.2d 712 (1949); *Sellers v. City of Summerville*, 208 Ga. 361, 67 S.E.2d 137 (1951); *Wolverine Ins. Co. v. Sorrough*, 122 Ga. App. 556, 177 S.E.2d 819 (1970).

When right to recover under contract depends on condition precedent, a petition seeking recovery under such contract must allege compliance with condition precedent or allege a legal excuse for noncompliance. *Nutting v. Wilson*, 75 Ga. App. 148, 42 S.E.2d 575 (1947).

In order to set out plainly the breach of a bond from which arises a cause of action, it is necessary to show a valid obligation and to do this there must be alleged facts showing performance or a sufficient legal excuse for nonperformance of conditions precedent upon which contract becomes obligatory upon surety. *Jenkins v. Gordy*, 105 Ga. App. 255, 124 S.E.2d 303 (1962).

Generally, cooperation clauses have been regarded as conditions precedent, so that no rights accrue until the conditions are satisfied. The rule is otherwise when contract or policy does not make performance of obligation a condition precedent. *Wolverine Ins. Co. v. Sorrough*, 122 Ga. App. 556, 177 S.E.2d 819 (1970).

Words "subject, however, to," create a condition precedent. — Conditions of a contract are either precedent or subsequent. The words, "subject, however, to," create a condition precedent. *Blue Ridge Apt. Co. v. Telfair Stockton & Co.*, 205 Ga. 552, 54 S.E.2d 608 (1949).

Code makes no distinction between conditions precedent as to personalty and realty. *Winn v. Tabernacle Infirmary*, 135 Ga. 380, 69 S.E. 557, 32 L.R.A. (n.s.) 512 (1910).

If condition subsequent becomes illegal, no forfeiture results, but if condition precedent, right never vests. — If condition subsequent becomes illegal, there is no forfeiture; for the estate having once vested, it shall not be divested because party fails to do an illegal or impossible act. But it is different with condition precedent. If that be illegal right never vests. It is not a question of forfeiture, but a failure to do the thing

necessary to acquire the right. *Dillard v. Manhattan Life Ins. Co.*, 44 Ga. 119, 9 Am. R. 167 (1871).

When performance of condition subsequent rendered impossible by act of God, nonperformance of condition excused. — If condition is subsequent, and title has vested subject to be divested in event of nonperformance of condition, and such condition becomes impossible of performance by act of God, nonperformance is excused, and estate which has vested in grantee will not be divested. *Winn v. Tabernacle Infirmary*, 135 Ga. 380, 69 S.E. 557, 32 L.R.A. (n.s.) 512 (1910).

Doctrine of equitable conversion. — The presence of an unfulfilled condition precedent in a sales contract provides an exception to the application of the doctrine of equitable conversion so as to prevent the risk of loss — as well as the chance of benefit — from falling on the vendee. *Simmons v. Krall*, 201 Ga. App. 893, 412 S.E.2d 559 (1991), cert. denied, 201 Ga. App. 904, 412 S.E.2d 559 (1992).

No recovery allowed on contingent fee contract unless specified contingency is brought about. — An attorney at law cannot recover whole or any part of contingent fee based upon express contract of employment, where contingencies provided for by contract have not been brought about, although entire service of attorney has been performed. *Sellers v. City of Summerville*, 208 Ga. 361, 67 S.E.2d 137 (1951).

Financing contingency failure did not void contract or right to commission. — Denial of the sellers' motion for summary judgment was proper because, since the deadline to pay the commission was before the deadline to satisfy the financing contingency, it was clear that the financing contingency was not a condition precedent to the obligation to pay the commission; accordingly, the failure of the financing contingency did not void the entire contract or the company's right to claim a commission under the terms therein. *Krogh v. Pargar, LLC*, 277 Ga. App. 35, 625 S.E.2d 435 (2005).

Insurance policy may require proof of loss within 90 days as condition precedent to recovery. — Provisions of insurance policy requiring the furnishing of proof of loss to home office of insurer within 90 days after death of insured from accidental means, and

making strict compliance therewith a condition precedent to recovery are valid, and beneficiary is bound thereby unless circumstances are such as to excuse a delay in complying therewith. *Mutual Benefit Health & Accident Ass'n v. Hulme*, 57 Ga. App. 876, 197 S.E. 85 (1938), later appeal, 60 Ga. App. 65, 2 S.E.2d 750 (1939).

It is inconsequential whether insured's failure to perform condition precedent may not have prejudiced an insurer. *Wolverine Ins. Co. v. Sorrough*, 122 Ga. App. 556, 177 S.E.2d 819 (1970).

When performance of condition precedent is in issue, court to instruct, without request, on O.C.G.A. § 13-3-4. — If in suit on written contract, sole contested issue was whether or not admitted condition precedent of contract had been performed, it was duty of court, without request, to instruct jury as to substance of legal rules embodied in former Code 1933, §§ 20-109 and 20-110 (see O.C.G.A. §§ 13-1-7 and 13-3-4), controlling conditional contracts and conditions precedent. *Rice v. Harris*, 52 Ga. App. 42, 182 S.E. 404 (1935).

Condition precedent prevented summary judgment. — Summary judgment was not properly granted in a breach of contract claim because a plain reading of the contract showed that the parties intended that a condition precedent existed, in that the seller should be given an opportunity to find replacement clients before the buyer was entitled to deduct payments due, and the evidence indicated that the buyer never gave the seller the opportunity to do so. *Hall v. Ross*, 273 Ga. App. 811, 616 S.E.2d 145 (2005).

Payment of rent did not negate conditions precedent of lease. — Making the first two months' rental payments to lessor did not waive the performance of the condition precedent where the lease agreement stated that the granting of two curb cuts was a condition precedent, and in both letters accompanying the rental payments, lessee stated that the payment of the rent should not have been construed as a waiver of the lessee's right to declare the lease null and void. *Chastain v. Spectrum Stores, Inc.*, 204 Ga. App. 65, 418 S.E.2d 420 (1992).

Lease provision requiring lessor to modify building in accordance with blueprint and city requirements was a covenant, and not

words of condition; and the remedy for a breach was an action for damages, and not a forfeiture of the estate for condition broken. *Fulton County v. Collum Properties, Inc.*, 193 Ga. App. 774, 388 S.E.2d 916 (1989).

Directed verdict error if issue remains as to party's good faith in meeting prerequisite. — Though a buyer's failure to get financing, a condition precedent to a contract, was not a breach of contract, the buyer was required to pursue it diligently, in good faith and, as there was a question of a material issue of fact on the reasonableness of the buyer's actions, a directed verdict was error. *Patel v. Burt Dev. Co.*, 261 Ga. App. 436, 582 S.E.2d 495 (2003).

Cited in *Mathis v. Harrell*, 1 Ga. App. 358, 58 S.E. 207 (1907); *Equitable Mfg. Co. v. J.B. Davis Co.*, 130 Ga. 67, 60 S.E. 262 (1908); *Atlantic Steel Co. v. R.O. Campbell Coal Co.*, 262 F. 555 (N.D. Ga. 1919); *Board of Drainage Comm'rs v. Williams*, 34 Ga. App. 731, 131 S.E. 911 (1925); *Hollomon v. Board of Educ.*, 168 Ga. 359, 147 S.E. 882 (1929); *Pope v. Harper*, 40 Ga. App. 573, 150 S.E. 470 (1929); *Campbell v. Rybert*, 178 Ga. 28, 172 S.E. 52 (1933); *Fulenwider v. Fulenwider*, 188 Ga. 856, 5 S.E.2d 20 (1939); *Webb v. National Life & Accident Ins. Co.*, 81 Ga. App. 198, 58 S.E.2d 548 (1950); *Bregman v. Rosenthal*, 212 Ga. 95, 90 S.E.2d 561 (1955); *Standard Oil Co. v. Mansfield*, 97 Ga. App. 82, 102 S.E.2d 85 (1958); *Crescent Brass & Pin Co. v. Owen*, 109 Ga. App. 369, 136 S.E.2d 141 (1964); *Peacock Constr. Co. v. West*, 111 Ga. App. 604, 142 S.E.2d 332 (1965); *McMurray v. Bateman*, 221 Ga. 240, 144 S.E.2d 345 (1965); *Stribling v. Ailion*, 223 Ga. 662, 157 S.E.2d 427 (1967); *Abco Bldrs., Inc. v. Peavy Concrete Prod., Inc.*, 123 Ga. App. 167, 179 S.E.2d 695 (1971); *Ansley v. Atlanta Suburbia Estates, Ltd.*, 230 Ga. 630, 198 S.E.2d 319 (1973); *Clarke's Super Gas, Inc. v. Tri-State Sys.*, 129 Ga. App. 650, 200 S.E.2d 472 (1973); *Columbia Nitrogen Corp. v. Dean's Power Oil Co.*, 136 Ga. App. 879, 222 S.E.2d 602 (1975); *Maine v. Strange*, 138 Ga. App. 24, 225 S.E.2d 484 (1976); *Kiser v. Warner Robins Air Park Estates, Inc.*, 237 Ga. 385, 228 S.E.2d 795 (1976); *Washington Rd. Properties, Inc. v. Home Ins. Co.*, 145 Ga. App. 782, 245 S.E.2d 15 (1978); *Walter E. Heller & Co. v. Aetna Bus. Credit, Inc.*, 158 Ga. App. 249, 280 S.E.2d 144 (1981); *Complete Trucklease*,

Inc. v. Auto Rental & Leasing, Inc., 160 Ga. App. 568, 288 S.E.2d 75 (1981); *Riverside Place, Ltd. v. B & D Asphalt Paving, Inc.*, 161 Ga. App. 773, 288 S.E.2d 730 (1982); *Breedlove v. Hurst*, 181 Ga. App. 4, 351 S.E.2d 212 (1986); *Brooks v. Forest Farms, Inc.*, 182 Ga. App. 901, 357 S.E.2d 604 (1987); *Panfel v. Boyd*, 186 Ga. App. 214, 367 S.E.2d 54 (1988); *Budget Car Sales v. Boddiford*, 189 Ga. App. 316, 375 S.E.2d 632

(1988), cert. denied, 189 Ga. App. 911, 375 S.E.2d 632 (1989); *Grier v. Brogdon*, 234 Ga. App. 79, 505 S.E.2d 512 (1998); *Georgia Dep't of Human Res. v. Citibank*, 243 Ga. App. 433, 534 S.E.2d 422 (2000); *Sheridan v. Crown Capital Corp.*, 251 Ga. App. 314, 554 S.E.2d 296 (2001); *Shah v. Taco Del Sur, Inc.*, 257 Ga. App. 224, 570 S.E.2d 654 (2002); *Woody's Steaks, LLC v. Pastoria*, 261 Ga. App. 815, 584 S.E.2d 41 (2003).

RESEARCH REFERENCES

C.J.S. — 17A C.J.S., Contracts, §§ 325, 338, 339, 400, 407, 412, 436 et seq., 456, 491, 512, 525, 537, 549, 566, 590.

ALR. — Admissibility of parol evidence to show that a bill or note was conditional, or given for a special purpose, 20 ALR 421.

Conclusiveness of certificate or decision of architect or engineer under building or construction contract, 110 ALR 137.

Waiver of arbitration provision in contract, 117 ALR 301; 161 ALR 1426.

Provision in contract for sale of real property which makes performance conditional upon purchaser's or third person's satisfaction with condition of property, 167 ALR 411.

Vendor and purchaser: contract provision referring to purchaser's uncompleted arrangement for financing balance of pur-

chase price as creating condition precedent, 81 ALR2d 1338.

Construction and effect of clause making lease contingent or conditional upon the lessee obtaining a use permit from public building or zoning authorities, 90 ALR2d 1031.

Necessity for payment or tender of purchase money within option period in order to exercise option, in absence of specific time requirement for payment, 71 ALR3d 1201.

Right of architect to compensation under contractual provision that fee is to be paid from construction loan funds, 92 ALR3d 509.

Limitation to quantum meruit recovery, where attorney employed under contingent fee contract is discharged without cause, 92 ALR3d 690.

13-3-5. Effect of impossible, immoral, and illegal conditions.

Impossible, immoral, and illegal conditions are void and are binding upon no one. (Orig. Code 1863, § 2685; Code 1868, § 2681; Code 1873, § 2723; Code 1882, § 2723; Civil Code 1895, § 3640; Civil Code 1910, § 4225; Code 1933, § 20-111.)

Law reviews. — For article discussing the anachronistic nature of the Georgia contracts Code as dramatized by comparing the doctrine of consideration as it is formulated in the Restatements of Contracts and in

Code 1933, Title 20 (now this title), and the interpretative approach Georgia courts have taken in dealing with such Code, see 13 Ga. L. Rev. 499 (1979). (But see amendments by Ga. L. 1981, p. 876.)

JUDICIAL DECISIONS

Consideration of contract must be moral and legal. If its consideration fails to meet either of these requirements, contract is not

enforceable. *Baker v. American Oil Co.*, 90 Ga. App. 662, 83 S.E.2d 826 (1954).

Impossibility does not amount to perfor-

mance save where it is set up as a defense. *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 345 F. Supp. 1066 (S.D. Ga. 1972), later proceeding, 401 F. Supp. 1051 (S.D. Ga. 1975).

Insurance policy provisions in violation of statute automatically rendered null and void by such statute. *Curtis v. Girard Fire & Marine Ins. Co.*, 190 Ga. 854, 11 S.E.2d 3 (1940).

Effect of impossibility not caused by act of God or of other party. — Where the plaintiff contracts to perform covenants that are impossible, not because of an act of God or the conduct of the defendant, the failure to perform such covenants is as fatal to the plaintiff's right to recover as a breach of the contract for any other reason. *J.C. Penney Co. v. Davis & Davis, Inc.*, 158 Ga. App. 169, 279 S.E.2d 461 (1981).

Effect of consent judgment. — Where A sues B on contract and they enter into

consent judgment, B cannot later set that judgment aside on basis of impossibility of performance overlooked by B. *Leventhal v. Citizens & S. Nat'l Bank*, 249 Ga. 390, 291 S.E.2d 222 (1982).

Promissory note held unenforceable. — Promissory note which was founded upon illegal consideration violated public policy and rendered the note unenforceable. *Minor v. McDaniel*, 210 Ga. App. 146, 435 S.E.2d 508 (1993).

Cited in *Golden v. National Life & Accident Ins. Co.*, 189 Ga. 79, 5 S.E.2d 198 (1939); *Whitehead v. Cranford*, 210 Ga. 257, 78 S.E.2d 797 (1953); *Martell v. Atlanta Biltmore Hotel Corp.*, 114 Ga. App. 646, 152 S.E.2d 579 (1966); *Builders Transp., Inc. v. Hall*, 191 Ga. App. 889, 383 S.E.2d 341 (1989); *Mitchell v. Lucas*, 210 Ga. App. 821, 437 S.E.2d 792 (1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 10, 11.

Am. Jur. Proof of Facts. — "Impossibility" of Performing Contract, 24 POF2d 269.

C.J.S. — 17 C.J.S., Contracts, §§ 12, 141 et seq., 195.

ALR. — Validity of agreement to pay an officer or employee of a bank or trust company to disclose the existence of, or to assist one to establish, a deposit, 18 ALR 979.

Validity of provision in contract with corporation waiving liability of stockholders, 40 ALR 371.

Validity of contract to influence administrative or executive officer or department, 46 ALR 196; 148 ALR 768.

Validity of contract to influence third person with respect to disposal of property at death or by gift during lifetime, 61 ALR 646.

Validity and effect of contract, unconnected with transfer of any business or professional interest, purporting to grant exclusive right to use one's name or likeness for advertising purposes, 101 ALR 492.

Conditions, conditional limitations, or contracts in restraint of marriage, 122 ALR 7.

Obligation of owners who unite in contract relating to property which they own in severalty, as joint, several, or joint and several, 122 ALR 1336.

Rights of parties to contract the performance of which is interfered with or prevented by war conditions or acts of government in prosecution of war, 154 ALR 1445; 155 ALR 1147; 156 ALR 1446; 157 ALR 1446; 158 ALR 1446.

Validity of contractual provision by one other than carrier or employer for exemption from liability, or indemnification, for consequences of own negligence, 175 ALR 8.

Recovery of money or property entrusted to another for illegal purpose, but not so used, 8 ALR2d 307.

Modern status of the rules regarding impossibility of performance as defense in action for breach of contract, 84 ALR2d 12.

Purchaser's right to set up invalidity of contract because of violation of state securities regulation as affected by doctrines of estoppel or *pari delicto*, 84 ALR2d 479.

Validity, construction, and effect of contract between grower of vegetable or fruit crops, and purchasing processor, packer, or canner, 87 ALR2d 732.

Rights between landlord and tenant as affected by zoning regulations restricting contemplated use of premises, 37 ALR3d 1018.

Validity of exculpatory clause in lease exempting lessor from liability, 49 ALR3d 321.

Recovery for services rendered by persons living in apparent relation of husband and wife without express agreement for compensation, 94 ALR3d 552.

Liability for interference with invalid or unenforceable contracts, 96 ALR3d 1294.

ARTICLE 2

CAPACITY OF PARTIES

JUDICIAL DECISIONS

Cited in *Walker v. Walker*, 209 Ga. 490, 74 S.E.2d 66 (1953).

RESEARCH REFERENCES

ALR. — Personal liability to other party to contract of member of firm who, without authority, attempts to bind the firm, 4 ALR 258.

Parent's approval or sanction of infant's contract as affecting latter's liability on, or right to disaffirm, it, 9 ALR 1030.

Validity of contract by agent for compensation from third person for negotiating loan or sale with principal, 14 ALR 464.

Intermarriage of parties as affecting contract for services, 14 ALR 1013.

Enforceability by the purchaser of a business, of a covenant of a third person with his vendor not to engage in a similar business, 22 ALR 754.

Validity and enforceability of contract made in good faith with incompetent before adjudication of incompetency, 46 ALR 416; 95 ALR 1442; 95 ALR 1442.

Personal liability of members of committee or board who make a contract in name of unincorporated religious society incapable of contracting, 61 ALR 241.

Mistake by one party to contract as to identity of other party who acted in good faith, 147 ALR 1171.

Validity of contract between corporations as affected by directors or officers in common, 33 ALR2d 1060.

13-3-20. Minors — Contracts for property or valuable consideration; contracts for necessities.

(a) Generally the contract of a minor is voidable. If in a contractual transaction a minor receives property or other valuable consideration and, after arrival at the age of 18, retains possession of such property or continues to enjoy the benefit of such other valuable consideration, the minor shall have thereby ratified or affirmed the contract and it shall be binding on him or her. Such contractual transaction shall also be binding upon any minor who becomes emancipated by operation of law or pursuant to Article 6 of Chapter 11 of Title 15.

(b) The contract of a minor for necessities shall be binding on the minor as if the minor were 18 years of age except that the party furnishing them to the minor shall prove that the parent or guardian of such minor had failed or refused to supply sufficient necessities for the minor, that the minor was emancipated by operation of law, or the minor was emancipated pursuant to Article 6 of Chapter 11 of Title 15. (Ga. L. 1858, p. 58, § 1; Code 1863, §§ 2691, 2693; Code 1868, §§ 2687, 2689; Code 1873, §§ 2729,

2731; Code 1882, §§ 2729, 2731; Civil Code 1895, §§ 3647, 3648; Civil Code 1910, §§ 4232, 4233; Code 1933, § 20-201; Ga. L. 1966, p. 291, § 1; Ga. L. 1969, p. 640, § 1; Ga. L. 1972, p. 193, § 2; Ga. L. 2006, p. 141, § 3/HB 847.)

History of Code section. — This Code section is derived from the decision in *Strain v. Wright*, 7 Ga. 568 (1849), and *Hood v. Buren*, 33 Ga. App. 203, 125 S.E. 787 (1924).

Cross references. — Rights of minors generally, § 1-2-8. Minority as a contractual defense, § 13-5-3. Voidable nature of conveyance of property or interest to or by minor, § 44-5-41.

Code Commission notes. — Ga. L. 1972, p. 193, § 10, effective July 1, 1972, provided that the purpose of the Act was to reduce the age of legal majority from 21 years of age to 18 years of age so that all persons, upon reaching the age of 18, would have the rights, privileges, powers, duties, responsibilities, and liabilities previously applicable to persons 21 years of age or over. The section further provided that the Act was not to be construed to have the effect of changing the age from 21 to 18 with respect to any legal instrument or court decree in existence prior to the effective date of the Act when the instrument referred only to “the age of majority” or words of similar import, except that any guardianship of the person or prop-

erty of a minor under the provisions of Title 49 of the 1933 Code, whether such guardianship was created by court order or decree entered before or after the effective date of the Act or under the will of a testator which was executed after the effective date of the act, would terminate when the ward for whom such guardianship was created reached 18 years of age.

Law reviews. — For article discussing, “Voidability of Minors’ Contracts: A Feudal Doctrine in a Modern Economy,” see 1 Ga. L. Rev. 205 (1967). For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For article discussing the anachronistic nature of the Georgia contracts Code as dramatized by comparing the doctrine of consideration as it is formulated in the Restatements of Contracts and in Code 1933, Title 20 (now this title), and the interpretative approach Georgia courts have taken in dealing with such Code, see 13 Ga. L. Rev. 499 (1979). (But see amendments by Ga. L. 1981, p. 876.) For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 79 (2006).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
DISAFFIRMANCE OR REPUDIATION
RATIFICATION
CONTRACTS FOR NECESSARIES

General Consideration

Minor’s contract is not void, but voidable, at minor’s election when arriving at full age. *Clemons v. Olshine*, 54 Ga. App. 290, 187 S.E. 711 (1936).

Contracts of infants are voidable and may be ratified or rescinded upon maturity. *Smith v. Smith*, 36 Ga. 184, 91 Am. Dec. 761 (1867); *Hood v. Duren*, 33 Ga. App. 203, 125 S.E. 787 (1924); *Levy v. McPhail*, 33 Ga. App. 784, 127 S.E. 793 (1925).

Infant can pursue infant’s rights even as against innocent purchaser. — To give vitality to doctrine that infant is incapable of irre-

trievably alienating the infant’s property, it is necessary to hold that the infant can pursue the infant’s rights even as against an innocent purchaser. *Ware v. Mobley*, 190 Ga. 249, 9 S.E.2d 67 (1940).

Former Code 1933, §§ 20-201 and 29-106 (see O.C.G.A. §§ 13-3-20 and 44-5-41) should be construed in pari materia with former Code 1933, § 29-106 (see O.C.G.A. § 44-5-41). *Merritt v. Jowers*, 184 Ga. 762, 193 S.E. 238 (1937).

Former Code 1933, §§ 20-201 and 29-106 (see O.C.G.A. §§ 13-3-20 and 44-5-41), which contains declaration that deed of infant was voidable at infant’s pleasure on

General Consideration (Cont'd)

majority, should be construed in *pari materia*. *Ware v. Mobley*, 190 Ga. 249, 9 S.E.2d 67 (1940).

Infants generally lack ability to bind themselves by commercial papers. — Generally, infants by reason of their inability to make valid contracts, except for necessities, do not possess requisite legal capacity to bind themselves by commercial papers. Such instruments, however, are not absolutely void but are only voidable and are capable of being rendered binding by being ratified and affirmed by them after attaining majority. *Howard v. Simpkins*, 70 Ga. 322 (1883).

Broad statement that minor cannot make contract without consent of parent or guardian is erroneous. *Royal v. Grant*, 5 Ga. App. 643, 63 S.E. 708 (1909).

Mere fact that minor has neither parent nor guardian does not remove minor's disability and clothe the minor with power to contract generally. *Wickham v. Torley*, 136 Ga. 594, 71 S.E. 881, 36 L.R.A. (n.s.) 57 (1911).

Minor misrepresenting age and incapable of making restitution, denied infancy defense unless creditor on notice. — Where infant obtains from merchant clothing on credit on faith of false representation of age, and consumes or uses the clothing to injury of creditor, infant, in an action on open account against the creditor, will be estopped from setting up creditor's infancy as a defense. Unless youthful appearance of infant purchaser or other fact or circumstances appear, such as would reasonably tend to cast doubt or suspicion on truthfulness of infant's representation as to infant's majority, it is unnecessary for creditor to make independent investigation thereof. *Clemons v. Olshine*, 54 Ga. App. 290, 187 S.E. 711 (1936).

Minor estopped from exercising privilege of avoiding fair and reasonable contract upon ground of minority at time agreement was made, where it appears that the minor has received, enjoyed, and consumed its irrestorable benefits, and, where it appears that plaintiff, dealing in good faith, was induced to act to plaintiff's injury by reason of false and fraudulent misrepresentation of defendant with respect to defendant's apparent majority, and that, in view of all sur-

rounding facts and circumstances, plaintiff was justified in accepting such representation as true, and was free from fault or negligence, such as a failure to use all ready means of ascertaining truth touching the defendant's apparent majority. *Carney v. Southland Loan Co.*, 92 Ga. App. 559, 88 S.E.2d 805 (1955).

Defendant cannot avoid fair and reasonable contract upon ground of defendant's minority at time agreement was made, where it appears that defendant received, enjoyed, and consumed its irrestorable benefits; and where it appears that plaintiff, dealing in good faith and being free from negligence, was induced to act to plaintiff's injury by reason of the false and fraudulent representation of defendant with respect to defendant's apparent majority. *Hood v. Duren*, 33 Ga. App. 203, 125 S.E. 787 (1924).

Guardian suing to recover property sold by infant ward is entitled to possession unconditionally. — Statute inapplicable to suit brought by guardian to recover possession of personal property which an infant ward has sold and delivered. Guardian is entitled to possession of such property unconditionally. *Hughes v. Murphy*, 5 Ga. App. 328, 63 S.E. 231 (1908).

Contracts with minors voidable. — Minor's exemption under O.C.G.A. § 13-5-3 from contractual liability is a personal privilege which others may not assert as a defense; binding settlement agreement was reached between an insurer and a minor injured party even though: (1) a contract of a minor is voidable under O.C.G.A. § 13-3-20(a); (2) judicial approval pursuant to O.C.G.A. § 29-2-16(e) postdated the settlement agreement; and (3) no guardian had been appointed for the minor at the time the agreement was reached. *Grange Mut. Cas. Co. v. Kay*, 264 Ga. App. 139, 589 S.E.2d 711 (2003).

Withdrawal of guilty plea by minor. — By failing to make the argument in the trial court, the defendant waived the argument that because aspects of contract law apply to plea negotiations, the defendant's guilty plea was voidable as a matter of law pursuant to O.C.G.A. § 13-3-20, which provides, in pertinent part, that "generally the contract of a minor is voidable." *Boykins v. State*, 298 Ga. App. 654, 680 S.E.2d 665 (2009).

Cited in *Howard v. Simpkins*, 70 Ga. 322 (1883); *Shuford v. Alexander*, 74 Ga. 293

(1884); *McKamy v. Cooper*, 81 Ga. 679, 8 S.E. 312 (1888); *Medders v. Baxley Banking Co.*, 17 Ga. App. 730, 88 S.E. 407 (1916); *Sellers v. Sellers*, 160 Ga. 516, 128 S.E. 659 (1925); *New York Life Ins. Co. v. Gilmore*, 40 Ga. 431, 149 S.E. 799 (1929); *Paulk v. Roberts*, 42 Ga. App. 79, 155 S.E. 55 (1930); *Pendley v. Bennett*, 42 Ga. App. 596, 157 S.E. 250 (1931); *Parks v. Harper*, 43 Ga. App. 269, 158 S.E. 454 (1931); *McIntyre v. Ragan*, 179 Ga. 360, 175 S.E. 795 (1934); *Stephens v. Wilson*, 58 Ga. App. 24, 197 S.E. 350 (1938); *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939); *Holland v. Peerless Furn. Co.*, 60 Ga. App. 149, 3 S.E.2d 138 (1939); *Carney v. Southland Loan Co.*, 92 Ga. App. 559, 88 S.E. 805 (1955); *Greer v. Greer*, 218 Ga. 416, 128 S.E.2d 51 (1962); *Jackson v. Mitchell Motors, Inc.*, 123 Ga. App. 261, 180 S.E.2d 605 (1971); *Security Dev. & Inv. Co. v. Ben O'Callaghan Co.*, 125 Ga. App. 526, 188 S.E.2d 238 (1972).

Disaffirmance or Repudiation

Option to disaffirm contract is personal to minor. — Minor is generally under a disability to contract, but contract is not ipso facto void and option to disaffirm is personal to the minor. *Jones v. State*, 119 Ga. App. 105, 166 S.E.2d 617 (1969).

Infant's contracts regarding personality avoidable, whether executed or executory, during minority or after majority. *Weathers v. Owen*, 78 Ga. App. 505, 51 S.E.2d 584 (1949).

Infant may repudiate voidable contracts during minority or within reasonable time thereafter. — Contract of infant, except for necessities, being voidable, may be repudiated by infant either during minority or within reasonable time thereafter. *Wellborn v. Rogers*, 24 Ga. 558 (1858); *Bentley v. Greer*, 100 Ga. 35, 72 S.E. 974 (1896); *Bell v. Swainsboro Fertilizer Co.*, 12 Ga. App. 81, 76 S.E. 756 (1912); *Clyde v. Steger & Sons Piano Mfg. Co.*, 22 Ga. App. 192, 95 S.E. 734 (1918); *Levy v. McPhail*, 33 Ga. App. 784, 127 S.E. 793 (1925).

Reasonable time for disaffirmance after majority depends on circumstances, but is less than seven years. — Infant may disaffirm the deed within reasonable time after attaining majority; and if the infant fails to do so, right of avoidance on the ground of infancy will be lost. What is a reasonable time will

depend upon facts of each case, but not be longer than seven years after disability is removed. *Nathans v. Arkwright*, 66 Ga. 179 (1880); *McGarrity v. Cook*, 154 Ga. 311, 114 S.E. 213 (1922); *Holbrook v. Montgomery*, 165 Ga. 514, 141 S.E. 408 (1928).

Restitution not condition precedent to disaffirmance unless fruits of contract in infant's possession at time. — While an infant should not be allowed to avoid the infant's contract without making restitution of any money or property which the infant has received under the contract, the infant is not required to make restitution as condition precedent to disaffirmance, unless at time of attempted disaffirmance the infant has fruits of contract in the infant's possession. *Shuford v. Alexander*, 74 Ga. 293 (1884); *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S.E. 788 (1905); *Hughes v. Murphy*, 5 Ga. App. 328, 63 S.E. 231 (1908); *Gonackey v. General Accident, Fire & Life Assurance Corp.*, 6 Ga. App. 381, 65 S.E. 53 (1909); *Holbrook v. Montgomery*, 165 Ga. 514, 141 S.E. 408 (1928); *Merritt v. Jowers*, 184 Ga. 762, 193 S.E. 238 (1937); *Weathers v. Owen*, 78 Ga. App. 505, 51 S.E.2d 584 (1949).

It is not essential to right of infant to disaffirm contract in settlement of claim for personal injuries that the infant restore or offer to restore to other contracting party whatever consideration infant may have received for contract unless infant has not consumed or dissipated such consideration, and is able to make restitution. *Tharpe v. Cudahy Packing Co.*, 60 Ga. App. 449, 4 S.E.2d 49 (1939).

No attempted repudiation of liability under voidable contract can be effective unless accompanied by surrender of such property acquired thereunder as may still remain in minor's hands. Minor cannot hold property and make use of property's possession as basis of further negotiation. *Thomason v. Phillips*, 73 Ga. 140 (1884); *Clyde v. Steger & Sons Piano Mfg. Co.*, 22 Ga. App. 192, 95 S.E. 734 (1918).

If infant has lost, expended, or squandered consideration during infant's minority, this is nothing more than law anticipates of the infant. Otherwise rule would practically strike down shield which law, by reason of infant's inexperience and youth, throws around the infant. *White v. Sikes*, 129 Ga.

Disaffirmance or Repudiation (Cont'd)

508, 59 S.E. 228, 121 Am. St. R. 228 (1907); *Medders v. Baxley Banking Co.*, 17 Ga. App. 730, 88 S.E. 407 (1916). But see *Hood v. Duren*, 33 Ga. App. 203, 125 S.E. 787 (1924).

If, after majority, property is held into which contract proceeds traceable, repudiation without restitution disallowed. — If, upon arrival at majority, minor has in minor's possession either exact consideration that minor received during infancy or any substantial part of same, or property which is purchased with such consideration, that is, if minor has then anything of substantial nature into which can be traced proceeds of contract made during infancy, then neither law, equity, nor good conscience will permit the minor to repudiate the minor's contract and retain fruits of the contract. *White v. Sikes*, 129 Ga. 508, 59 S.E. 228, 121 Am. St. R. 228 (1907).

Minor may disaffirm signature on surety contract to secure parent's loan despite fact that loan proceeds flow directly into operating budget of home. *Martin v. National Bank*, 236 Ga. 621, 225 S.E.2d 10 (1976).

Infant, upon reaching majority, may disaffirm deed even against subsequent bona fide purchaser. — One who while an infant executes deed to real property may in proper case, upon reaching majority, disprove the act, not only as against the infant's immediate grantee, but also as against a subsequent bona fide purchaser. *Ware v. Mobley*, 190 Ga. 249, 9 S.E.2d 67 (1940).

Institution of suit by infant for personal injury amounts to disaffirmance of previous settlement. — Contract by which infant receives and accepts money in satisfaction and settlement of claim which infant may have for damages against another for personal injuries is voidable and may be disaffirmed by infant; institution or maintenance by infant of suit against other contracting party to recover damages for injuries sustained amounts to disaffirmance of such contract. *Tharpe v. Cudahy Packing Co.*, 60 Ga. App. 449, 4 S.E.2d 49 (1939).

Contract waiving all claims held inadmissible. — Trial court did not err when the court refused to admit at trial an agreement signed by a 14-year-old unaccompanied by any parent or guardian, which was tendered by the defendant for the sole purpose of

enabling the jury to determine whether the child had waived all claims against the defendant. *Smoky, Inc. v. McCray*, 196 Ga. App. 650, 396 S.E.2d 794 (1990).

To enforce disaffirmance of contract during minority infant may sue through guardian or next friend. *Gonackey v. General Accident, Fire & Life Assurance Corp.*, 6 Ga. App. 381, 65 S.E. 53 (1909).

Infant may enforce disaffirmance by cross action or plea in recoupment when sued upon infant's contract. *Levy v. McPhail*, 33 Ga. App. 784, 127 S.E. 793 (1925).

Plea of infancy manifests intent to repudiate and is binding upon infant. — Obligation or other deed of infant shall be avoided by plea of infancy, such plea, when made, is voluntary, manifesting infant's intention to repudiate contract, and is therefore binding upon the infant. *Strain v. Wright*, 7 Ga. 568 (1849).

Ratification

Ratification may be express or implied by conduct. — Contract made by one during minority may be ratified and confirmed by the minor after reaching majority, either expressly or impliedly by conduct. *Yancey v. O'Kelley*, 208 Ga. 600, 68 S.E.2d 574 (1952).

Retention after majority of fruits of contract made during infancy may amount to ratification. *Wickham v. Torley*, 136 Ga. 594, 71 S.E. 881, 36 L.R.A. (n.s.) 57 (1911); *Bell v. Swainsboro Fertilizer Co.*, 12 Ga. App. 81, 76 S.E. 756 (1912).

Retention, after attaining majority, or consideration received under contract, is binding ratification. — If infant receives property or other valuable consideration, and after arrival at age retains possession of such property, or enjoys proceeds of such valuable consideration, such ratification of contract shall bind the infant. *Holbrook v. Montgomery*, 165 Ga. 514, 141 S.E. 408 (1928).

Omission to pay back purchase money after majority not ratification where benefits not retained. — After infant enters into executory contract for sale of land, receives purchase price and expends the money, and, after attainment of majority, has neither money nor other property in which the money may have been invested, mere fact of the infant's omission, upon arriving at majority, to tender back purchase money will not amount to ratification of contract nor

prevent election to disaffirm sale. *White v. Sikes*, 129 Ga. 508, 59 S.E. 228, 121 Am. St. R. 228 (1907).

Ratification may occur although consideration destroyed during minority and no new consideration received. — Even where consideration received by infant has been consumed or destroyed by the infant during infancy, if, after arriving at majority, the infant expressly ratifies contract and promises performance, the infant is bound, although the infant received no new consideration. *Bell v. Swainsboro Fertilizer Co.*, 12 Ga. App. 81, 76 S.E. 756 (1912).

Showing required to establish ratification. — One seeking to hold infant bound upon contract, for reason that consideration was retained after arrival at majority, has imposed upon the infant burden of showing possession of consideration after majority and retention for sufficient length of time that ratification of contract is to be inferred. *Medders v. Baxley Banking Co.*, 17 Ga. App. 730, 88 S.E. 407 (1916).

Contracts for Necessaries

Minor may under some conditions be liable on executed contract for necessities. *Jernigan v. Radford*, 182 Ga. 484, 185 S.E. 828 (1936).

Infant bound by implied contract to pay reasonably for necessities furnished infant. *Mauldin v. Southern Shorthand & Bus. Univ.*, 3 Ga. App. 800, 60 S.E. 358 (1908).

Negotiable instrument given by infant for necessities or pursuant to trade or profession is not voidable. — If a negotiable instrument is given for necessities or to secure funds to educate an infant, it will not be voidable; and if an instrument is given in performance of practice of a profession, vocation, or trade, it will not be voidable. *James v. Sasser*, 3 Ga. App. 568, 60 S.E. 329 (1908).

Minor cannot bind oneself by executory contract for necessities. *White v. Sikes*, 129 Ga. 508, 59 S.E. 228, 121 Am. St. R. 228 (1907); *Mauldin v. Southern Shorthand & Bus. Univ.*, 3 Ga. App. 800, 60 S.E. 358 (1908).

Affirmative refusal by parent or guardian to furnish necessities need not be shown. *McLean v. Jackson*, 12 Ga. App. 51, 76 S.E. 792 (1912).

Infant's contract for necessities invalid unless parent or guardian refuses and fails to supply sufficient necessities. *McAllister v. Gatlin*, 3 Ga. App. 731, 60 S.E. 355 (1908), criticized, *McLean v. Jackson*, 12 Ga. App. 51, 76 S.E. 792 (1912).

What are necessities. — See *McLean v. Jackson*, 12 Ga. App. 51, 76 S.E. 792 (1912); *Geiger v. Worth*, 17 Ga. App. 361, 86 S.E. 938 (1915).

What are necessities for infant is question for determination by jury, according to circumstances and condition in life of infant. *McLean v. Jackson*, 12 Ga. App. 51, 76 S.E. 792 (1912); *Geiger v. Worth*, 17 Ga. App. 361, 86 S.E. 938 (1915).

Medical expenses incurred by reason of injury are necessities. *Evans v. Caldwell*, 52 Ga. App. 475, 184 S.E. 440 (1936), *aff'd*, 184 Ga. 203, 190 S.E. 582 (1937).

Dentist may recover of minor value of services necessary for preservation of minor's health. *McLean v. Jackson*, 12 Ga. App. 51, 76 S.E. 792 (1912).

Guardian must pay preappointment debts for necessities incurred by infant regardless of estate's size. — If, before appointment of guardian, debts for necessities be incurred by infant, guardian, after the guardian's appointment, must pay the debts out of the infant's estate, even though that estate be so small that annual profits of it may not be sufficient for infant's education and maintenance. *Jernigan v. Radford*, 182 Ga. 484, 185 S.E. 828 (1936).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deeds, § 133.

C.J.S. — 17 C.J.S., Contracts, § 98.

ALR. — Ignorance of legal right to avoid contract or conveyance made during infancy as affecting ratification thereof upon attaining majority, 5 ALR 137.

Parent's approval or sanction of infant's contract as affecting latter's liability on, or right to disaffirm, it, 9 ALR 1030.

Right of infant to enjoin other party to contract from asserting its validity, 15 ALR 1215.

Return of property purchased by infant as

condition of recovery of purchase money paid, 16 ALR 1475; 36 ALR 782; 124 ALR 1368.

Stipulations in pass as binding on infant, 41 ALR 1099.

Infancy of party to contract as affecting his right to specific enforcement, 43 ALR 120.

Law of infant's contract as applied to contract of or by partnership, 58 ALR 1366.

Payment by infant after majority on contract made during infancy as ratification, 59 ALR 281.

Infant's rights and liabilities on subscription to or purchase of corporate stock, 64 ALR 972.

Right to recover for money loaned to infant to purchase necessities, 65 ALR 1337.

Liability of infant in tort for inducing contract by misrepresenting his age, 67 ALR 1264.

Liability of infant or his estate for rent, 68 ALR 1185.

Liability of infant for necessities where he lives with his parents, 70 ALR 572.

Liability of infant for medical, dental, or hospital services to him, 71 ALR 226.

Law of infant's contracts as applied to infant's dealings with stockbroker, 83 ALR 914.

Return of property purchased by infant as condition of recovery of purchase price, 124 ALR 1368.

Enlistment or mustering of minors into military service, 137 ALR 1467; 147 ALR 1311; 148 ALR 1388; 149 ALR 1457; 150 ALR 1420; 151 ALR 1455; 151 ALR 1456; 152 ALR 1452; 153 ALR 1420; 153 ALR 1422; 154 ALR

1448; 155 ALR 1451; 155 ALR 1452; 156 ALR 1450; 157 ALR 1449; 157 ALR 1450; 158 ALR 1450.

Failure to disaffirm as ratification of infant's executory contract, 5 ALR2d 7.

Right of infant to disaffirm his sale of personalty and recover it from third person purchasing without notice of infancy, 16 ALR2d 1420.

Right of infant who repudiates contract for services to recover thereon or in quantum meruit, 35 ALR2d 1302.

Applicability of statute of frauds to promise to pay for medical, dental, or hospital services furnished to another, 64 ALR2d 1071.

Agreement to arbitrate future controversies as binding on infant, 78 ALR2d 1292.

Infant's liability for use or depreciation of subject matter, in action to recover purchase price upon his disaffirmance of contract to purchase goods, 12 ALR3d 1174.

Infant's liability for services rendered by attorney at law under contract with him, 13 ALR3d 1251.

Enforceability of covenant not to compete in infant's employment contract, 17 ALR3d 863.

Infant's misrepresentation as to his age as estopping him from disaffirming his voidable transaction, 29 ALR3d 1270.

Infant's liability for services of an employment agency, 41 ALR3d 1075.

Automobile or motorcycle as necessary for infant, 56 ALR3d 1335.

Infant's liability for medical, dental, or hospital services, 53 ALR4th 1249.

13-3-21. Minors — Contracts relating to practice of profession, trade, or business.

If a minor, by permission of his parent or guardian or by permission of law, practices any profession or trade or engages in any business as an adult, he shall be bound for all contracts connected with such profession, trade, or business. (Orig. Code 1863, § 2695; Code 1868, § 2691; Code 1873, § 2733; Code 1882, § 2733; Civil Code 1895, § 3650; Civil Code 1910, § 4235; Code 1933, § 20-203.)

Law reviews. — For article discussing, "Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy," see 1 Ga. L. Rev. 205 (1967).

For comment on *Ware v. Mobley*, 190 Ga. 249, 9 S.E.2d 67 (1940), see 3 Ga. B.J. 65 (1940).

JUDICIAL DECISIONS

Prerequisites to recovery against infant to contract under O.C.G.A. § 13-3-21. — In order to hold an infant upon a contract, not made for necessities, it must appear, (1) that the infant was practicing profession or trade, or was engaged in business; (2) that the infant had permission of the infant's parent, guardian, or law to pursue that occupation; and (3) that contract was connected with that profession, trade, or business. Burden of proving existence of this condition rests upon party asserting validity of contract. *Medders v. Baxley Banking Co.*, 17 Ga. App. 730, 88 S.E. 407 (1916).

Emancipation from parental control does not remove disability to contract. — Emancipation of minor from parental control only gives the minor a right to the minor's own earnings and releases the minor from the minor's parent's control from that time, but it does not remove the minor's disability and clothe the minor with power to contract. *Wickham v. Torley*, 136 Ga. 594, 71 S.E. 881, 36 L.R.A. (n.s.) 57 (1911).

Receipt of proceeds by infant for labor, insufficient to establish permission of parent. — Fact that infant is receiving proceeds of infant's own labor is not alone sufficient to establish that permission on part of infant's parent has been given to engage in such business. *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S.E. 788 (1905).

Section inapplicable to single transaction for sale of land. — Rule which authorizes infant to make binding contract in connection with business in which the infant may be engaged, by permission of infant's parent or guardian, as an adult, is not applicable to single transaction for sale of land. *White v. Sikes*, 129 Ga. 508, 59 S.E. 228, 121 Am. St. R. 228 (1907).

Negotiable instrument given by infant for necessities or pursuant to trade or profession is not voidable. — If a negotiable instrument is given for necessities or to secure funds to educate an infant, it will not be voidable; and if an instrument is given in performance of practice of a profession, vocation, or trade, it will not be voidable. *James v. Sasser*, 3 Ga. App. 568, 60 S.E. 329 (1908).

Contracts of guaranty or suretyship not within scope of any ordinary business. — It

would be contrary to spirit of the law that infant should be bound insofar as the infant is merely a surety or guarantor; a contract of guaranty or suretyship is not within scope of any ordinary business. *James v. Sasser*, 3 Ga. App. 568, 60 S.E. 329 (1908).

Occupation as laborer not profession, trade, or business. — Fact that minor was working for wages with mining company showed that the minor was not engaged in practicing a profession or trade nor could the minor's occupation as a laborer be called a business. *Pearsons v. White & Cochran*, 13 Ga. App. 117, 78 S.E. 864 (1913).

Minor employed as clerk, not engaged in such business within meaning of law. *Howard v. Simpkins*, 70 Ga. 322 (1883).

Infant employed as linter in oil mill, not engaged in profession, trade, or business. — Linter in oil mill, who is an infant, is not engaged in profession, trade, or business, within meaning of the law, so as to make the infant bound by contract made with the infant's employer in reference to claim for damages for personal injuries sustained in course of the infant's employment. *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S.E. 788 (1905).

Infant engaged in business as adult, still entitled to service required in suits against minors. — If infant by permission of parent or guardian engages in any business as an adult and becomes bound for all contracts connected with such business, this fact would not, while the infant was so engaged in business, dispense with necessity of making service on the infant in regular method provided for in suits against minors. *Miller v. Luckey*, 132 Ga. 581, 64 S.E. 658 (1909).

Instruction referring to business "of an adult" rather than "as an adult," not reversible error. *Jennings v. Gibson*, 77 Ga. App. 28, 47 S.E.2d 779 (1948).

Cited in *McKamy v. Cooper*, 81 Ga. 679, 8 S.E. 312 (1888); *Ullmer v. Fitzgerald*, 106 Ga. 815, 32 S.E. 869 (1899); *Jimmerson v. Lawrence*, 112 Ga. 340, 370 S.E. 371 (1900); *McAllister v. Gatlin*, 3 Ga. App. 731, 60 S.E. 355 (1908); *Croom v. Jordan*, 20 Ga. App. 802, 93 S.E. 538 (1917); *Abraham v. Maloof & Co.*, 21 Ga. App. 522, 94 S.E. 826 (1917); *Gibson v. Kyle*, 46 Ga. App. 295, 167 S.E. 547 (1932); *Tharpe v. Cudahy Packing Co.*, 60

Ga. App. 449, 4 S.E.2d 49 (1939); *McCoy v. Weathers v. Owen*, 78 Ga. App. 505, 51 State, 74 Ga. App. 889, 41 S.E.2d 830 (1947); S.E.2d 584 (1949).

RESEARCH REFERENCES

C.J.S. — 17A C.J.S., Contracts, § 584.

ALR. — Law of infant's contract as applied to contract of or by partnership, 58 ALR 1366.

Liability of infant or his estate for rent, 68 ALR 1185.

Validity, construction, and effect of court's approval of contract of minor's services, 3 ALR2d 702.

Failure to disaffirm as ratification of infant's executory contract, 5 ALR2d 7.

Right of infant who repudiates contract

for services to recover thereon or in quantum meruit, 35 ALR2d 1302.

Infant's liability for use or depreciation of subject matter, in action to recover purchase price upon his disaffirmance of contract to purchase goods, 12 ALR3d 1174.

Enforceability of covenant not to compete in infant's employment contract, 17 ALR3d 863.

Infant's misrepresentation as to his age as estopping him from disaffirming his voidable transaction, 29 ALR3d 1270.

13-3-22. Minors — Marriage contracts and settlements.

Marriage contracts and settlements made by persons who are minors but of lawful age to marry are binding as if made by adults. (Orig. Code 1863, § 2696; Code 1868, § 2692; Code 1873, § 2734; Code 1882, § 2734; Civil Code 1895, § 3651; Civil Code 1910, § 4236; Code 1933, § 20-204.)

Law reviews. — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969).

JUDICIAL DECISIONS

Section provides exception to general disability of minors to contract. — Exception to general rule as to contracts of infant, under age of majority but of lawful age to marry, is to make marriage contracts and settlements binding as if made by adults. *Walker v. Walker*, 209 Ga. 490, 74 S.E.2d 66 (1953).

Marriage does not remove disabilities of infancy unless so provided by statute. *Walker v. Walker*, 209 Ga. 490, 74 S.E.2d 66 (1953).

Marriage contracts and settlements are prenuptial contracts and settlements. *Sellers v. Sellers*, 160 Ga. 516, 128 S.E. 659 (1925).

Minor wife's waiver of right to child custody not within scope of O.C.G.A. § 13-3-22.

— Contract between husband and minor wife, who was of lawful age to marry, wherein minor wife waived right to custody of child, was not binding on wife and did not preclude wife from applying to court of competent jurisdiction for custody of child. *Walker v. Walker*, 209 Ga. 490, 74 S.E.2d 66 (1953).

Cited in *Weathers v. Owen*, 78 Ga. App. 505, 51 S.E.2d 584 (1949); *Kay v. Vaughan*, 224 Ga. 875, 165 S.E.2d 131 (1968).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, §§ 17, 120.

C.J.S. — 17 C.J.S., Contracts, § 96. 55 C.J.S., Marriage, §§ 24, 43 et seq.

ALR. — Right of infant who repudiates contract for services to recover thereon or in quantum meruit, 35 ALR2d 1302.

Husband's death as affecting periodic payment provision of separation agreement, 5 ALR4th 1153.

Separation agreements: enforceability of provision affecting property rights upon death of one party prior to final judgment of divorce, 67 ALR4th 237.

13-3-23. Minors — Contracts, promissory notes, written obligation, or other evidence, for loans from trust funds for educational purposes.

Any contract, promissory note, written obligation, or other evidence of indebtedness made and executed by a minor for a loan from any trust fund for educational purposes to any educational institution shall be as valid and binding as if said minor were sui juris at the time of making such contract or other obligation and otherwise capacitated to contract. (Ga. L. 1911, p. 163, § 1; Code 1933, § 20-205.)

JUDICIAL DECISIONS

No defense of minority in action to recover on teacher scholarship loan notes. — In action to recover on teacher scholarship loan notes, executed by defendant recipient of loans as maker and by defendant's mother as comaker, defense of minority of maker at time of executing notes was not valid.

Swindell v. Georgia State Dep't of Educ., 138 Ga. App. 57, 225 S.E.2d 503 (1976).

Cited in Hancock v. Lizella Fruit Farm, 184 Ga. 73, 190 S.E. 362 (1937); Weathers v. Owen, 78 Ga. App. 505, 51 S.E.2d 584 (1949).

13-3-24. Insane, mentally ill, mentally retarded, or mentally incompetent persons.

(a) The contract of an insane, a mentally ill, a mentally retarded, or a mentally incompetent person who has never been adjudicated to be insane, mentally ill, mentally retarded, or mentally incompetent to the extent that he is incapable of managing his estate as prescribed by this Code is not absolutely void but only voidable, except that a contract made by such person during a lucid interval is valid without ratification.

(b) After the fact that a person is insane, mentally ill, mentally retarded, or mentally incompetent to the extent that he is incapable of managing his estate has been established by a court of competent jurisdiction in this state and the affairs of such person are vested in a guardian, the power of such person to contract, even though restored to sanity, shall be entirely gone; any contracts made by such person shall be absolutely void until the guardianship is dissolved. One may recover for necessities furnished an insane person, a mentally ill person, a mentally retarded person, or a mentally incompetent person upon the same proof as if furnished to minors. (Orig. Code 1863, §§ 2691, 2697; Code 1868, §§ 2687, 2693; Code 1873, §§ 2729, 2735; Code 1882, §§ 2729, 2735; Civil Code 1895, §§ 3647, 3652; Civil Code 1910, §§ 4232, 4237; Code 1933, § 20-206.)

History of Code section. — The language of this Code section is derived in part from the decision in Norman v. Georgia Loan & Trust Co., 92 Ga. 295, 18 S.E. 27 (1893), and Fields v. Union Cent. Life Ins. Co., 170 Ga. 239, 152 S.E. 237 (1930).

Cross references. — Rights of mental patients generally, § 37-3-140 et seq. Rights and privileges of mentally retarded persons undergoing habilitation generally, § 37-4-100 et seq.

Law reviews. — For comment on Georgia

Power Co. v. Roper, 73 Ga. App. 826, 38 S.E.2d 91 (1946), see 9 Ga. B.J. 89 (1946).

JUDICIAL DECISIONS

Total deprivation of reason is necessary to destroy contractual ability. Slaughter v. Heath, 127 Ga. 747, 57 S.E. 69, 27 L.R.A. (n.s.) 1 (1907).

What constitutes lack of mental capacity to contract. — See Eagan v. Conway, 115 Ga. 130, 41 S.E. 493 (1903).

One claiming adjudged incompetent was sane at time of contracting bears burden of proof. — Law presumes continuance of insanity, and person contracting with one who has been adjudicated insane bears burden of proving sanity at time contract is executed. Summer v. Boyd, 208 Ga. 207, 66 S.E.2d 51 (1951).

When one has been adjudicated insane, the law presumes continuance of insanity, and one contracting with such person bears burden of proving sanity at time contract is executed. Strickland v. Chewning, 227 Ga. 333, 180 S.E.2d 736 (1971).

Void adjudication of incompetence and appointment of guardian does not affect ability to contract. — Void order adjudicating one mentally incompetent and appointing guardian for one's property will not of itself nullify or affect one's subsequent power to contract or afford evidence of one's competency. Hamilton v. First Nat'l Bank, 54 Ga. App. 707, 188 S.E. 840 (1936).

Party with whom incompetent contracted cannot repudiate voidable agreement on grounds of this statute. Such contract is subject to ratification by incompetent in spite of other contracting party. Georgia Power Co. v. Roper, 201 Ga. 760, 41 S.E.2d 226 (1947) (see O.C.G.A. § 13-3-24).

One ignorant of other party's insanity not per se entitled to enforcement. — Ignorance by one party to alleged contract of fact that other party was insane at time of contract's execution does not per se entitle former to enforce the contract against latter. Wooley v. Gaines, 114 Ga. 122, 39 S.E. 892, 88 Am. St. R. 22 (1901); Watkins v. Stulb & Vorhauer, 23 Ga. App. 181, 98 S.E. 94 (1919).

Good faith of grantee of deed from incompetent affords no protection. — In case brought by proper party to cancel incompetent's deed, good faith on part of grantee

affords no protection; grantee buys at the grantee's peril and must bear the loss. Williford v. Swint, 183 Ga. 375, 188 S.E. 685 (1936).

Voidable means that which is capable of being or may be made void. Herrin v. George, 183 Ga. 77, 187 S.E. 58 (1936).

Deed of incompetent who is never adjudicated as such, voidable rather than void. — Deed of incompetent who has never been adjudicated to be of unsound mind is not absolutely void, but only voidable. Holcomb v. Garcia, 221 Ga. 115, 143 S.E.2d 184 (1965).

Contract of insane person never adjudicated insane is voidable. — Contract of insane person or one non compos mentis, who has never been adjudicated to be insane or of unsound mind is not absolutely void, but only voidable. Whiteley v. Downs, 174 Ga. 839, 164 S.E. 318 (1932).

Contract of insane person, though never adjudged insane, is voidable. Sewell v. Anderson, 197 Ga. 623, 30 S.E.2d 102 (1944).

Note given before adjudication of incompetence voidable only if creditor knew of incompetence. — If note is given by one before adjudication of incompetence, the note is voidable only upon showing that creditor knew party was insane or incompetent at time note was executed. McEachern v. Costal Plain Prod. Credit Ass'n, 221 Ga. 335, 144 S.E.2d 516 (1965).

If incompetent never adjudged as such and grantee unaware of insanity, restitution prerequisite to avoidance. — If grantee in deed from insane grantor not previously adjudged insane and without guardian takes without notice of insanity of grantor, restitution or restoration of status quo is necessary before cancellation is allowable at instance of grantor or grantor's heirs at law in equitable action for that purpose. Dean v. Goings, 184 Ga. 698, 192 S.E. 826 (1937).

Contract of incompetent, not adjudicated as such, voidable unless ratified, but restitution generally required. — Contract of one who has not been adjudged mentally incompetent, but who is in fact insane at time contract is entered, can be repudiated by

incompetent unless it be expressly or impliedly thereafter effectively ratified. If not subsequently ratified, general rule is that incompetent is required to make restitution of benefits received under agreement, so as to restore parties as far as possible to their status quo. *Georgia Power Co. v. Roper*, 201 Ga. 760, 41 S.E.2d 226 (1947).

Insurance contract void. — If, at the time plaintiff accepted defendant's application for insurance, defendant was incompetent as a matter of law to enter into any contractual arrangements, the contract between plaintiff and defendant was void ab initio, regardless of the lack of an existing formal declaration of incompetence. *Network Am. Life Ins. Co. v. Taylor*, 837 F. Supp. 421 (M.D. Ga. 1993), aff'd, 35 F.3d 577 (11th Cir. 1994).

How contract by incompetent ratified. — Contract of one who was insane at time of agreement, but who had never been legally so adjudged, ceases to be voidable and becomes valid and binding whenever it is shown that obligation has been subsequently ratified either by words or conduct of contracting party personally during a lucid interval, or by virtue of what amounts to a confirmation on the part of one's personal representative. *Bunn v. Postell*, 107 Ga. 490, 33 S.E. 707 (1899); *Watkins v. Stulb & Vorhauer*, 23 Ga. App. 181, 98 S.E. 94 (1919).

A contract executed by a person without the requisite mental capacity may be ratified expressly or by implication after that person is restored to mental capacity. *Norfolk S. Corp. v. Smith*, 262 Ga. 80, 414 S.E.2d 485 (1992).

No tender required where contracting party aware of incompetency. — Generally, if the contract is voided, restitution is required. However, if the other party was aware that it was contracting with an incompetent, no tender is required. *Metter Banking Co. v. Millen Lumber & Supply Co.*, 191 Ga. App. 634, 382 S.E.2d 624 (1989).

Failure to make restitution does not preclude cancellation of deed where grantee aware of insanity. — If grantee in deed from insane grantor not previously adjudged insane and without guardian had notice of insanity of grantor at time of execution and delivery of deed, failure to make restitution or tender of restitution by heirs at law of grantor will not prevent cancellation of such

deed at their instance. *Dean v. Goings*, 184 Ga. 698, 192 S.E. 826 (1937).

Restitution of benefits received, where possible, is condition precedent to avoidance of contract by incompetent. — It is condition precedent for mental incompetent to relieve oneself from contract made during incapacity, to restore benefits received by the incompetent if such benefits are still in the incompetent's possession or control. *Whiteley v. Downs*, 174 Ga. 839, 164 S.E. 318 (1932).

Restitution not prerequisite to avoidance of contract by incompetent where impossible. — Incompetent is relieved of necessity to make restitution or tender where the incompetent shows that such restitution or tender is impossible. *Whiteley v. Downs*, 174 Ga. 839, 164 S.E. 318 (1932).

With respect to cases at law but not to cases in equity, restitution not required where one seeking to avoid contract has not ratified the contract by holding onto benefits after sanity has been restored and shows that it is impossible to make restoration of benefits received by reason of one's poverty. *Georgia Power Co. v. Roper*, 201 Ga. 760, 41 S.E.2d 226 (1947).

Contract of insane person, never adjudged as such, voidable after death by legal representative. — Contract of insane person who has not been so adjudged by court of competent jurisdiction is voidable after the person's death, at instance of the person's legal representative. *Morris v. Mobley*, 171 Ga. 224, 155 S.E. 8 (1930).

Devisee under will is proper party to bring suit for disaffirmance of voidable deed made by testator while insane. *Williford v. Swint*, 183 Ga. 375, 188 S.E. 685 (1936).

Deed of incompetent, not adjudged as such may be voidable at instance of heirs. — Contract of insane person who has never been adjudged insane is voidable after the person's death, at instance of the person's heirs at law, if there be no legal representative of that insane person. *Warren v. Federal Land Bank*, 157 Ga. 464, 122 S.E. 40, 33 A.L.R. 45 (1924).

Deed of insane person not previously adjudged insane by court of competent jurisdiction, and for whom no guardian has been appointed, is voidable after the person's death at instance of the person's heirs at law, if there be no legal representative of that

insane person. *Dean v. Goings*, 184 Ga. 698, 192 S.E. 826 (1937).

Heirs of insane grantor may avoid deed as against immediate grantee and subsequent, innocent purchasers. — Deed of insane person, though made without fraud and for adequate consideration, may be avoided by that person's heirs, not only as against that person's immediate grantee but also as against bona fide purchasers for value and without notice of such insanity. The fairness of defendant's conduct cannot supply plaintiff's want of capacity. *Warren v. Federal Land Bank*, 157 Ga. 464, 122 S.E. 40, 33 A.L.R. 45 (1924).

Deed of insane person, though made without fraud and for adequate consideration, may be avoided by that person's heirs, not only as against that person's immediate grantee but also as against bona fide purchasers for value and without notice of such insanity. *Jones v. Union Cent. Life Ins. Co.*, 178 Ga. 591, 173 S.E. 845 (1934).

Validity of contract of one adjudicated insane, but without guardian, dependent upon sanity at execution. *Summer v. Boyd*, 208 Ga. 207, 66 S.E.2d 51 (1951).

Despite adjudication of insanity, if no guardian has been appointed, validity of contract depends upon sanity at time of its execution. *Strickland v. Chewning*, 227 Ga. 333, 180 S.E.2d 736 (1971).

Contract of incompetent not absolutely void, unless guardian appointed for incompetent. — Contract of incompetent, while voidable, is not absolutely void, unless guardian for incompetent has been appointed. *Georgia Power Co. v. Roper*, 201 Ga. 760, 41 S.E.2d 226 (1947).

After adjudication of insanity and appointment of guardian, such person lacks all contractual capacity. — Under law of this state, after fact of insanity has been established by court of competent jurisdiction in this state and affairs of such person vested in a guardian, power of such person to contract is entirely gone, and such contracts are absolutely void. *American Trust & Banking Co. v. Boone*, 102 Ga. 202, 29 S.E. 182, 66 Am. St. R. 167, 40 L.R.A. 250 (1897).

Deed of insane person avoidable upon restoration to sanity even as against subsequent, innocent purchasers. — Deed of insane person, though made without fraud and for adequate consideration, may be

avoided by the insane person upon that person's restoration to sanity, not only as against that person's immediate grantee, but also as against a bona fide purchaser for value who had no notice of insanity. *Sewell v. Anderson*, 197 Ga. 623, 30 S.E.2d 102 (1944).

Change of retirement account beneficiary by incompetent person. — Ward for whom a guardian was appointed due to the ward's mental disability was stripped by the probate court of power to contract, but not the power to make a will; thus, the ward's change of beneficiary on an individual retirement account was a contractual rather than a testamentary act. *SunTrust Bank, Middle Ga., N.A. v. Harper*, 250 Ga. App. 300, 551 S.E.2d 419 (2001).

Summary judgment. — In a damages action filed by a decedent-stockholder's executors arising from the alleged wrongful transfer of stock, summary judgment in favor of those corporate defendants acting as signature guarantors, as well as on a claim to avoid the stock transfers under O.C.G.A. § 13-3-24, was proper. But, summary judgment was reversed as to the alleged wrongful registration of the transfer of that stock. *Dudley v. Wachovia Bank, N.A.*, 290 Ga. App. 220, 659 S.E.2d 658 (2008).

Cited in *Lemon v. Jenkins*, 48 Ga. 313 (1873); *Cason v. Owens*, 100 Ga. 145, 28 S.E. 75 (1897); *Fields v. Union Cent. Life Ins. Co.*, 170 Ga. 239, 152 S.E. 237 (1930); *Pendley v. Bennett*, 42 Ga. App. 596, 157 S.E. 250 (1931); *Perry v. Fletcher*, 46 Ga. App. 450, 167 S.E. 796 (1933); *Robinson v. Murray*, 198 Ga. 690, 32 S.E.2d 496 (1944); *Phillips v. Phillips*, 203 Ga. 106, 45 S.E.2d 621 (1947); *Gaulding v. Gaulding*, 209 Ga. 781, 75 S.E.2d 811 (1953); *Abner v. Weekes*, 91 Ga. App. 682, 86 S.E.2d 727 (1955); *Hobbs v. New England Ins. Co.*, 212 Ga. 513, 93 S.E.2d 653 (1956); *Carr v. Sparks*, 213 Ga. 606, 100 S.E.2d 583 (1957); *Whitehurst v. Del-Cook Timber Co.*, 215 Ga. 124, 109 S.E.2d 602 (1959); *Fuller v. Weekes*, 105 Ga. App. 790, 125 S.E.2d 662 (1962); *Greer v. Greer*, 218 Ga. 416, 128 S.E.2d 51 (1962); *Simmons v. Watson*, 221 Ga. 765, 147 S.E.2d 322 (1966); *Wheat v. Montgomery*, 130 Ga. App. 202, 202 S.E.2d 664 (1973); *Beavers v. Weatherly*, 250 Ga. 546, 299 S.E.2d 730 (1983); *Thornton v. Carpenter*, 222 Ga. App. 809, 476 S.E.2d 92 (1996).

OPINIONS OF THE ATTORNEY GENERAL

One who has been declared incompetent lacks capacity to contract marriage. — One who has been declared incompetent and not restored from such incompetency cannot enter into valid marriage, whether it is performed by minister or arises by declaration

through common-law cohabitation; only a court can adjudicate existence of marital relationship in specific case based on set of particular circumstances. 1965-66 Op. Att'y Gen. No. 66-69.

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Incompetent Persons, §§ 65 et seq., 139 et seq.

C.J.S. — 17 C.J.S., Contracts, §§ 133, 185. 17A C.J.S., Contracts, §§ 414, 418, 438, 439, 465, 547, 605.

ALR. — Right of executor or administrator to avoid contract or conveyance by decedent on ground of mental incapacity, 1 ALR 1517.

Inference from circumstances of bad faith on part of persons receiving property from one who received it from an incompetent, 19 ALR 67.

Restoration of status quo as condition of avoidance of suretyship or accommodation contract of incompetent, 34 ALR 1403.

Validity and enforceability of and relief from contract made in good faith with in-

competent before adjudication of incompetency, 95 ALR 1442.

Admissibility of evidence of reputation on issue of mental condition, or testamentary or contractual incapacity or capacity, 105 ALR 1443.

Admissibility and probative force, on issue of competency to execute an instrument, of evidence of incompetency at other times, 168 ALR 969.

Insanity of maker, drawer, or indorser as defense against holder in due course, 24 ALR2d 1380.

Right of guardian or committee of incompetent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without prior approval by court, 63 ALR3d 780.

13-3-25. Intoxicated persons.

A contract made by an intoxicated person is not void, though the intoxication is brought about by the other party, but is merely voidable at the election of the intoxicated person and may be ratified by him expressly or by conduct inconsistent with its rescission. (Orig. Code 1863, §§ 2691, 2699; Code 1868, §§ 2687, 2695; Code 1873, §§ 2729, 2737; Code 1882, §§ 2729, 2737; Civil Code 1895, §§ 3647, 3654; Civil Code 1910, §§ 4232, 4239; Code 1933, § 20-207.)

History of Code section. — The language of this Code section is derived in part from the decision in *Strickland v. Parlin & Orendorf Co.*, 118 Ga. 213, 44 S.E. 997 (1903).

Cross references. — Intoxication as defense to criminal action, § 16-3-4.

JUDICIAL DECISIONS

Rights of one unaware of and having no part in other party's drunkenness not affected. — That one endorsed obligation

while in drunken condition will not affect rights of payee who had no knowledge of such drunkenness and no hand in causing

the drunkenness. *Abbeville Trading Co. v. Butler, Stevens & Co.*, 3 Ga. App. 138, 59 S.E. 450 (1907).

O.C.G.A. § 13-3-25 will not relieve one who is voluntarily intoxicated unless other party has notice. — One is not to be relieved of one's contract made while one was under influence of voluntary drunkenness brought about in no wise by instigation of other party, unless intoxication was so great as to deprive that person of use of the person's reasoning faculties and other party had notice of the person's condition. *Abbeville Trading Co. v. Butler, Stevens & Co.*, 3 Ga. App. 138, 59 S.E. 450 (1907); *Bing v. Bank of Kingston*, 5 Ga. App. 578, 63 S.E. 652 (1909); *Hall v. Langford*, 18 Ga. App. 73, 88 S.E. 918 (1916).

One voluntarily intoxicated may enter binding contract absent fraud or imposition.

— Voluntary intoxication short of deprivation of reason, unless opposite party has contributed to produce the intoxication, will not disable person to waive right or to bind oneself by contract, in absence of fraud or imposition. *Weldon v. Colquitt*, 62 Ga. 449, 35 Am. R. 128 (1879).

Cited in *Strickland v. Parlin & Orendorf Co.*, 118 Ga. 213, 44 S.E. 997 (1903); *Parks v. Harper*, 43 Ga. App. 269, 158 S.E. 454 (1931); *McKaig v. Hardy*, 196 Ga. 582, 27 S.E.2d 11 (1943); *Douglas v. Sumner*, 213 Ga. 82, 97 S.E.2d 122 (1957); *Lynch v. State*, 164 Ga. App. 317, 296 S.E.2d 179 (1982); *Southern Ry. v. Lawson*, 256 Ga. 798, 353 S.E.2d 491 (1987).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Lack of Capacity to Form Specific Intent — Voluntary Intoxication, 5 POF2d 189.

C.J.S. — 17 C.J.S., Contracts, § 133(2). 17A C.J.S., Contracts, §§ 414, 418(3), 438 et seq., 605, 614.

ALR. — Relief in equity from deed on ground of intoxication, 6 ALR 331.

Inference from circumstances of bad faith on part of persons receiving property from one who received it from an incompetent, 19 ALR 67.

Intoxication as ground for avoiding contract, 36 ALR 619.

ARTICLE 3

CONSIDERATION

Cross references. — Effect of want or failure of consideration with regard to transfer of negotiable instruments, § 11-3-408.

RESEARCH REFERENCES

ALR. — Necessity and sufficiency of consideration for modification of real estate broker's contract, 42 ALR 987.

Consideration for modification of terms of existing tenancy, 43 ALR 1451; 93 ALR 1404.

Mutuality and enforceability of an agreement upon the sale of goods, to give the purchaser an option or the exclusive sale of similar goods without a corresponding obligation on his part, 45 ALR 1197.

Effect of promise by one whose name is forged to take care of paper, 48 ALR 1368.

Promise of additional compensation for

completing building or construction contract, 55 ALR 1333; 138 ALR 136.

Surrender of, or forbearance to prosecute, a claim for damages for personal injuries or death as a consideration, 57 ALR 279.

Surrender of claim against insolvent as consideration for promise by third person, 59 ALR 315.

Services by one spouse to other as consideration for latter's promise, 73 ALR 1518.

Validity of promise conditioned upon forbearance or nonexercise of right, without an agreement or other original consideration by promisee, 74 ALR 293.

Moral obligation as consideration for executory promise, 79 ALR 1346; 8 ALR2d 787.

Consideration for subscription agreements, 95 ALR 1305; 115 ALR 589; 151 ALR 1238.

Assumption of payment or guaranty of corporation's indebtedness as consideration for transfer of its stock, 103 ALR 1417.

Extension of time for payment of obligation or agreement to forgo enforcement thereof as consideration for a new promise by a third person as affected by nonenforceability of the obligation at time extension or agreement was made, 114 ALR 1203.

Validity and effect of transfer of expectancy by prospective heir, 121 ALR 450.

Creditor's release of, or promise to release, guarantor as affected by existence or sufficiency of consideration, 126 ALR 1241.

Forbearance to interpose or insist upon defense which is doubtful or known to be unfounded, as sufficient consideration for a promise, 139 ALR 854.

What taxes are within contemplation of contract which provides for payment or assumption of taxes or varies consideration with reference to taxes, 140 ALR 517.

Necessity of specific allegation of consideration in action upon insurance policy, 153 ALR 1406.

Consideration for change of terms of employment, 158 ALR 231.

Validity and enforceability of contract in consideration of naming child, 21 ALR2d 1061.

Mutuality and enforceability of contract to furnish another with his needs, wants, desires, requirements, and the like, of certain commodities, 26 ALR2d 1139.

Consideration for rider, endorsement, or other modification of insurance policy to change risks covered, 52 ALR2d 826.

Validity, enforceability, and effect of provision in seamen's employment contract stipulating the maximum recovery for scheduled personal injuries, 9 ALR3d 417.

Validity, construction, and enforcement of business opportunities or "finder's fee" contract, 24 ALR3d 1160.

Sufficiency of consideration for employee's covenant not to compete, entered into after inception of employment, 51 ALR3d 825.

Enforceability of contract to make will in return for services, by one who continues performance after death of person originally undertaking to serve, 84 ALR3d 930.

Reward for disproving commercial claim, 96 ALR3d 907.

Moral or natural obligation as consideration for contract, 98 ALR5th 353.

13-3-40. Necessity for consideration; presumption of consideration.

(a) A consideration is essential to a contract which the law will enforce. An executory contract without such consideration is called *nudum pactum* or a naked promise.

(b) In some cases a consideration is presumed, and an averment to the contrary will not be received. (Orig. Code 1863, § 2703; Code 1868, § 2697; Code 1873, § 2739; Code 1882, § 2739; Civil Code 1895, § 3656; Civil Code 1910, § 4241; Code 1933, § 20-301.)

Law reviews. — For article discussing the anachronistic nature of the Georgia Contracts Code as dramatized by comparing the doctrine of consideration as it is formulated in the Restatements of Contracts and in Code 1933, Title 20 (now this title), and in the interpretative approach Georgia courts

have taken in dealing with such Code, see 13 Ga. L. Rev. 499 (1979). (But see amendments by Ga. L. 1981, p. 876.) For article surveying developments in Georgia real property law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 219 (1981).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICATION
CONTRACTS UNDER SEAL

General Consideration

Consideration is essence and soul of a contract; without consideration there is no life in the contract; it is as the law says, a nude pact, and no recovery can be had upon that contract. *O'Neal v. Phillips*, 83 Ga. 556, 10 S.E. 352 (1889); *Monroe v. Martin*, 137 Ga. 262, 73 S.E. 341 (1911); *Strickland v. Farmers Supply Co.*, 14 Ga. App. 661, 82 S.E. 161 (1914).

Consideration means something of value in eye of the law, moving from plaintiff to defendant. It may be some benefit to plaintiff or some detriment to defendant. *Austell v. Rice*, 5 Ga. 472 (1848); *Reynolds v. Nevin*, 1 Ga. App. 269, 57 S.E. 918 (1907); *Red Cypress Lumber Co. v. Beall*, 5 Ga. App. 202, 62 S.E. 1056 (1908).

Motive with which party enters into contract is no part of contract's consideration. *Brousseau v. Jacobs' Pharmacy Co.*, 147 Ga. 185, 93 S.E. 293 (1917).

Nudum pactum agreement constitutes no legal basis for claim of damages put forward as for breach of contract. *Massell v. Fourth Nat'l Bank*, 38 Ga. App. 631, 144 S.E. 806 (1928).

Nudum pactum rendered binding when one party performs and other party benefits by such performance. *Barnes v. Didschuneit*, 94 Ga. App. 661, 96 S.E.2d 216 (1956).

Consideration open to inquiry between original parties to show failure, illegality, or lack thereof. — Between original parties, consideration expressed in contract is ordinarily open to inquiry for purpose of showing that contract was in fact executed without consideration and is nudum pactum, or that consideration was originally illegal and contract void, or that consideration has subsequently failed in whole or in part. *Herrington v. Herrington*, 70 Ga. App. 768, 29 S.E.2d 516 (1944).

Application to releases. — General rule, that contract to bind must be supported by valid and sufficient consideration, applies in case of release. Claim of release can have no

legal force without consideration. *Parrott v. Baker*, 82 Ga. 364, 9 S.E. 1068 (1889).

Novation must be supported by some new consideration. *Bradbury v. Morrison*, 93 Ga. App. 704, 92 S.E.2d 607 (1956).

Guaranty agreement was not novated by a cash collateral agreement entered during partnership's bankruptcy proceedings which simply delayed the amounts due. *Westinghouse Credit Corp. v. Hall*, 144 Bankr. 568 (S.D. Ga. 1992).

Accord and satisfaction is a contract, and must be based on valid consideration. *Herrington v. Herrington*, 70 Ga. App. 768, 29 S.E.2d 516 (1944).

Accord and satisfaction requires consideration for underlying settlement to be enforceable. — If release or instrument relied on by defendant as accord and satisfaction is devoid of consideration, alleged settlement, under which it is contended defendant was released from liability, is unenforceable. *Herrington v. Herrington*, 70 Ga. App. 768, 29 S.E.2d 516 (1944).

Bills of exchange and promissory notes are exceptions to rule requiring consideration to give validity to contract; those documents prima facie import consideration. *Boynton v. Twitty*, 53 Ga. 214 (1874); *Smith v. Hightower*, 3 Ga. App. 197, 59 S.E. 593 (1907).

Commercial paper prima facie presumed to be founded upon consideration. — Commercial paper is prima facie presumed to be founded on full legal consideration; especially is this true where there is a recital of "value received," or where instrument is under seal. *Bing v. Bank of Kingston*, 5 Ga. App. 578, 63 S.E. 652 (1909).

Promissory note stating it is for value received creates rebuttable presumption of consideration. — In case of promissory note which states that it is for value received, consideration is presumed, but not conclusively. Presumption merely puts other party upon proof. *Citizens' Bank v. Hall*, 179 Ga. 662, 177 S.E. 496 (1934).

Cited in *Black v. Maddox*, 104 Ga. 157, 30 S.E. 723 (1898); *Sivell v. Hogan*, 119 Ga. 167,

46 S.E. 67 (1903); *Cobb v. Jolley*, 26 Ga. App. 123, 105 S.E. 630 (1921); *Ross & Williams v. Southern Exch. Bank*, 38 Ga. App. 532, 144 S.E. 338 (1928); *Sheldon & Co. v. Emory Univ.*, 52 Ga. App. 628, 184 S.E. 401 (1936); *Slaten v. College Park Cem. Co.*, 185 Ga. 27, 193 S.E. 872 (1937); *Taylor v. Cureton*, 196 Ga. 28, 25 S.E.2d 815 (1943); *Ocean Lake & River Fish Co. v. Dotson*, 70 Ga. App. 268, 28 S.E.2d 319 (1943); *Simmons v. Noble*, 84 Ga. App. 255, 65 S.E.2d 834 (1951); *Flatauer v. Goodman*, 84 Ga. App. 881, 67 S.E.2d 794 (1951); *Carlisle v. General Tire Serv. Co.*, 86 Ga. App. 807, 72 S.E.2d 568 (1952); *Renney v. Kimberly*, 211 Ga. 396, 86 S.E.2d 217 (1955); *Peerless Cas. Co. v. Housing Auth.*, 228 F.2d 376 (5th Cir. 1955); *Wallace v. Bennett*, 218 Ga. 78, 126 S.E.2d 619 (1962); *Jennings v. Stewart*, 106 Ga. App. 689, 127 S.E.2d 842 (1962); *Jefferson Mills, Inc. v. United States*, 259 F. Supp. 305 (N.D. Ga. 1965); *Bonnett v. Cherokee Timber Corp.*, 222 Ga. 199, 149 S.E.2d 104 (1966); *Moore v. Hughey*, 133 Ga. App. 901, 212 S.E.2d 503 (1975); *Trust Co. v. Rhodes*, 144 Ga. App. 816, 242 S.E.2d 738 (1978); *Insilco Corp. v. First Nat'l Bank*, 156 Ga. App. 382, 274 S.E.2d 767 (1980); *Newport Timber Corp. v. Floyd*, 247 Ga. 535, 277 S.E.2d 646 (1981); *Willis v. Rabun County Bank*, 161 Ga. App. 151, 291 S.E.2d 52 (1982); *McLain v. Heard*, 162 Ga. App. 480, 291 S.E.2d 781 (1982); *Sellers v. Citizens & S. Nat'l Bank*, 177 Ga. App. 85, 338 S.E.2d 480 (1985); *Scott v. Stroud*, 186 Ga. App. 869, 369 S.E.2d 51 (1988); *Roberson v. Eichholz*, 218 Ga. App. 511, 462 S.E.2d 382 (1995); *Han v. Han*, 295 Ga. App. 1, 670 S.E.2d 842 (2008).

Application

Consideration may be supplied by subsequent act. — It is well settled that promise, although nudum pactum when made, because promisee is not bound, may become binding when promisee subsequently furnishes consideration by doing that which promisee was expected to do. *Brown v. Bowman*, 119 Ga. 153, 46 S.E. 410 (1903); *Purcell v. Armour Packing Co.*, 4 Ga. App. 253, 61 S.E. 138 (1908); *Peeples v. Citizens' Nat'l Life Ins. Co.*, 11 Ga. App. 177, 74 S.E. 1034 (1912).

When money consideration is stated in writing, contract is good although money not

actually paid. *Segars v. City of Cornelia*, 60 Ga. App. 457, 4 S.E.2d 60 (1939).

Written extensions of option, reciting consideration of one dollar, receipt of which was acknowledged, cannot be held to be invalid because without consideration, although sum named may not have been actually paid. *Jones v. Smith*, 206 Ga. 162, 56 S.E.2d 462 (1949).

Love and affection or moral obligation as satisfying requirement of consideration. —

It is a general rule that, in order to be enforceable, every executory contract must be supported by a valuable consideration, or, in absence of valuable consideration, by good consideration founded either on love and affection toward one to whom natural duty exists, or on strong moral obligation supported either by some antecedent legal obligation, though unenforceable, at the time, or by some present equitable duty. *McCowen v. McCord*, 49 Ga. App. 358, 175 S.E. 593 (1934); *Trustees of Jesse Parker Williams Hosp. v. Nisbet*, 189 Ga. 807, 7 S.E.2d 737 (1940).

Termination of family controversies affords sufficient consideration to support contracts for such purposes. — Compromises of doubtful rights are upheld by public policy of this state and by decisions of this court, especially when the compromises partake of the nature of family arrangements. Termination of family controversies affords consideration which is sufficient to support contract for such purposes. To render valid such a compromise agreement, it is not essential that matter should be really in doubt; but it is sufficient if parties should consider it so far doubtful as to make it the subject of compromise. *Waxelbaum v. Carroll*, 58 Ga. App. 771, 199 S.E. 858 (1938).

Provision that either party may withdraw before benefits of enterprise achieved, not rendering agreement unenforceable. — Fact that agreement for purchase and resale of certain securities allowed either party in good faith to withdraw from joint account before any benefits of enterprise had been achieved, and thus before any equities had arisen in favor of other member, would not render agreement nugatory; in absence of limitation upon duration of agreement, such would seem to be right of either party, even in absence of any such specific authority.

Application (Cont'd)

Clement A. Evans & Co. v. Waggoner, 197 Ga. 857, 30 S.E.2d 915 (1944).

Agreement, subsequent to written contract, for valuable consideration, may supplement written agreement. — Additional obligation cannot be engrafted upon written contract by parol testimony, unless made subsequent to contract, upon valuable consideration. *Smith v. Newton*, 59 Ga. 113 (1877).

Executory contract founded on no consideration, either good or valuable is unenforceable. *Georgia Cas. & Sur. Co. v. Hardrick*, 211 Ga. 709, 88 S.E.2d 394 (1955).

Agreement to do what one is already legally bound to do is insufficient consideration for promise of another. *Johnson v. Hinson*, 188 Ga. 639, 4 S.E.2d 561 (1939).

Reliance on promise to pay. — When a bank had a recorded lien on insured property which was destroyed by fire, and notified the insurer of the insurer's interest, and thereafter the insurer promised to pay to the lienholder any proceeds of the policy of insurance, the bank's reliance on the promise to pay, and the resulting forbearance of legal action, constituted sufficient consideration to support the insurer's promise to pay. *Georgia Farm Bureau Mut. Ins. Co. v. Alma Exch. Bank & Trust*, 195 Ga. App. 103, 392 S.E.2d 320 (1990).

Agreement to release debt. — An oral agreement to release a debt without new consideration is not enforceable. *NationsBank v. Tucker*, 231 Ga. App. 622, 500 S.E.2d 378 (1998).

Promise to pay preexisting debt of another unenforceable without consideration. — Promise to pay preexisting debt of another, without any detriment or inconvenience to creditor or any benefit accruing to debtor in consequence of undertaking is mere nudum pactum. *Davis v. Tift*, 70 Ga. 52 (1883); *Burruss v. Smith & Turner*, 75 Ga. 710 (1885).

Executory promise to pay preexisting debt of another with love and affection as consideration, unenforceable. — Promise to pay existing debt of another, which has only love and affection for consideration, and which is executory, and from which no benefit accrues to promisor or to debtor, is nudum pactum and cannot be enforced. *Wright v.*

Threatt, 146 Ga. 778, 92 S.E. 640, 1918C L.R.A. 541 (1917).

Love and affection for deceased husband not consideration for executory promise to pay estate's obligation. — Mere sentiment, love, and affection, or respect for memory of deceased husband, by his widow, will not support executory promise on her part to assume payment of obligation due by his estate. *McCowen v. McCord*, 49 Ga. App. 358, 175 S.E. 593 (1934).

Extension of due date for debt, without additional consideration, unenforceable. — If debt is due, extension of time, or arrangement to extend time of payment, without additional consideration, is unenforceable. *Tallent v. Scarratt*, 51 Ga. App. 577, 181 S.E. 141 (1935).

Promise of one to work unenforceable without corresponding promise to pay for services. — Contract not created by promise on part of one to labor without any mutual concurrent obligation on part of order to pay for those services. *Mason v. Terrell*, 3 Ga. App. 348, 60 S.E. 4 (1908).

Landlord's promise, without consideration, to pay for damage to lessee's goods, not binding upon defendant. *Plaza Hotel Co. v. Fine Prods. Corp.*, 87 Ga. App. 460, 74 S.E.2d 372 (1953).

Promissory note accompanying insurance application lacked consideration if policy never issued. — When one applies for a policy of insurance, accompanying the application with note to cover premium, yet no policy of insurance was ever delivered or tendered to the person by or for the company, note was without any consideration to support the note. *Home Ins. Co. v. Swann*, 34 Ga. App. 19, 128 S.E. 70 (1924), later appeal, 35 Ga. App. 358, 133 S.E. 280 (1926), later appeal, 36 Ga. App. 601, 137 S.E. 304 (1927).

Indemnity agreement, like a release, must be supported by consideration. *George R. Hall, Inc. v. Superior Trucking Co.*, 532 F. Supp. 985 (N.D. Ga. 1982).

Agreement whereby seller promises to supply buyer's reasonable requirements, in itself, without consideration. — Where agreement did not specify amount limiting buyer's reasonable requirements and buyer had no obligation imposed under the agreement to purchase from seller, there was no consideration for seller's promise to supply

buyer's reasonable requirements. *Billings Cottonseed, Inc. v. Albany Oil Mill, Inc.*, 173 Ga. App. 825, 328 S.E.2d 426 (1985).

On facts, alleged contract was offer to make a gift and lacked valid consideration. *Moore v. Logan-Long Co.*, 40 Ga. App. 259, 149 S.E. 321 (1929).

Claim of fraud based on unenforceable, broken promise, unsupported by consideration must fail. *Phillips v. Atlantic Bank & Trust Co.*, 168 Ga. App. 590, 309 S.E.2d 813 (1983).

Consideration not shown. — Defendant's promise to pay for the repairs was not enforceable because the promise was not given in return for any consideration. *Johnson v. Hardwick*, 212 Ga. App. 44, 441 S.E.2d 450 (1994).

Bond insurer offered no evidence that co-counsel for the estate of a minor child received any consideration for his agreement to assist the guardian of the child's estate in the probate process. Accordingly, no contract existed between the insurer and co-counsel. *O.C.G.A. § 13-3-40. Hartford Fire Ins. Co. v. Schneider*, No. 07-14935, 2008 U.S. App. LEXIS 5039 (11th Cir. Mar. 6, 2008) (Unpublished).

Contract requires consideration between parties and without consideration no enforcement. — Defendant's theft by deception conviction, based upon a promise to provide brokerage services, was reversed on appeal, as the state, which elected to base its accusation on a promise for brokerage services, failed to show any consideration for them; as a result, no brokerage contract existed, and absent such, no theft by deception based upon a promise of brokerage services resulted. *Campbell v. State*, 286 Ga. App. 72, 648 S.E.2d 684 (2007).

Contracts Under Seal

Common law rules as to specialties, requiring no consideration, remain in force. — Common law recognized as specialties, requiring no consideration, not only double or conditional bonds with penalty and defeasance clause, but other sealed and formally delivered obligations known as single bonds; these rules as to specialties remain of force in this state, and include like instruments creating gifts of money payable in future. *Trustees of Jesse Parker Williams*

Hosp. v. Nisbet, 189 Ga. 807, 7 S.E.2d 737 (1940).

In case of a specialty, no consideration is necessary to give it validity even in a court of equity, because seal necessarily imports consideration which promisor or covenantor will be estopped to deny. *Black v. Maddox*, 104 Ga. 157, 30 S.E. 723 (1898).

When the value of the stock and the condition of the sellers' business were not unknown to the buyers at the time the buyers signed the agreement to indemnify, release and hold harmless the sellers from any and all claims on a note and guaranty, the buyers' urging of a failure of consideration availed them nothing, since the agreement for the sale of the stock was a contract under seal. *Paige v. Jurgensen*, 204 Ga. App. 524, 419 S.E.2d 722, cert. denied, 204 Ga. App. 922, 419 S.E.2d 722 (1992).

Sealed instrument estops covenantor from denying consideration, except for fraud. — Solemnity of a sealed instrument imports consideration, or, to speak more accurately, it estops a covenantor from denying consideration, except for fraud. *Weaver v. Cosby*, 109 Ga. 310, 34 S.E. 680 (1899).

Contract valid even if recited amount was not paid. — When the contract is under seal, thus raising a presumption of consideration, and a monetary amount is recited as consideration, the contract is valid notwithstanding the fact that the amount was not paid. *Warthen v. Moore*, 258 Ga. 198, 366 S.E.2d 666 (1988).

Either want or failure of consideration may generally be pleaded to contract under seal. *Sims v. Scheussler*, 5 Ga. App. 850, 64 S.E. 99 (1909).

Lack of consideration is good defense in equity to contract under seal. — Courts of equity recognize consideration as essential element of all contracts, with few exceptions, and do not recognize formality of execution as a substitute therefor. Hence lack of consideration is a good defense in equity to contract under seal. *Lacey v. Hutchinson*, 5 Ga. App. 865, 64 S.E. 105 (1909).

Lack of lawful consideration for promissory note under seal is good defense against original payee. — It is good defense to action on negotiable promissory note under seal, in hands of original payee, that the note was executed without any lawful consideration. *Lacey v. Hutchinson*, 5 Ga. App. 865, 64 S.E. 105 (1909).

OPINIONS OF THE ATTORNEY GENERAL

Authority to contract includes authority to give consideration. — Since both counties and Department of Human Resources have authority to contract, it is self-evident that they have authority to give consideration for contract since consideration is essential to a contract and a contract without consideration is unenforceable. 1975 Op. Att'y Gen. No. 75-22.

Required waivers by environmental protection division personnel of liability for

injuries lack consideration. — Requiring environmental protection division personnel to sign waivers of liability for injuries to person or property sustained while on premises for purpose of carrying out their duties of inspection constitutes unreasonable restriction on state's police power and any such waiver is not binding on EPD personnel because of lack of valid consideration. 1976 Op. Att'y Gen. No. 76-121.

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, § 85 et seq.

C.J.S. — 17 C.J.S., Contracts, § 71.

ALR. — Effect of recital in option of receipt of consideration which was not paid, 27 ALR 1127.

Early death of vendor as affecting enforcement of contract to convey in consideration of contract for his or her support for life, 49 ALR 601.

Promise to pay another's antecedent debt in consideration of agreement to cancel it as within statute of frauds as a promise to pay debt default or miscarriage of another, 74 ALR 1025.

Original consideration as supporting obligation of accommodation parties who became such after the contract had been delivered and accepted, 74 ALR 1097.

Consideration for assumption of obligation of lease by assignee thereof, 100 ALR 1232.

Consideration for subscription agreements, 115 ALR 589; 151 ALR 1238.

What taxes are within contemplation of contract which provides for payment or assumption of taxes or varies consideration with reference to taxes, 124 ALR 1020; 140 ALR 517.

Creditor's statement or assurance to debtor, not supported by a consideration, that payment need to be made at time due, as binding upon creditor by way of estoppel, 124 ALR 1248.

Promise of additional compensation for

completing building or construction contract, 138 ALR 136.

Rights and remedies as to premium where insured was under mistaken belief regarding value, nature, or existence of property subject of insurance, 138 ALR 924.

Forbearance to sue on original obligation as consideration for note payable on demand, 141 ALR 1481.

Promise to pay debt conditioned upon future act of creditor as tolling statute of limitations, 143 ALR 1429.

Consideration for subscription agreements, 151 ALR 1238.

Consideration for assumption of obligation as guarantor, surety, endorser, or indemnitor, after execution and delivery of principal contract, as predicable upon an antecedent promise to assume or furnish such obligation, 167 ALR 1174.

Rights and liabilities as between employer and employee with respect to employee stock options, 96 ALR2d 176.

Validity of individual employment contract for specific term which contains provision that employee will perform if physically able, if health permits, or the like, 7 ALR3d 898.

Waiver of right to widow's allowance by postnuptial agreement, 9 ALR3d 955.

Validity of contract for sale of "good will" of law practice, 79 ALR3d 1243.

Enforceability of voluntary promise of additional compensation because of unforeseen difficulties in performance of existing contract, 85 ALR3d 259.

13-3-41. Types of consideration.

Considerations are distinguished into "good" and "valuable." A good consideration is such as is founded on natural duty and affection or on a strong moral obligation. A valuable consideration is founded on money or something convertible into money or having a value in money, except marriage, which is a valuable consideration. (Orig. Code 1863, § 2705; Code 1868, § 2699; Code 1873, § 2741; Code 1882, § 2741; Civil Code 1895, § 3658; Civil Code 1910, § 4243; Code 1933, § 20-303.)

Cross references. — Additional provisions relating to marriage as valuable consideration, § 19-3-60.

Law reviews. — For article discussing the anachronistic nature of the Georgia contracts Code as dramatized by comparing the doctrine of consideration as it is formulated in the Restatements of Contracts and in Code 1933, Title 20 (now this title), and the

interpretative approach Georgia courts have taken in dealing with such Code, see 13 Ga. L. Rev. 499 (1979). (But see amendments by Ga. L. 1981, p. 876.)

For comment on property interest of inventor as valuable consideration, in light of *Alexis, Inc. v. Werbell*, 209 Ga. 665, 75 S.E.2d 168 (1953), see 5 Mercer L. Rev. 208 (1953).

JUDICIAL DECISIONS

Every executory contract must be supported by valuable or good consideration. — It is the general rule that, in order to be enforceable, every executory contract must be supported by valuable consideration, or, in absence of valuable consideration, by good consideration founded either on love and affection toward one to whom a natural duty exists, or on strong moral obligation supported either by some antecedent legal obligation, though unenforceable, at the time, or by some present equitable duty. *Trustees of Jesse Parker Williams Hosp. v. Nisbet*, 189 Ga. 807, 7 S.E.2d 737 (1940).

Executory contract, founded on no consideration, either good or valuable, is nudum pactum and unenforceable. *Georgia Cas. & Sur. Co. v. Hardrick*, 211 Ga. 709, 88 S.E.2d 394 (1955).

Alleged contract on which there is no firm agreement as to consideration is unenforceable. *Venable v. Block*, 138 Ga. App. 215, 225 S.E.2d 755 (1976).

When consideration admitted although parties disagree on specific amount, contract enforceable. — Contract is enforceable where consideration is admitted and there is disagreement only as to whether there was common agreement as to specific amount of consideration in parol contract. *Venable v. Block*, 138 Ga. App. 215, 225 S.E.2d 755 (1976).

In contract between attorney and client for commissions, oral exchange of promises is sufficient consideration, and fact that promises were based on contingency will not affect validity as consideration. *Venable v. Block*, 138 Ga. App. 215, 225 S.E.2d 755 (1976).

Marriage is valuable consideration and will support contract made in consideration thereof. *Vason v. Bell*, 53 Ga. 416 (1874); *Beall v. Clark*, 71 Ga. 818 (1883).

Wife as purchaser for value as to property settled upon her in consideration of marriage. — Marriage is valuable consideration, and wife stands, as to property of husband settled upon her by marriage contract, as other purchasers for value. *Sheridan v. Sheridan*, 153 Ga. 262, 111 S.E. 906 (1922). And see *Nally v. Nally*, 74 Ga. 669, 58 Am. R. 458 (1885); *Bell v. Sappington*, 111 Ga. 391, 36 S.E. 780 (1900).

What constitutes good consideration. — See *Cannon v. Williams*, 194 Ga. 808, 22 S.E.2d 838 (1942); *Hobbs v. Clark*, 221 Ga. 558, 146 S.E.2d 271 (1965); *Waters v. Lanier*, 116 Ga. App. 471, 157 S.E.2d 796 (1967).

Good consideration is founded upon some antecedent legal obligation, although unenforceable at the time. *Waters v. Lanier*, 116 Ga. App. 471, 157 S.E.2d 796 (1967).

Assignment to bank of future periodic proceeds. — For discussion of status (legal

or equitable) of assignment to bank of specific amount from future periodic proceeds and consideration required for such an assignment, see *Bank of Cave Spring v. Gold Kist, Inc.*, 173 Ga. App. 679, 327 S.E.2d 800 (1985).

Natural duty and affection is as good a basis for consideration as strong moral obligation. *Worth v. Daniel*, 1 Ga. App. 15, 57 S.E. 898 (1907).

Natural affection is such as naturally subsists between near relatives as father and child, brother and sister, husband and wife. This is regarded in law as a good consideration. *Worth v. Daniel*, 1 Ga. App. 15, 57 S.E. 898 (1907).

Affection and sense of duty towards aged, dependent parent is good consideration. — Affection and sense of duty which should naturally exist on part of child towards aged and dependent parent is good consideration to support contract making provisions for a parent's support. *Worth v. Daniel*, 1 Ga. App. 15, 57 S.E. 898 (1907).

Parties' natural love and affection for each other provided adequate and good consideration in support of an option contract executed for "ten dollars and other valuable consideration," even though the ten dollars recited was not paid. *Warthen v. Moore*, 258 Ga. 198, 366 S.E.2d 666 (1988).

Love and affection for deceased not consideration for executory promise to pay estate's obligation. — Mere love and affection, or moral obligation alone to pay debt of deceased person who left no estate will not support promissory note for amount of debt. *Brazell v. Hearn*, 33 Ga. App. 490, 127 S.E. 479 (1925).

Mere sentiment, love, and affection, or respect for memory of deceased husband, by his widow, will not support executory promise on her part to assume payment of obligation due by his estate. *McCowen v. McCord*, 49 Ga. App. 358, 175 S.E. 593 (1934).

Courts cannot enforce promises binding on the conscience, unless some pecuniary damage flows from breach, or where, in addition to moral obligation, promise is also supported by legal consideration. *Davis & Co. v. Morgan*, 117 Ga. 504, 43 S.E. 732, 97 Am. St. R. 171, 61 L.R.A. 148 (1903).

Law does not relate to moral obligation inherent in every promise. *Worth v. Daniel*, 1 Ga. App. 15, 57 S.E. 898 (1907).

On facts, moral obligation provided consideration for promised payment for past services. *Gray v. Hamil*, 82 Ga. 375, 10 S.E. 205, 6 L.R.A. 72 (1889).

Cited in *McElven v. A.M. Sloan & Co.*, 56 Ga. 208 (1876); *Dicks v. Andrews*, 129 Ga. 756, 59 S.E. 782 (1907); *Monroe v. Martin*, 137 Ga. 262, 73 S.E. 341 (1911); *Helmer v. Helmer*, 159 Ga. 376, 125 S.E. 849, 37 A.L.R. 1137 (1924); *Ayer v. First Nat'l Bank & Trust Co.*, 182 Ga. 765, 187 S.E. 27 (1936); *Sinclair Ref. Co. v. Reid*, 60 Ga. App. 119, 3 S.E.2d 121 (1939); *Moore v. Moore*, 188 Ga. 314, 4 S.E.2d 18 (1939); *Taylor v. Cureton*, 196 Ga. 28, 25 S.E.2d 815 (1943); *Avary v. Avary*, 202 Ga. 22, 41 S.E.2d 314 (1947); *Summers v. Allison*, 127 Ga. App. 217, 193 S.E.2d 177 (1972); *Norris v. Cady*, 231 Ga. 19, 200 S.E.2d 102 (1973); *Worthington v. Worthington*, 250 Ga. 730, 301 S.E.2d 44 (1983); *Tidwell v. Galbreath*, 207 Bankr. 309 (Bankr. M.D. Ga. 1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 85, 95, 106.

C.J.S. — 17 C.J.S., Contracts, §§ 92, 97, 129, 180, 266. 17A C.J.S., Contracts, § 536.

ALR. — Remedies during promisor's lifetime on contract to convey or will property at death in consideration of support or services, 7 ALR2d 1166.

Moral obligation as consideration for contract — modern trend, 8 ALR2d 787.

Extension of time or forbearance to sue as consideration constituting mortgagee bona fide purchaser, 39 ALR2d 1088.

Forbearance as sufficient consideration for guaranty, 78 ALR2d 1414.

Right to follow chattel into hands of purchaser who took in payment of preexisting debt, 11 ALR3d 1028.

Sufficiency of consideration for employee stock-option contract, 57 ALR3d 1241.

Enforceability of voluntary promise of additional compensation because of unforeseen difficulties in performance of existing contract, 85 ALR3d 259.

13-3-42. Acts which constitute consideration; effect of consideration given or received by persons other than promisor or promisee.

(a) To constitute consideration, a performance or a return promise must be bargained for by the parties to a contract.

(b) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

(c) The performance may consist of:

(1) An act other than a promise;

(2) A forbearance; or

(3) The creation, modification, or destruction of a legal relation.

(d) The performance or return promise may be given to the promisor or to some other person. If there is a valid consideration for a promise, it does not matter from whom it moves and it may be given by the promisee or by some other person; the promisee may sustain his action, though a stranger to the consideration.

(e) In mutual subscriptions for a common object, the promise of the others is a good consideration for the promise of each. (Orig. Code 1863, §§ 2704, 2708, 2711; Code 1868, §§ 2698, 2702, 2705; Code 1873, §§ 2740, 2744, 2747; Code 1882, §§ 2740, 2744, 2747; Civil Code 1895, §§ 3657, 3661, 3664; Civil Code 1910, §§ 4242, 4246, 4249; Code 1933, §§ 20-302, 20-304, 20-306; Ga. L. 1981, p. 876, § 2.)

Law reviews. — For article discussing the anachronistic nature of the Georgia Contracts Code as dramatized by comparing the doctrine of consideration as it is formulated in the Restatements of Contracts and in Code 1933, Title 20 (now this title), and the interpretative approach Georgia courts have taken in dealing with such Code, see 13 Ga. L. Rev. 499 (1979). (But see amendments by Ga. L. 1981, p. 876.) For article, "Promissory Estoppel and the Georgia Statute of

Frauds," see 15 Ga. L. Rev. 204 (1980). For article surveying developments in Georgia contract law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 67 (1981). For article surveying developments in Georgia real property law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 219 (1981). For article, "Considering the Consideration Approach to Classifying Georgia Contracts In Partial Restraint of Trade," see 10 Ga. St. B.J. 18 (2004).

JUDICIAL DECISIONS

ANALYSIS

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PROMISES FOR BENEFIT OF THIRD PARTY

General Consideration

Editor's notes. — In light of the similarity of the provisions, decisions decided prior to the amendment by Ga. L. 1981, p. 876, which changed the definition of consideration, are included in the annotations for this Code section.

Slight consideration is sufficient, and courts of law will not look closely into its adequacy. *Wolfe v. Breman*, 69 Ga. App. 813, 26 S.E.2d 633 (1943).

On principle it is immaterial whether promisor or promisee initiated negotiations which resulted in promise. *Strachan v. Burford*, 173 Ga. 821, 162 S.E. 120 (1931).

Language of section negatives idea that both benefit and injury must occur, but expressly provides that either, by itself, will support promise. Supreme Court has uniformly followed plain mandate of law, and held that, in absence of fraud, even slight benefit will be sufficient. *Crine & Daniel v. Davis*, 68 Ga. 138 (1881); *Roberts v. Davis*, 72 Ga. 819 (1884); *Burruss v. Smith & Turner*, 75 Ga. 710 (1885); *Sanders & Ables v. Carter*, 91 Ga. 450, 17 S.E. 345 (1893); *Gilmore v. Hammock*, 72 Ga. App. 35, 32 S.E.2d 844 (1945).

Damage or trouble to promisee, as well as benefit to promisor, is sufficient consideration to support promise. *Mankin v. Bryant*, 206 Ga. 120, 56 S.E.2d 447 (1949); *Zachos v. Citizens & S. Nat'l Bank*, 213 Ga. 619, 100 S.E.2d 418 (1957); *Mann Elec. Co. v. Webco S. Corp.*, 194 Ga. App. 541, 390 S.E.2d 905 (1990).

Any benefit accruing to promisor, or any loss, trouble, or disadvantage to promisee, is sufficient consideration, in eyes of the law, to sustain cause of action upon breach of agreement. *Vanguard Properties Dev. Corp. v. Murphy*, 136 Ga. App. 519, 221 S.E.2d 691 (1975).

Any benefit accruing to one who makes promise, or any loss, trouble, or disadvantage undergone by person to whom promise is made, is sufficient consideration, in eyes of the law, to sustain an assumpsit. *Whitley v. Powell*, 47 Ga. App. 105, 169 S.E. 766 (1933); *Mankin v. Bryant*, 206 Ga. 120, 56 S.E.2d 447 (1949); *Zachos v. Citizens & S. Nat'l Bank*, 213 Ga. 619, 100 S.E.2d 418 (1957).

Any benefit accruing to one who makes promise, or any loss, trouble, or disadvantage undergone by, or charge imposed

upon, him to whom it is made, is sufficient consideration. *Pepsi Cola Bottling Co. v. First Nat'l Bank*, 248 Ga. 114, 281 S.E.2d 579 (1981).

Consideration need not be benefit accruing to promisor. *Porter Fertilizer Co. v. Brewer*, 36 Ga. App. 329, 136 S.E. 477 (1927).

Consideration need not be benefit accruing to promisor, but may be benefit accruing to another. *Owens v. Service Fire Ins. Co.*, 90 Ga. App. 553, 83 S.E.2d 249 (1954).

Motive with which a party enters into a contract is no part of contract's consideration. *Sellers v. Citizens & S. Nat'l Bank*, 177 Ga. App. 85, 338 S.E.2d 480 (1985).

Mutual promises. — When mutual promises are given, each promise is itself consideration for the return promise. *Phillips Audio Video Systems Corp. v. Bateman*, 160 Ga. App. 12, 285 S.E.2d 747 (1981).

It is not necessary that promisor receive anything, as loss, trouble, or disadvantage undergone by promisee is sufficient consideration. *Collins v. Gwinnett Bank & Trust Co.*, 149 Ga. App. 658, 255 S.E.2d 122 (1979).

Contract may be supported by adequate consideration, although promisor never receives any part of it. *Fine v. Haas*, 120 Ga. App. 524, 171 S.E.2d 372 (1969).

Detriment sustained if relied on as consideration should be alleged and proved. — Detriment sustained by plaintiff, if relied upon as consideration for contract sued on, should be distinctly alleged in declaration and proved upon trial. *Stovall v. Hairston*, 55 Ga. 9 (1875).

Agreement to settle existing debt by part payment requires consideration. — Agreement to settle existing debt by promise to pay part thereof, is void, for want of consideration, unless some benefit accrues from agreement to creditor or detriment to debtor, other than what springs out of original contract. *Stovall v. Hairston*, 55 Ga. 9 (1875).

Promise to pay preexisting debt of another requires new consideration. — When one person has sold and delivered goods to another and detriments and benefits which constituted consideration of contract between them have been suffered and received and transaction has thus become fixed as to their reciprocal liabilities, contract by third

person, not originally bound, to pay debt thus already pre-existing and incurred by purchaser, is nudum pactum, unless supported by new consideration. *Saul v. Southern Seating & Cabinet Co.*, 6 Ga. App. 843, 65 S.E. 1065 (1909).

Agreement to do what one is already legally bound to do is not sufficient consideration for promise of another. *Johnson v. Hinson*, 188 Ga. 639, 4 S.E.2d 561 (1939).

Relinquishment of interest in valid indebtedness is valid consideration. *Smith v. Davis*, 65 Ga. App. 245, 15 S.E.2d 820 (1941).

Settlement of pending cause of action. — A definite, certain, and unambiguous oral contract of settlement of a pending cause of action is a valid and binding agreement. When the suit is pending, either of the parties to the case is entitled to a final judgment based on the terms of the agreement of settlement so as to render certain the termination of the case. *Olson v. Chicago Title Ins. Co.*, 158 Ga. App. 713, 282 S.E.2d 184 (1981).

Contract not bargained for. — Trial court did not err in denying plaintiff's motion for directed verdict predicated on claims that a contract was enforceable as supported by valid consideration since plaintiff did not provide the contract to the defendant for signature until after all the work performed thereunder had been done. *Driggers v. Campbell*, 247 Ga. App. 300, 543 S.E.2d 787 (2000).

Forbearance in bringing suit on legal claim is sufficient consideration to support contract. *Trust Co. v. Rhodes*, 144 Ga. App. 816, 242 S.E.2d 738 (1978).

Forbearance to prosecute legal claim, and compromise of doubtful right, are both sufficient considerations to support a contract. *Wolfe v. Breman*, 69 Ga. App. 813, 26 S.E.2d 633 (1943).

Forbearance from asserting defenses in litigation as consideration for release from contract. — Forbearance by party from asserting defenses in related litigation would be, if bargained for by other party, consideration sufficient to support release from contract. *Atlanta Nat'l Real Estate Trust v. Tally*, 243 Ga. 247, 253 S.E.2d 692 (1979).

Recital of payment of one dollar suffices as consideration, although never actually paid. — When contract contains recital of payment of one dollar as contract's consid-

eration, contract is valid though sum named was not actually paid. *Hickok v. Starka Indus., Inc.*, 154 Ga. App. 589, 269 S.E.2d 84 (1980).

Subsequent act as consideration for promise unenforceable when made. — Promise, though unenforceable for lack of consideration when made may become binding and enforceable, if promisee subsequently furnishes consideration contemplated by doing what promisee was expected to do. *ABC Sch. Supply, Inc. v. Brunswick-Balke-Collender Co.*, 97 Ga. App. 84, 102 S.E.2d 199 (1958).

Cited in *Pitts v. Allen*, 72 Ga. 69 (1883); *Glanton v. Whitaker*, 75 Ga. 523 (1885); *Sanders & Ables v. Carter*, 91 Ga. 450, 17 S.E. 345 (1893); *LaGrange Lumber & Supply Co. v. Farmers & Traders Bank*, 37 Ga. App. 409, 140 S.E. 766 (1927); *Owens v. Glover Grocery Co.*, 39 Ga. App. 798, 148 S.E. 541 (1929); *Benton v. Roberts*, 41 Ga. App. 189, 152 S.E. 141 (1930); *Strachan v. Burford*, 173 Ga. 821, 162 S.E. 120 (1931); *Conley v. Kelley*, 43 Ga. App. 822, 160 S.E. 532 (1931); *McCowen v. McCord*, 49 Ga. App. 358, 175 S.E. 593 (1934); *Ocean Lake & River Fish Co. v. Dotson*, 70 Ga. App. 268, 28 S.E.2d 319 (1943); *Thompson v. Hudson*, 76 Ga. App. 807, 47 S.E.2d 112 (1948); *R.A.C. Realty Co. v. W.O.U.F. Atlanta Realty Corp.*, 205 Ga. 154, 52 S.E.2d 617 (1949); *W.O.U.F. Atlanta Realty Corp. v. R.A.C. Realty Co.*, 207 Ga. 334, 61 S.E.2d 499 (1950); *Flatauer v. Goodman*, 84 Ga. App. 881, 67 S.E.2d 794 (1951); *Carlisle v. General Fire Serv. Co.*, 86 Ga. App. 807, 72 S.E.2d 568 (1952); *Wilson v. Whitmire*, 212 Ga. 287, 92 S.E.2d 20 (1956); *Utzman v. Caribbean & S.E. Dev. Corp.*, 107 Ga. App. 56, 129 S.E.2d 62 (1962); *Jefferson Mills, Inc. v. United States*, 259 F. Supp. 305 (N.D. Ga. 1965); *Maddox v. Loden*, 117 Ga. App. 99, 159 S.E.2d 743 (1968); *Frink v. Derst Baking Co.*, 224 Ga. 642, 163 S.E.2d 712 (1968); *Top Quality Homes, Inc. v. Jackson*, 231 Ga. 844, 204 S.E.2d 600 (1974); *Haire v. Cook*, 237 Ga. 639, 229 S.E.2d 436 (1976); *Boxwood Corp. v. Berry*, 144 Ga. App. 351, 241 S.E.2d 297 (1977); *McCrackin v. Clay*, 151 Ga. App. 744, 261 S.E.2d 471 (1979); *American Century Mtg. Investors v. Bankamerica Realty Investors*, 246 Ga. 39, 268 S.E.2d 609 (1980); *Hospital Auth. v. Bryant*, 157 Ga. App. 330, 277 S.E.2d 322 (1981); *Grant v. Bell*, 161 Ga. App. 878, 288 S.E.2d 907 (1982); *European Bakers, Ltd. v.*

General Consideration (Cont'd)

Holman, 177 Ga. App. 172, 338 S.E.2d 702 (1985); Starr v. Robinson, 181 Ga. App. 9, 351 S.E.2d 238 (1986); Thornton v. Ellis, 184 Ga. App. 884, 363 S.E.2d 584 (1987); Citizens & S. Nat'l Bank v. Benton, 257 Ga. 751, 363 S.E.2d 549 (1988); Hawes v. Emory Univ., 188 Ga. App. 803, 374 S.E.2d 328 (1988); Rogers v. deMonteguain, 193 Ga. App. 480, 388 S.E.2d 10 (1989); Avanti Group (U.S.A.), Ltd. v. Robert Half of Atlanta, Inc., 198 Ga. App. 366, 401 S.E.2d 576 (1991); Wimpey v. Bissinger, 198 Ga. App. 784, 403 S.E.2d 78 (1991); Acuff v. Proctor, 267 Ga. 85, 475 S.E.2d 616 (1996); Fisher v. Toombs County Nursing Home, 223 Ga. App. 842, 479 S.E.2d 180 (1996); Drake v. Wallace, 259 Ga. App. 111, 576 S.E.2d 87 (2003).

Application

Taking possession of and improving property in reliance on promise to convey as sufficient consideration. — When petition alleged that plaintiff, relying upon promise of corporation to convey to the plaintiff certain property, took possession and made valuable improvements thereon, it alleges a benefit to corporation by reason of enhancement in value of corporation's remaining property because of valuable improvements made by plaintiff, and injury to plaintiff, by reason of valuable improvements made by plaintiff in reliance upon promise of conveyance. Mankin v. Bryant, 206 Ga. 120, 56 S.E.2d 447 (1949).

Promise to help or cooperate in work, sufficient consideration for agreement to accept and pay for service. Roberts v. Allen, 31 Ga. App. 660, 122 S.E. 86, cert. denied, 31 Ga. App. 812 (1924).

Agreement that one shall share equally in firm profits supports promise to pay one-third of losses. Tillinghast v. Banks, 14 Ga. 649 (1954).

Release from partnership debts in exchange for release of partnership interest provide requisite consideration. — When partnership is dissolved and creditor is made party to dissolution agreement, expressly agreeing to release retiring partner from, and to look solely to continuing partner for payment of firm's debt, and retiring partner releases to continuing partner retiring part-

ner's entire interest and equity in firm's assets, undertaking of each party constitutes sufficient consideration to support undertakings of the other. Stanley & Gravitt v. Roberts Bros., 31 Ga. App. 746, 121 S.E. 878 (1924).

Deed in consideration of one dollar, plus past and future support, is valid. — Deed in consideration of one dollar actually paid, and of past support of grantors by grantees, and an agreement on the part of the grantees for the future support of the grantors, is not a voluntary conveyance, but one based upon a valuable consideration. Dorsey v. Clower, 162 Ga. 299, 133 S.E. 249 (1926).

Change of residence at another's request is valid consideration for promise to pay money. Zachos v. Citizens & S. Nat'l Bank, 213 Ga. 619, 100 S.E.2d 418 (1957).

Agreement of defendant to obtain loan for benefit of plaintiff provides consideration for deed. Grice v. Grice, 197 Ga. 686, 30 S.E.2d 183 (1944).

Withdrawal of objections to year's support as consideration for promise to pay deceased husband's debt. — Note made by widow to creditor of deceased husband's estate, in which she promised to pay creditor's debt, provided estate should fail to do so, consideration for note being withdrawal by creditor of objections filed by creditor to allowance of year's support, is in absence of fraud, a valid contract. Golding v. McCall, 5 Ga. App. 545, 63 S.E. 706 (1909).

When consideration of contract supports agreement to extend time, see Baker v. Davis, 127 Ga. 649, 57 S.E. 62 (1907).

Extension of time for payment of debt supports endorsement of renewal note. — Extension of time by creditor to principal debtor is sufficient consideration to support endorsement of note renewing original debt. Reed v. Gormley, 57 Ga. App. 821, 196 S.E. 921 (1938).

Option in lease contract supported by general consideration of entire lease. — When lease contract at specified annual rental, contained option allowing lessee to purchase property during term at such amount as might be offered for it by another, option was supported by general consideration for entire contract, and was not unenforceable on ground that it was merely unilateral. Turman v. Smarr, 145 Ga. 312, 89 S.E. 214 (1916).

Benefit to locality as consideration for guaranty by stockholder residents. — Benefits to guarantors as stockholders and as residents of town where corporation's plant was to be located is sufficient consideration for guaranty made to induce subscription for stock. *Rogers v. Burr*, 105 Ga. 432, 31 S.E. 438, 70 Am. St. R. 50 (1898).

Insurer's agreement to issue a policy and determine the insurance premiums was sufficient consideration for a named driver exclusion of coverage in the policy. *Middlebrooks v. Atlanta Cas. Co.*, 222 Ga. App. 785, 476 S.E.2d 82 (1996).

Continuing liability coverage as consideration for exclusion endorsement. — Adequate consideration is present when both parties intended that the execution of an exclusion endorsement would continue liability coverage. *Miley v. Fireman's Fund Ins. Co.*, 176 Ga. App. 527, 336 S.E.2d 583 (1985).

Helping mother settle estate. — Defendant son's testimony as to his assistance to his mother in settling estate of his father constituted something of value "convertible into money, or having a value in money," and when considered with evidence of love and affection between mother and son, amounted to good and valuable consideration for mother's forbearance to collect son's indebtedness to estate of which she was sole beneficiary. *Bates v. Bates*, 163 Ga. App. 268, 293 S.E.2d 515 (1982).

Appellees' agreement to sell and appellant's agreement to buy certain stock of a corporation constituted such mutual promises as afforded consideration one as to the other. *Brown v. Reeves*, 164 Ga. App. 89, 296 S.E.2d 393 (1982).

Unilateral right to extend contract without additional consideration. — The unilateral right by one party under a contract to extend the term covered by such contract without payment of additional consideration is unenforceable for lack of consideration. *Newport Timber Corp. v. Floyd*, 247 Ga. 535, 277 S.E.2d 646 (1981).

Assignment to bank of future periodic proceeds. — For discussion of status (legal or equitable) of assignment to bank of specific amount from future periodic proceeds and consideration required for such an assignment, see *Bank of Cave Spring v. Gold Kist, Inc.*, 173 Ga. App. 679, 327 S.E.2d 800 (1985).

When employer undertook to have renovation work done in a portion of the plant, and contracted with another to do the floor refinishing, an employee was not a party to the contract but was, at best, an incidental beneficiary. *Church v. SMS Enters.*, 186 Ga. App. 791, 368 S.E.2d 554 (1988).

Arbitration agreement enforceable between employees and employers. — Employer's "Open Door" policy was an enforceable contract under Georgia law, O.C.G.A. § 13-3-42. When viewing a facilitator as an advisor rather than a gatekeeper, it was readily apparent that the arbitration agreement contained mutual promises—both the employer and its employees committed to resolving workplace disputes through the Open Door process. *Lambert v. Austin Ind.*, 544 F.3d 1192 (11th Cir. 2008).

Reliance on promise to pay. — When a bank had a recorded lien on insured property which was destroyed by fire, and notified the insurer of the bank's interest, and thereafter the insurer promised to pay to the lienholder any proceeds of the policy of insurance, the bank's reliance on the promise to pay, and the resulting forbearance of legal action, constituted sufficient consideration to support the insurer's promise to pay. *Georgia Farm Bureau Mut. Ins. Co. v. Alma Exch. Bank & Trust*, 195 Ga. App. 103, 392 S.E.2d 320 (1990).

Separation agreements. — A separation agreement entered in contemplation of the parties' uncontested divorce was supported by consideration and was enforceable. *Sheppard v. Sheppard*, 229 Ga. App. 494, 494 S.E.2d 240 (1997).

Promises for Benefit of Third Party

Third-party beneficiary can be a stranger to consideration and still maintain action on contract, so long as a valid consideration supports a promise. *Hercules, Inc. v. Stevens Shipping Co.*, 629 F.2d 418 (5th Cir. 1980), rev'd and remanded on other grounds on rehearing, 698 F.2d 726 (5th Cir. 1983).

Promise to pay another's debt, supported by relinquishment of lien on collateral for such debt. — There is sufficient consideration to support agreement to answer for debt of another when creditor is thereby induced by promisor to relinquish valuable lien which creditor had acquired upon property to secure original debt. *Bluthenthal &*

Promises for Benefit of Third Party (Cont'd)

Bickart v. Moore, 106 Ga. 424, 32 S.E. 344 (1899).

Note given by father for relinquishment of disputed claim against son is enforceable. — While promise by father to assume unenforceable obligation against his minor son is unenforceable, and while promissory note cannot be enforced when the note is executed to pay existing debt of another unless supported by legal consideration, a note voluntarily given by father in liquidation of disputed, and perhaps valid, claim against son, is not without consideration where promisee relinquishes bona fide claim against son, and surrenders evidence thereof. Gibson v. Kyle, 46 Ga. App. 295, 167 S.E. 547 (1932).

Assumption of third person's past-due debt for promise to extend maturity of debt is enforceable. — Written contract in which plaintiff, in consideration of conditional assumption by defendant of past-due indebtedness of third persons, expressly agreed to extend date of maturity of debt, and thereby incurred detriment was not without valuable consideration to defendant. Rice v. Harris, 52 Ga. App. 42, 182 S.E. 404 (1935).

Release from employment contract supports third party's promise to pay released

employee's debt to employer. — Release of laborer from contract of employment is sufficient consideration to support promise of third person to pay debt of laborer to employer. Johnson v. Cothorn, 12 Ga. App. 258, 77 S.E. 207 (1903); Wilson v. McDougald Bros. & Co., 12 Ga. App. 74, 76 S.E. 755 (1912).

Promise to pay for another's car repairs, provided promisor allowed to designate garage, lacks consideration. — When only consideration alleged for contract for auto repairs was right given to defendant, employer of tort-feasor, to designate garage at which owner was to have car repaired, and if defendant was not otherwise obligated to repair vehicle, mere choice of place where owner would have the car repaired does not appear to be such consideration as would confer any benefit upon defendant, or any injury to plaintiff, thus alleged agreement to have another's car repaired at defendant's expense was unenforceable. Simmons v. Noble, 84 Ga. App. 255, 65 S.E.2d 834 (1951).

Promise of note may maintain action although consideration furnished by third party. — When in suit on note it appears that there was consideration to defendant endorser, fact that consideration was furnished by one other than promisee does not prevent promisee from maintaining suit on such note. Edgar v. Edgar Casket Co., 125 Ga. App. 389, 187 S.E.2d 925 (1972).

OPINIONS OF THE ATTORNEY GENERAL

Required waivers by environmental protection division personnel of liability for injuries lack consideration. — Requiring environmental protection division personnel to sign waivers of liability for injuries to person or property sustained while on pre-

mises for purpose of carrying out their duties of inspection constitutes unreasonable restriction on state's police power and any such waiver is not binding on EPD personnel because of lack of valid consideration. 1976 Op. Att'y Gen. No. 76-121.

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 85, 95, 96.

C.J.S. — 17 C.J.S., Contracts, § 70 et seq.

ALR. — Validity and enforceability of contract in consideration of naming child, 21 ALR2d 1061.

Forbearance as sufficient consideration for guaranty, 78 ALR2d 1414.

Validity of agreement to pay royalties for use of patented articles beyond patent expiration date, 3 ALR3d 770.

Right to follow chattel into hands of purchaser who took in payment of preexisting debt, 11 ALR3d 1028.

Sufficiency of consideration for employee stock-option contract, 57 ALR3d 1241.

13-3-43. Effect of satisfying requirement of consideration.

If the requirement of consideration is met, there is no additional requirement of a gain, advantage, or benefit to the promisor or of a loss, disadvantage, or detriment to the promisee. (Code 1933, § 20-302.1, enacted by Ga. L. 1981, p. 876, § 2.)

Law reviews. — For article discussing third party beneficiary contracts, see 4 Ga. B.J. 19 (1941). For article, “Considering the Con-

sideration Approach to Classifying Georgia Contracts In Partial Restraint of Trade,” see 10 Ga. St. B.J. 18 (No. 2, 2004).

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the provisions, decisions decided prior to Ga. L. 1981, p. 876, which changed the definition of consideration, are included in the annotations for this Code section.

It matters not from whom consideration flows or that consideration may flow to third party. *Mason v. Blayton*, 119 Ga. App. 203, 166 S.E.2d 601 (1969) (decided prior to the passage of Ga. L. 1981, p. 876).

Consideration of contract need not flow from promisee, but may consist in promise or undertaking of one or more third persons. *Steadwell v. Morris*, 61 Ga. 97 (1879); *Bell v. Sappington*, 111 Ga. 391, 36 S.E. 780 (1900); *Bing v. Bank of Kingston*, 5 Ga. App. 578, 63 S.E. 652 (1909) (decided prior to the passage of Ga. L. 1981, p. 876).

Contract may be supported by adequate consideration although promisor never receives any of the consideration. *Fine v. Haas*, 120 Ga. App. 524, 171 S.E.2d 372 (1969) (decided prior to the passage of Ga. L. 1981, p. 876).

Promisee of note may maintain action although consideration furnished by third party. — When in suit on note it appears that there was consideration to defendant endorser, fact that the consideration was furnished by one other than promisee does not prevent promisee from maintaining suit on such note. *Edgar v. Edgar Casket Co.*, 125 Ga. App. 389, 187 S.E.2d 925 (1972) (decided prior to the passage of Ga. L. 1981, p. 876).

Whether admittedly adequate consideration was supplied by promisee or another is irrelevant. — It is no legitimate concern of plaintiff whether consideration, which admittedly was adequate and has been paid, was supplied by grantee at considerable cost

to grantee or was donated to grantee by a friend without cost. Inquiry on this point need go no further than to disclose that grantee obligated itself to supply consideration which was valuable and adequate, and that grantee did in fact discharge that obligation by supplying consideration promised. *Archer v. Kelley*, 194 Ga. 117, 21 S.E.2d 51 (1942) (decided prior to the passage of Ga. L. 1981, p. 876).

Consideration supplied by husband supports deed made to wife. — When husband furnishes consideration for deed to be made to himself, but directed that deed be made to his wife, consideration furnished by him would support conveyance to his wife, as if conveyance had been made to him and by him to his wife. *Read v. Gould*, 139 Ga. 499, 77 S.E. 642 (1913) (decided prior to the passage of Ga. L. 1981, p. 876).

Transfer of chattel mortgage from mortgagee to mortgagor for consideration from nonparty passes title. — Transfer of chattel mortgage from mortgagee to one of mortgagors, based on valuable consideration flowing from one not party to transaction, passes title to interest of such mortgagee into mortgagor named in transfer. *Nolley v. Elliott*, 50 Ga. App. 382, 178 S.E. 309 (1935) (decided prior to the passage of Ga. L. 1981, p. 876).

Promise made for purpose of benefiting third party, enforceable by latter. — When promise is made for purpose of conferring benefit upon one not party to contract, and not furnishing consideration for the promise, one can bring suit upon the contract. *Carruth v. Aetna Life Ins. Co.*, 157 Ga. 608, 122 S.E. 226 (1924) (decided prior to the passage of Ga. L. 1981, p. 876).

Fact of payment of group insurance premiums by employer, not rendering policy

unenforceable by employee. — Fact that plaintiff holder of certificate of group insurance did not pay any premiums on this insurance, but that certificate was issued to plaintiff by plaintiff's employer because of plaintiff's employment, and premiums were paid by plaintiff's employer, and fact that certificate depended upon master policy between his employer and insurer, would not render insurance not binding upon insurer. *Liner v. Travelers Ins. Co.*, 50 Ga. App. 643, 180 S.E. 383 (1935) (decided prior to the passage of Ga. L. 1981, p. 876).

Note given by father for relinquishment of disputed claim against son is enforceable.

— While promise by father to assume unenforceable obligation against his minor son is unenforceable, and while promissory note cannot be enforced when the note is executed to pay existing debt of another and such assumption is supported by no legal consideration, a note voluntarily given by father in liquidation of disputed, and perhaps valid, claim against his son, is not without consideration where promisee relinquishes his bona fide claim against son, and surrenders evidence thereof. *Gibson v. Kyle*, 46 Ga. App. 295, 167 S.E. 547 (1932) (decided prior to the passage of Ga. L. 1981, p. 876).

When contract benefits public, member of public injured by contracting party's negligence may sue directly. — Contract between state highway department and construction company by which latter undertakes to provide for safety of public during construction of project inures to benefit of public, and member of public injured as a result of negligence in failing to do so may sue contracting party directly. *Lee v. Petty*, 133 Ga. App. 201, 210 S.E.2d 383 (1974) (decided prior to the passage of Ga. L. 1981, p. 876).

Remote grantee of mortgaged property agreeing to pay debt incurs personal liability to mortgagee. — Remote grantee of mortgaged property, who takes by deed in which one agrees to pay a debt, is personally liable to mortgagee where intermediate grantor took only subject to the debt and was not personally liable for the debt. *Somers v. Avant*, 244 Ga. 460, 261 S.E.2d 334 (1979) (decided prior to the passage of Ga. L. 1981, p. 876).

Promise of one to pay another's debts not

authorization to latter's creditors to enforce.

— When one, for valuable consideration, agrees with another to pay latter's debts, this alone does not authorize creditor of promisee to bring action at law against promisor to recover debt. *Sheppard v. Bridges*, 137 Ga. 615, 74 S.E. 245 (1912) (decided prior to the passage of Ga. L. 1981, p. 876).

When promisor merely assumes to pay another's debt to third person, latter cannot enforce. — When third person is not named as promisee, and where no trust is created in that person's favor, but another promisor, merely assumes to pay debt of another to such third person, latter cannot maintain action thereon. *Hawkins v. Central of Ga. Ry.*, 119 Ga. 159, 46 S.E. 82 (1903) (decided prior to the passage of Ga. L. 1981, p. 876).

Wife of promisee, merely beneficiary and utter stranger to contract, could not maintain suit in one's own name. *Waxelbaum v. Waxelbaum*, 54 Ga. App. 823, 189 S.E. 283 (1936) (decided prior to the passage of Ga. L. 1981, p. 876). But see § 9-2-20.

Compromise on conflicting claims. — If parties have conflicting claims, depending upon a law point, and the parties compromise those claims, each is bound by the settlement, whether the law point turns out to have been in one party's favor or not. *Capitol Materials, Inc. v. Kellogg & Kimsey, Inc.*, 242 Ga. App. 584, 530 S.E.2d 488 (2000).

Injured party generally cannot sue tort-feasor's insurer directly due to lack of privity. — Absent policy provisions to contrary, one who suffers injury is not in privity of contract with insurer under liability insurance policy and cannot reach proceeds of policy for payment of one's claim by action directly against insurer. *Lee v. Petty*, 133 Ga. App. 201, 210 S.E.2d 383 (1974) (decided prior to the passage of Ga. L. 1981, p. 876).

Cited in *Gunter v. Mooney*, 72 Ga. 205 (1883); *Lee v. Exchange Nat'l Bank*, 31 Ga. App. 470, 120 S.E. 694 (1923); *Worsham v. Penn*, 32 Ga. App. 189, 122 S.E. 817 (1924); *Knight Co. v. Calhoun*, 33 Ga. App. 312, 125 S.E. 790 (1924); *Hall v. Wingate*, 159 Ga. 630, 126 S.E. 796 (1924); *Benton v. Roberts*, 41 Ga. App. 189, 152 S.E. 141 (1930); *Ray v. McCurdy*, 171 Ga. 554, 156 S.E. 232 (1930); *First Nat'l Bank & Trust Co. v. Roberts*, 187 Ga. 472, 1 S.E.2d 12 (1939); *Knight v. Wingate*, 205 Ga. 133, 52 S.E.2d 604 (1949); *Franklin v. Pope*, 81 Ga. App. 729, 59 S.E.2d

726 (1950); *Simonton Constr. Co. v. Pope*, 213 Ga. 360, 99 S.E.2d 216 (1957); *Carroll v. First Nat'l Bank*, 106 Ga. App. 794, 128 S.E.2d 344 (1962); *Utzman v. Caribbean & S.E. Dev. Corp.*, 107 Ga. App. 56, 129 S.E.2d 62 (1962); *Murray v. Life Ins. Co.*, 107 Ga. App. 545, 130 S.E.2d 767 (1963); *Potts v. Levin*, 113 Ga. App. 4, 147 S.E.2d 1 (1966); *McWhirter Material Handling Co. v. Georgia Paper Stock Co.*, 118 Ga. App. 582, 164

S.E.2d 852 (1968); *Knight v. Lowery*, 124 Ga. App. 172, 183 S.E.2d 221 (1971); *Fidelity & Deposit Co. v. Gainesville Iron Works, Inc.*, 125 Ga. App. 829, 189 S.E.2d 130 (1972); *Clarke v. Fanning*, 127 Ga. App. 86, 192 S.E.2d 565 (1972); *Continental Cas. Co. v. Continental Rent-A-Car of Ga., Inc.*, 349 F. Supp. 666 (N.D. Ga. 1972); *McCrackin v. Clay*, 151 Ga. App. 744, 261 S.E.2d 471 (1979).

RESEARCH REFERENCES

ALR. — Services by one spouse to other as consideration for latter's promise, 73 ALR 1518.

Implied obligation of one to pay for services or goods which another at his request has rendered or furnished to a third person, 125 ALR 1428.

Contract to induce promise to enter into contractual or other relations with third person as enforceable by latter, his creditors or representatives, 129 ALR 172.

13-3-44. Effect of promise which is reasonably expected to induce action or forbearance by promisee or third person; requirement as to proof of reliance in cases of charitable subscriptions or marriage settlements.

(a) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(b) A charitable subscription or a marriage settlement is binding under subsection (a) of this Code section without proof that the promise induced action or forbearance. (Code 1933, § 20-302.2, enacted by Ga. L. 1981, p. 876, § 2.)

Law reviews. — For article discussing the anachronistic nature of the Georgia Contracts Code as dramatized by comparing the doctrine of consideration as it is formulated in the Restatements of Contracts and in Code 1933, Title 20 (now this title), and the interpretative approach Georgia courts have taken in dealing with such Code, see 13 Ga. L. Rev. 499 (1979). (But see amendments by

Ga. L. 1981, p. 876.) For article surveying developments in Georgia real property law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 219 (1981).

For note, "Promissory Estoppel in Georgia," see 2 Mercer L. Rev. 405 (1951). For note, "Contingency Financing Clauses in Real Estate Sales Contracts in Georgia," see 8 Ga. L. Rev. 186 (1973).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION PROMISSORY ESTOPPEL

1. IN GENERAL

2. APPLICATION

MUTUAL SUBSCRIPTIONS

General Consideration

Editor's notes. — In light of the similarity of the provisions, decisions decided prior to Ga. L. 1981, p. 876, which changed the definition of consideration, are included in the annotations for this Code section.

Covenant of each party is sufficient consideration to support promise of other. *Anderson v. Brown*, 72 Ga. 713 (1884); *Graham & Ward v. Macon, D. & S.R.R.*, 120 Ga. 757, 49 S.E. 75 (1904) (decided prior to the passage of Ga. L. 1981, p. 876).

To constitute consideration, promise must be sufficiently definite both as to time and subject matter. *McMurray v. Bateman*, 221 Ga. 240, 144 S.E.2d 345 (1965) (decided prior to the passage of Ga. L. 1981, p. 876).

Implied promise may be sufficient consideration for express promise. *Klag v. Home Ins. Co.*, 116 Ga. App. 678, 158 S.E.2d 444 (1967) (decided prior to the passage of Ga. L. 1981, p. 876).

Promise, which may be good consideration can be either express, or implied from circumstances. *Reynolds v. Nevin*, 1 Ga. App. 269, 57 S.E. 918 (1907) (decided prior to the passage of Ga. L. 1981, p. 876).

Contract may be supported by adequate consideration although promisor never receives any part of the consideration. *Fine v. Haas*, 120 Ga. App. 524, 171 S.E.2d 372 (1969) (decided prior to the passage of Ga. L. 1981, p. 876).

That promisor should receive benefit or consideration is not necessary prerequisite to validity of contract. *Miller v. Oglethorpe Univ.*, 24 Ga. App. 388, 100 S.E. 784 (1919) (decided prior to the passage of Ga. L. 1981, p. 876).

That promisor should receive personal benefit is not necessary prerequisite to contract. *Glass v. Grant*, 46 Ga. App. 327, 167 S.E. 727 (1933) (decided prior to the passage of Ga. L. 1981, p. 876).

Promise to buy certain goods is good consideration for promise to sell those goods. *Mitchell-Huntley Cotton Co. v. Lawson*, 377 F. Supp. 661 (M.D. Ga. 1973) (decided prior to the passage of Ga. L. 1981, p. 876).

Contract by which one party agrees to buy and other party agrees to sell is based on valid considerations. *Taunton v. Allenberg Cotton Co.*, 378 F. Supp. 34 (M.D. Ga. 1973) (decided prior to the passage of Ga. L. 1981, p. 876).

Agreement on part of one party to sell for stipulated amount is good consideration for promise of other to buy. *Mangum v. Jones*, 205 Ga. 661, 54 S.E.2d 603 (1949) (decided prior to the passage of Ga. L. 1981, p. 876).

Offer to sell and acceptance of that offer makes complete contract, obligation of each party furnishing sufficient consideration for that of other. *Northington-Munger-Pratt Co. v. Farmers' Gin & Whse. Co.*, 119 Ga. 851, 47 S.E. 200, 100 Am. St. R. 210 (1904) (decided prior to the passage of Ga. L. 1981, p. 876).

Consideration for contract may be promise that agreed beneficial thing shall afterwards be done for maker. *Bing v. Bank of Kingston*, 5 Ga. App. 578, 63 S.E. 652 (1909) (decided prior to the passage of Ga. L. 1981, p. 876).

Mutual promises must be capable of enforcement against parties making promises.

— Where mutual promises are relied upon as consideration to support contract, obligations of contract must be mutually binding upon respective parties; and if one assumes under such agreement to do special act beneficial to another, and that other under terms of contract is under no obligation to perform any act of corresponding advantage to former, agreement is without such consideration as will support promise of party assuming to perform. *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S.E. 998 (1897); *Marietta Paper Mfg. Co. v. Bussey & Carswell*, 104 Ga. 477, 31 S.E. 415 (1898); *Cooley v. Moss*, 123 Ga. 707, 51 S.E. 625 (1905); *Atlanta Buggy Co. v. Hess Spring & Axle Co.*, 124 Ga. 338, 52 S.E. 613, 4 L.R.A. (n.s.) 431 (1905); *Simpson & Harper v. Sanders & Jenkins*, 130 Ga. 265, 60 S.E. 541 (1908); *Mason v. Terrell*, 3 Ga. App. 348, 60 S.E. 4 (1908); *Kamat v. Allatoona Fed. Sav. Bank*, 231 Ga. App. 259, 498 S.E.2d 152 (1998) (decided prior to the passage of Ga. L. 1981, p. 876).

Promise in each instance must be of such

character as to be capable of enforcement against party making the promise, as otherwise neither party will be bound. A promise must be sufficiently definite both as to time and subject matter. *Pepsi-Cola Co. v. Wright*, 187 Ga. 723, 2 S.E.2d 73 (1939) (decided prior to the passage of Ga. L. 1981, p. 876).

If mutual promises are relied on as consideration to support contract, obligations of contract must be mutually binding upon respective parties. *Clement A. Evans & Co. v. Waggoner*, 197 Ga. 857, 30 S.E.2d 915 (1944) (decided prior to the passage of Ga. L. 1981, p. 876).

While promise of another is good consideration for a promise, promise in each instance must be of such character as to be capable of enforcement against party making the promise, as otherwise neither party will be bound. *McMurray v. Bateman*, 221 Ga. 240, 144 S.E.2d 345 (1965) (decided prior to the passage of Ga. L. 1981, p. 876).

Unless promises are of such character contract based thereon is unilateral and not binding. *Pepsi-Cola Co. v. Wright*, 187 Ga. 723, 2 S.E.2d 73 (1939) (decided prior to the passage of Ga. L. 1981, p. 876).

Mutual promises must be concurrent and obligatory upon each party at same time. — When promise of one party is relied on as consideration for other, promises must be concurrent and obligatory upon each at same time in order to render either binding. *Mason v. Terrell*, 3 Ga. App. 348, 60 S.E. 4 (1908); *Peoples v. Citizens' Nat'l Life Ins. Co.*, 11 Ga. App. 177, 74 S.E. 1034 (1912), later appeal, 13 Ga. App. 788, 79 S.E. 1135 (1913). See also *Chickamauga Mfg. Co. v. Augusta Grocery Co.*, 23 Ga. App. 163, 98 S.E. 114 (1919) (decided prior to the passage of Ga. L. 1981, p. 876).

Mutual promises must be such that each party has right at once to hold other. — Promise is not good consideration for a promise unless there is absolute mutuality of engagement so that each party has right at once to hold other to positive agreement. *Clement A. Evans & Co. v. Waggoner*, 197 Ga. 857, 30 S.E.2d 915 (1944) (decided prior to the passage of Ga. L. 1981, p. 876).

Test of mutuality is to be applied at time contract is to be enforced; and if promisee accomplishes object contemplated, then promise is rendered valid and binding. *McMurray v. Bateman*, 221 Ga. 240, 144

S.E.2d 345 (1965) (decided prior to the passage of Ga. L. 1981, p. 876).

Test of mutuality of promise is to be applied, not as of time promise was made, but as of time when promise is to be enforced; therefore promise in subscription paper for given object may be unilateral when made, but if party intended accomplishes object as contemplated, then promise is rendered valid and binding. *Owenby v. Georgia Baptist Ass'y*, 137 Ga. 698, 74 S.E. 56, 1913B Ann. Cas. 238 (1912) (decided prior to the passage of Ga. L. 1981, p. 876).

Mutual promises to convey real estate to each other support enforceable contract. — Written agreement whereby A agrees to convey certain described real estate to B in consideration of B's agreement to convey certain described real estate to A is such valuable consideration as will support enforceable contract. *Webb v. Smith*, 220 Ga. 809, 141 S.E.2d 899 (1965) (decided prior to the passage of Ga. L. 1981, p. 876).

Evidence of an agreement or promise is required to support a claim under a theory of promissory estoppel. *Mooney v. Mooney*, 245 Ga. App. 780, 538 S.E.2d 864 (2000) (decided prior to the passage of Ga. L. 1981, p. 876).

Assignment for promise to sell property and divide proceeds among assignor's creditors is for consideration. — Assignment based upon promise of assignee to sell property assigned and divide proceeds among assignor's creditors is not without consideration. *Block v. Peter*, 63 Ga. 260 (1879) (decided prior to the passage of Ga. L. 1981, p. 876).

For wills to be mutual wills, the wills must contain reference that they result from contract. — Agreements to make wills are not established merely because two persons simultaneously make reciprocal testamentary dispositions in favor of each other, when language of such wills contains nothing to effect that instruments are result of contract. *Webb v. Smith*, 220 Ga. 809, 141 S.E.2d 899 (1965) (decided prior to the passage of Ga. L. 1981, p. 876).

Contract or agreement between joint testators may be made out from promises made in will. *Webb v. Smith*, 220 Ga. 809, 141 S.E.2d 899 (1965) (decided prior to the passage of Ga. L. 1981, p. 876).

Application to promise to make charitable donation. — See *Wilson v. First Presbyterian*

General Consideration (Cont'd)

Church, 56 Ga. 554 (1876); YMCA v. Estill, 140 Ga. 291, 78 S.E. 1075, 48 L.R.A. (n.s.) 783, 1914D Ann. Cas. 136 (1913); Miller v. Oglethorpe Univ., 24 Ga. App. 388, 100 S.E. 784 (1919); Willingham v. Benton, 25 Ga. App. 412, 103 S.E. 497 (1920) (decided prior to the passage of Ga. L. 1981, p. 876):

Contract for sale of real property conditioned upon purchaser's ability to obtain loan is not unenforceable for lack of mutuality of obligation. Brack v. Brownlee, 246 Ga. 818, 273 S.E.2d 390 (1980) (decided prior to the passage of Ga. L. 1981, p. 876).

Cited in Jackson v. Forward Atlanta Comm'n, Inc., 39 Ga. App. 738, 148 S.E. 356 (1929); Brooke v. Kennedy, 172 Ga. 461, 158 S.E. 4 (1931); Sheldon & Co. v. Emory Univ., 52 Ga. App. 628, 184 S.E. 401 (1936); Sinclair Ref. Co. v. Reid, 60 Ga. App. 119, 3 S.E.2d 121 (1939); Stevenson v. Atlanta Mission Holding Corp., 72 Ga. App. 258, 33 S.E.2d 568 (1945); Beazley v. Allen, 61 F. Supp. 929 (M.D. Ga. 1945); Russell v. Smith, 77 Ga. App. 70, 47 S.E.2d 772 (1948); Griffin v. Vandegriff, 205 Ga. 288, 53 S.E.2d 345 (1949); Flatauer v. Goodman, 84 Ga. App. 881, 67 S.E.2d 794 (1951); Faust v. General Fin. & Loan Co., 90 Ga. App. 724, 84 S.E.2d 118 (1954); Georgia Cas. & Sur. Co. v. Hardrick, 211 Ga. 709, 88 S.E.2d 394 (1955); Bailey v. Martin, 101 Ga. App. 63, 112 S.E.2d 807 (1960); Jefferson Mills, Inc. v. United States, 259 F. Supp. 305 (N.D. Ga. 1965); Kelley v. Carson, 120 Ga. App. 450, 171 S.E.2d 150 (1969); DeKalb County v. Georgia Paperstock Co., 226 Ga. 369, 174 S.E.2d 884 (1970); R.L. Kimsey Cotton Co. v. Ferguson, 233 Ga. 962, 214 S.E.2d 360 (1975); Gage v. Tiffin Motor Homes, Inc., 153 Ga. App. 704, 266 S.E.2d 345 (1980); Atkinson v. American Agency Life Ins. Co., 165 Ga. App. 102, 299 S.E.2d 600 (1983); 20/20 Vision Ctr., Inc. v. Hudgens, 256 Ga. 130, 345 S.E.2d 330 (1986); Folks, Inc. v. Dobbs, 181 Ga. App. 311, 352 S.E.2d 212 (1986); Arthur Pew Constr. Co. v. First Nat'l Bank, 827 F.2d 1488 (11th Cir. 1987); Jackson v. Southern Pan- & Shoring Co., 258 Ga. 401, 369 S.E.2d 239 (1988); Credit Alliance Corp. v. National Bank, 718 F. Supp. 954 (N.D. Ga. 1989); DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499 (11th Cir. 1989); American Legion v. Foote & Davies, Inc., 193

Ga. App. 225, 387 S.E.2d 380 (1989); Christensen v. Intelligent Sys. Master Ltd. Partnership, 197 Ga. App. 778, 399 S.E.2d 495 (1990); Maccabees Mut. Life Ins. Co. v. Morton, 941 F.2d 1181 (11th Cir. 1991); Peterson v. First Clayton Bank & Trust Co., 214 Ga. App. 94, 447 S.E.2d 63 (1994); Dooley v. Dun & Bradstreet Software Servs., Inc., 225 Ga. App. 63, 483 S.E.2d 308 (1997); F & W Agriservices, Inc. v. UAP/Ga. Ag. Chem., Inc., 250 Ga. App. 238, 549 S.E.2d 746 (2001); Vernon Library Supplies, Inc. v. Ard, 249 Ga. App. 853, 550 S.E.2d 108 (2001).

Promissory Estoppel**1. In General**

Promissory estoppel is an equitable doctrine designed to prevent the intricacies and details of the law from frustrating the ends of justice. Doll v. Grand Union Co., 925 F.2d 1363 (11th Cir. 1991).

Doctrine of promissory estoppel has been adopted in Georgia through O.C.G.A. § 13-3-44. Insilco Corp. v. First Nat'l Bank, 248 Ga. 322, 283 S.E.2d 262 (1981) (decided prior to the passage of Ga. L. 1981, p. 876).

Principle of promissory estoppel has no application where the promise relied on was for employment for an indefinite period; thus, fired at-will employees' claims against their employer based on promissory estoppel were dismissed for failure to state a claim upon which relief could be granted. Balmer v. Elan Corp., 278 Ga. 227, 599 S.E.2d 158 (2004).

To prevail on a promissory estoppel claim a plaintiff must demonstrate that: (1) the defendant made certain promises; (2) the defendant should have expected that the plaintiff would rely on such promises; and (3) the plaintiff did in fact rely on such promises to the plaintiff's detriment. Doll v. Grand Union Co., 925 F.2d 1363 (11th Cir. 1991).

Under the promissory estoppel doctrine, codified at O.C.G.A. § 13-3-44(a), a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise; the essential elements of promissory estoppel

are: (1) the defendant made a promise or promises; (2) the defendant should have reasonably expected the plaintiffs to rely on such promise; (3) the plaintiffs relied on such promise to plaintiffs' detriment; and (4) an injustice can only be avoided by the enforcement of the promise, because as a result of the reliance, plaintiffs changed plaintiffs' position to plaintiffs' detriment by surrendering, foregoing, or rendering a valuable right. *McReynolds v. Prudential Ins. Co. of America*, 276 Ga. App. 747, 624 S.E.2d 218 (2005).

Promissory estoppel requires an enforceable promise. — Threshold requirement of a promissory estoppel claim is that there be some enforceable promise by the adverse party. *Foley Co. v. Warren Eng'g, Inc.*, 804 F. Supp. 1540 (N.D. Ga. 1992).

Promissory estoppel requires reasonable reliance. — Promissory estoppel cannot be applied unless the promisee reasonably relied on the promise. *Fidelity & Deposit Co. v. West Point Constr. Co.*, 178 Ga. App. 578, 344 S.E.2d 268 (1986); *Poindexter v. American Bd. of Surgery, Inc.*, 911 F. Supp. 1510 (N.D. Ga. 1994); *Owens v. American Refuse Sys., Inc.*, 244 Ga. App. 780, 536 S.E.2d 782 (2000).

Because a letter of intent signed by the plaintiff specifically stated that neither party could rely on any representations made by the other party regarding whether the transaction in question would be consummated, as a matter of law, the plaintiff could not rely reasonably upon any alleged representations by the defendant. *W.R. Grace & Co.-Conn. v. Taco Tico Acquisition Corp.*, 216 Ga. App. 423, 454 S.E.2d 789 (1995).

Promissory estoppel requires only that the reliance by the injured party be reasonable, and it does not require that the injured party exhaust all other possible means of obtaining the benefit of the promise from any and all sources before being able to enforce the promise against the promisor. *Mooney v. Mooney*, 235 Ga. App. 117, 508 S.E.2d 766 (1998).

Failure to show reliance on a promise. — Former city employee failed to establish a promissory estoppel claim under O.C.G.A. § 13-3-44(a) based on an alleged promise by the city manager that she had a year on the job to prove herself because the employee did not show any action or forbearance she

made in reliance on this promise. *Goddard v. City of Albany*, 285 Ga. 882, 684 S.E.2d 635 (2009).

Promise performable in the future. — Fact that a contractor's purported promise was both performable in the future and conditioned on a future event would not preclude the application of promissory estoppel. *Kemire, Inc. v. Williams Investigative & Sec. Servs., Inc.*, 215 Ga. App. 194, 450 S.E.2d 427 (1994).

Plaintiff need not be in privity of contract with defendant to assert promissory estoppel. — Regardless of whether or not the plaintiff was in privity of contract with the defendants, plaintiff was clearly entitled to assert a right of action against the defendants based on plaintiff alleged assurances to plaintiff, after delivery, that the metal plaintiff's contractor had purchased from the defendants was guaranteed and that its discoloration did not indicate the existence of a substantial defect. Moreover, if no consideration was given by the plaintiff in return for these assurances, the assurances were nevertheless binding based on the doctrine of promissory estoppel. *Irvin v. Lowe's of Gainesville, Inc.*, 165 Ga. App. 828, 302 S.E.2d 734 (1983).

Compliance with expired covenants. — Landowners, unaware that restrictive covenants had expired, relied on an agreement to extend the covenants and took no action to enact new covenants or otherwise protect their property interests, this forbearance, combined with their continued compliance with and enforcement of the covenants, bound defendant and other landowners personally to comply with the covenants. *Canterbury Forest Ass'n v. Collins*, 243 Ga. App. 425, 532 S.E.2d 736 (2000).

Promissory estoppel claim survived summary judgment as issue of reliance remained. — As there was evidence that a landlord promised to pay for remediation of the tenants' property and the cost of decontaminating and storing their possessions, and questions of fact remained as to whether the landlords should have expected the tenants to rely on these promises and whether that reliance was reasonable and to the tenants' detriment, the landlords were not entitled to summary judgment on the tenants' promissory estoppel claim. *Brown v. Rader*, 299 Ga. App. 606, 683 S.E.2d 16 (2009).

Promissory Estoppel (Cont'd)**2. Application**

Promise to pay for college. — Complaint sufficiently stated a promissory estoppel claim where it alleged that a father had repeatedly promised his daughter that he would pay one-half of the costs of the daughter attending a private historically African-American college or university, that relying on this promise, the daughter applied to and was accepted into such a school, foregoing opportunities to apply to and enroll in other colleges or universities of significantly less cost, that the father nevertheless refused to honor his commitment, and that to avoid injustice, the father should have been required to honor his promise; a trial court erred in granting the father's motion to dismiss. *Houston v. Houston*, 267 Ga. App. 450, 600 S.E.2d 395 (2004).

Real property purchase agreements. — Trial court erred in dismissing a real property purchaser's claims of negligent misrepresentation and promissory estoppel under O.C.G.A. § 13-3-44 as there was no requirement that the real property purchase agreement be enforceable for those claims to be actionable, and the agreement was enforceable at the time that the agreement was made, such that reliance could have been had thereon; damages were properly pled, as recovery under promissory estoppel could have been had for damages that were equitable and necessary to prevent injustice, and as to negligent misrepresentation, necessary expenses consequent upon an injury were recoverable under O.C.G.A. § 51-12-7. *Hendon Props. v. Cinema Dev., LLC*, 275 Ga. App. 434, 620 S.E.2d 644 (2005).

Price quotes. — Price quoted over the telephone by equipment supplier to general contractor preparing a bid was not enforceable in the absence of evidence that the quote was intended or understood as a "firm offer." *Foley Co. v. Warren Eng'g, Inc.*, 804 F. Supp. 1540 (N.D. Ga. 1992).

Promise for pay increase. — County employees could not establish a promissory estoppel claim where, O.C.G.A. § 36-30-3(a), which prevents any council from preventing free legislation by binding future county authorities to approve annual salary increases, the county could not promise mandatory annual four percent pay

raises. *Johnson v. Fulton County*, 235 Ga. App. 277, 509 S.E.2d 355 (1998).

Franchising agreements. — Franchisee failed to state a claim of promissory estoppel under O.C.G.A. § 13-3-44(a) because the allegations against the franchiser regarding statements about initial investment expenses, food and labor costs, the franchiser's experience, knowledge, and expertise, and the franchiser's perfected system of opening and operating its franchises were not manifestations of an intention to act or refrain from action; instead, the statements were merely representations and not promises, and an actionable claim of promissory estoppel required reliance on a promise, rather than a representation of fact. *Am. Casual Dining, L.P. v. Moe's Southwest Grill, L.L.C.*, 426 F. Supp. 2d 1356 (N.D. Ga. 2006).

Employee benefits. — Because the evidence did not support a finding that an employer promised to extend a service contract with an employee benefits plan administrator, the trial court properly granted summary judgment to the employer on the administrator's promissory estoppel claim. *Hewitt Assocs., LLC v. Rollins, Inc.*, 294 Ga. App. 600, 669 S.E.2d 551 (2008).

Real estate developers' reliance on a supermarket's assurances regarding its desire to lease space in a shopping center was unreasonable, in the light of the supermarket's clear intention not to become obligated until a lease was drafted, approved, and signed by both parties. *Doll v. Grand Union Co.*, 925 F.2d 1363 (11th Cir. 1991).

An employee could not reasonably rely upon oral promises of certain payments by an employer, since an earlier agreement regarding compensation specified that the agreement could be altered only in writing and this was never done. *Gerdes v. Russell Rowe Communications, Inc.*, 232 Ga. App. 534, 502 S.E.2d 352 (1998).

Promise of agency agreement. — Since the evidence showed that, even if a promise of an exclusive one year agency agreement was conditional upon the working out of details, there was a material issue of fact concerning whether this condition was fulfilled and whether the defendants should have reasonably expected to induce the action taken by plaintiffs, the trial court erroneously granted summary judgment to defendants on plaintiffs' promissory estoppel

claim. *Pacrim Assocs. v. Turner Home Entertainment, Inc.*, 235 Ga. App. 761, 510 S.E.2d 52 (1998).

Stockholder in venture capital firm. — Trial court granted summary judgment to the venture capital firm on the first stockholder's promissory estoppel claim against the venture capital firm regarding a reverse merger; the first stockholder entered into the reverse merger after the venture capital firm had investigated the publicly-traded company to be acquired in that merger, which subsequently went bankrupt and prevented the first stockholder from redeeming shares the first stockholder had in that company; the documents that the first stockholder signed regarding the reverse merger disclaimed any reliance on oral agreements that the first stockholder might have entered into regarding the reverse merger, and, thus, the first stockholder could not show reasonable reliance on any such oral agreements, such as the allegation that the venture capital firm had guaranteed the redemption of the shares of stock in order to get the first stockholder to sign the reverse merger documents. *Tampa Bay Fin., Inc. v. Nordeen*, 272 Ga. App. 529, 612 S.E.2d 856 (2005).

Insurance policies. — When an insurer was advised that its insured was ordered to maintain a particular life insurance policy for the benefit of a former wife, its statement to the former wife that it would "consider" that order before taking any action under the policy did not create a promissory estoppel claim, under O.C.G.A. § 13-3-44(a), by the former wife against the insurer, when the insurer paid life insurance benefits to the insured's new wife, upon the husband's death, rather than to the former wife, because the insurer could not reasonably expect that the former wife would rely on that alleged promise, as the insurer did not commit itself to take or refrain from any particular action regarding the policy. *McReynolds v. Prudential Ins. Co. of America*, 276 Ga. App. 747, 624 S.E.2d 218 (2005).

Plaintiff insurer's O.C.G.A. § 13-3-44(a) promissory estoppel claim, contending that the defendant insurer was precluded from recovering defense and settlement costs in excess of 25%, failed because the plaintiff did not rely to plaintiff's detriment on a letter from the defendant, which proposed that the plaintiff pay 25 percent of costs, as

the plaintiff never responded to that letter and that letter did not induce any action of forbearance on the plaintiff's part. *Graphic Arts Mut. Ins. Co. v. Essex Ins. Co.*, 465 F. Supp. 2d 1290 (N.D. Ga. 2006).

Breach of contract. — In a cottonseed buyer's suit for breach of contract against a cottonseed seller, the trial court properly granted summary judgment to the seller as no mutuality as to the contract terms existed since the buyer never obtained credit approval. Further, the buyer's reliance on the purported promise was unreasonable as a matter of law; thus, promissory estoppel did not apply as the buyer never received credit approval, which was an essential element of the cottonseed business. *AgriCommodities, Inc. v. J. D. Heiskell & Co.*, 297 Ga. App. 210, 676 S.E.2d 847 (2009).

Applicant's claim of promissory estoppel, based on the applicant's acts, including declining a job offer, in reliance on a promise of a job and substantial company stock, failed because a reasonable person would not rely on such a promise that was not reduced to writing. *Reindel v. Mobile Content Network Co., LLC*, 652 F. Supp. 2d 1278 (N.D. Ga. 2009).

Restrictions on vacant property. — When the plaintiffs produced evidence that agents and principals of a development company promised that adjoining vacant property would be at least as restricted as the plaintiffs' lots, and that these promises induced the appellees to purchase lots and homes in a subdivision, under subsection (a) of O.C.G.A. § 13-3-44 the plaintiffs have produced sufficient evidence to create an issue of fact as to whether the defendants should be bound by promissory estoppel. *Knotts Landing Corp. v. Lathem*, 256 Ga. 321, 348 S.E.2d 651 (1986).

Restrictive covenants. — Doctrine of promissory estoppel did not apply to bind landowners to uphold legally insufficient restrictive covenants to which the landowners never agreed. *Duffy v. Landings Ass'n, Inc.*, 245 Ga. App. 104, 536 S.E.2d 758 (2000).

Termination of oral distributorship. — Promissory estoppel was inapplicable to situation where manufacturer terminated oral distributorship. *Loy's Office Supplies, Inc. v. Steelcase, Inc.*, 174 Ga. App. 701, 331 S.E.2d 75 (1985).

Promissory Estoppel (Cont'd)
2. Application (Cont'd)

Estoppel not invoked by hospital agent's statement regarding insurance coverage. — There could be no detrimental reliance on a hospital agent's erroneous statement that a patient's treatment would be covered by insurance since the agent did not tell the patient something the patient did not already believe or know, and the patient had an opportunity to inquire of the patient's insurer whether the patient's care would be covered. *LaVeau v. Republic Health Corp.*, 181 Ga. App. 106, 351 S.E.2d 506 (1986).

After employer undertook to have renovation work done in a portion of the plant, and contracted with another to do the floor refinishing, an employee was not a party to the contract but was, at best, an incidental beneficiary. *Church v. SMS Enters.*, 186 Ga. App. 791, 368 S.E.2d 554 (1988).

Promise of employment for indefinite period. — Principle of promissory estoppel, codified in subsection (a) of O.C.G.A. § 13-3-44, has no application where the promise relied on was for employment for an indefinite period. *Barker v. CTC Sales Corp.*, 199 Ga. App. 742, 406 S.E.2d 88, cert. denied, 199 Ga. App. 905, 406 S.E.2d 88 (1991).

Employee whose employment was for an indefinite term, and for that reason was terminable at the will of the employer, had no cause of action for the employer's alleged failure to honor the terms of the employee's employment contract under the doctrine of promissory estoppel. The doctrine of promissory estoppel codified at subsection (a) of O.C.G.A. § 13-3-44 has no application to enforce executory promises pertaining to employment for an indefinite term. Also, any promises upon which the employee could rely to show misrepresentation were unenforceable because the employee's underlying employment contract, being terminable at will, was unenforceable. *Johnson v. Metropolitan Atlanta Rapid Transit Auth.*, 207 Ga. App. 869, 429 S.E.2d 285, cert. denied, 510 U.S. 1016, 114 S. Ct. 612, 126 L. Ed. 2d 577 (1993).

Trial court did not err in finding that the terminated employees did not state a claim upon which relief could be granted related to their claim that the doctrine of promis-

sory estoppel applied to the alleged promise of the businesses not to fire the employees for participating in a government inspection of the businesses' facilities, and was an exception to the employee's at-will employment, as the doctrine of promissory estoppel did not allow for enforcement of executory promises pertaining to employment for an indefinite term. *Balmer v. Elan Corp.*, 261 Ga. App. 543, 583 S.E.2d 131 (2003), *aff'd*, 278 Ga. 227, 599 S.E.2d 158 (2004).

Promise of child support. — When defendant in a support proceeding who was not the natural or formally adoptive father of the child had voluntarily assumed a duty to support and continued to support the child for a period of 10 years, the duty remained enforceable. *Wright v. Newman*, 266 Ga. 519, 467 S.E.2d 533 (1996).

Former wife's allegations that she detrimentally relied on the former husband's repeated promises to financially support the parties' grandchild, of which they had custody, stated a claim for promissory estoppel in her action seeking child support. *Mooney v. Mooney*, 235 Ga. App. 117, 508 S.E.2d 766 (1998).

Trial court erred by requiring an ex-spouse to pay child support for a child of whom the ex-spouse was not the biological parent of, despite allegedly promising to pay, because the trial court incorrectly applied the doctrine of promissory estoppel to the agreement as there was no evidence that the promise to pay support caused the actual parent/ex-spouse of the child to forego a valuable legal right to the actual parent's/ex-spouse's detriment. *Garcia v. Garcia*, 284 Ga. 152, 663 S.E.2d 709 (2008).

Not applicable to O.C.G.A. § 11-8-319. — The circumstances set out in paragraphs (b) through (d) of O.C.G.A. § 11-8-319 do not include promissory estoppel. Promissory estoppel is thus unavailable to plaintiffs in plaintiffs' effort to be relieved of the burden of proving an enforceable written agreement. *Anderson Chem. Co. v. Portals Water Treatment, Inc.*, 768 F. Supp. 1568 (M.D. Ga. 1991), *aff'd in part, rev'd in part*, 971 F.2d 756 (11th Cir. 1992).

Sale of business. — Evidence that, in reliance on the promise of the first purchaser and the second purchaser to buy the corporation's store and pay the purchase price over time by paying the corporation to

process all clothes brought to the store, the corporation closed the corporate store, transferred the store's inventory and customer base to the first purchaser and the second purchaser at their nearby new location, actively referred all the store's customers to the new store location, refrained from competing against the store, and agreed to allow the store to use the store's trade name, was sufficient to support the jury's verdict against the first purchaser and the second purchaser under the principles of promissory estoppel. *DeCelles v. Morgan Cleaners & Laundry, Inc.*, 261 Ga. App. 690, 583 S.E.2d 462 (2003).

Extension on closing date. — Because a buyer under a real estate contract failed to present evidence of any efforts it took to get the property rezoned after an extension of the closing date was signed, or evidence of any forbearance resulting from the buyer's reliance upon the extension, there was no detrimental reliance, and the buyer's claim that the extension was enforceable by means of promissory estoppel was meritless. *Lotus Prop. Dev., LLC v. Greer*, 278 Ga. App. 773, 630 S.E.2d 112 (2006).

Ultra vires action of public official does not support promissory estoppel claim. — County administrator incorrectly advised a former county employee that the employee would start receiving retirement benefits in nine years. As the administrator disregarded and deviated from the terms of the county retirement plan, rather than simply making a mistake during an otherwise authorized action under the plan, the administrator engaged in an ultra vires action that could not support the employee's promissory estoppel claim under O.C.G.A. § 13-3-44(a). *Mullis v. Bibb County*, 294 Ga. App. 721, 669 S.E.2d 716 (2008).

Mutual Subscriptions

Application to written but not oral mutual subscriptions. — Application to mutual subscriptions, which means written promises mutually entered into by subscribers, but statute is not sufficiently broad to include oral promises and cannot be so extended. *YMCA v. Estill*, 140 Ga. 291, 78 S.E. 1075, 48 L.R.A. (n.s.) 783, 1914D Ann. Cas. 136 (1913) (decided prior to the passage of Ga. L. 1981, p. 876).

13-3-45. Effect of partially valid consideration; effect of illegal consideration.

If the consideration is good in part and void in part, the promise will or will not be sustained, depending upon whether it is entire or severable. If the consideration is illegal in whole or in part, the whole promise fails. (Orig. Code 1863, § 2709; Code 1868, § 2703; Code 1873, § 2745; Code 1882, § 2745; Civil Code 1895, § 3662; Civil Code 1910, § 4247; Code 1933, § 20-305.)

JUDICIAL DECISIONS

If part of consideration of contract is illegal, contract is void. *Hanley v. Savannah Bank & Trust Co.*, 208 Ga. 585, 68 S.E.2d 581 (1952).

An attorney was prohibited from enforcing a client's single promise to pay the attorney a lump-sum fee in the amount of ten percent of the sale price of the client's property, after a part of the consideration for the client's promise was illegal because the attorney was not a licensed real estate broker. *Starr v. Robinson*, 181 Ga. App. 9, 351 S.E.2d 238 (1986).

Reason that consideration, illegal in part, voids entire contract. — If part of consideration of contract be illegal, contract is void, reason being that every part of consideration is to be presumed to have had some effect in inducing party recipient of consideration to enter into contract. *Brown v. Baer*, 79 Ga. 347, 5 S.E. 72 (1887).

Word "illegal" applies to contracts forbidden by public policy. *Hanley v. Savannah Bank & Trust Co.*, 208 Ga. 585, 68 S.E.2d 581 (1952).

Illegal consideration is act or forbearance,

contrary to law or public policy, or promise to such effect. *Hanley v. Savannah Bank & Trust Co.*, 208 Ga. 585, 68 S.E.2d 581 (1952).

Consideration involving action opposed to public policy is illegal and absolutely void. — If agreement binds either or both parties to do, or if consideration is to do, something opposed to public policy of state or nation it is illegal and absolutely void, however solemnly made. *Hanley v. Savannah Bank & Trust Co.*, 208 Ga. 585, 68 S.E.2d 581 (1952).

Illegal consideration is void, but consideration may be void, though not illegal. — A contract may have no consideration for part of promise, and one that has totally failed. In such cases, if it be possible to sever that part of contract founded on this void or defective consideration from good part, it may be done, and good part will stand. But if consideration for any part of it be illegal, whole contract is void. Illegality corrupts and vitiates whole, and courts will have nothing to do with it. *Chandler v. Johnson*, 39 Ga. 85 (1869).

Courts will not aid either party to contract founded upon illegal or immoral consideration. — Neither a court of law nor a court of equity will lend the court's aid to either party to a contract founded upon an illegal or immoral consideration. If the contract is executed, it will be left to stand. If it be executory, neither party can enforce the contract. *Carter v. Butler*, 71 Ga. App. 492, 31 S.E.2d 210 (1944), rev'd on other grounds, 198 Ga. 754, 32 S.E.2d 808 (1945).

Neither court of law nor court of equity will lend aid to either party to contract founded upon illegal or immoral consideration. *Wellmaker v. Roberts*, 213 Ga. 740, 101 S.E.2d 712 (1958).

Lower courts properly found that a poultry grower could not maintain claims for fraud and misrepresentation against a poultry integrator in connection with an oral contract because the contract was not enforceable in that the grower's consideration for the contract involved the illegal act of false swearing. *Blockum v. Fieldale Farms Corp.*, 275 Ga. 798, 573 S.E.2d 36 (2002).

"Adulterous and/or fornicacious relationship as consideration." — Because fornication and adultery are illegal, the trial court did not err in precluding the defendant from claiming that the consideration for the alleged contract with the decedent was an

"adulterous and/or fornicacious relationship;" however, defendant should have had the right to present evidence of the relationship with the decedent in order to support defendant's contention that no contract existed between them that required defendant to pay for decedent's services because the services were provided gratuitously. *Broughton v. Johnson*, 247 Ga. App. 819, 545 S.E.2d 370 (2001).

Illegality is defense to executory contract but cannot support action to recover back money paid. — If contract is illegal as against public policy, the contract's invalidity is a defense while the contract remains unexecuted. If illegal contract is in part performed, and money has been paid in pursuance of the contract, no action will lie to recover money. *Hanley v. Savannah Bank & Trust Co.*, 208 Ga. 585, 68 S.E.2d 581 (1952).

Contract based on legal consideration which contains legal and illegal promises, valid as to former. — When agreement consists of single promise, based on single consideration, if either is illegal, the whole contract is void. But when agreement is founded on legal consideration containing a promise to do several things or to refrain from doing several things, and only some of the promises are illegal, those promises which are not illegal will be held to be valid. *Roberts v. H. C. Whitmer Co.*, 46 Ga. App. 839, 169 S.E. 385 (1933).

If a contract is otherwise based on sufficient legal consideration and also contains multiple promises which are divisible in containing a lawful agreement, coupled with a separable unlawful promise, any unenforceability of the latter will not affect the validity of the former agreement. *Starr v. Robinson*, 181 Ga. App. 9, 351 S.E.2d 238 (1986); *Circle Appliance Leasing, Inc. v. Appliance Whse., Inc.*, 206 Ga. App. 405, 425 S.E.2d 339 (1992).

The trial court properly granted summary judgment to a payee under the terms of a settlement agreement to recover funds owed for a preexisting debt, despite the fact that a confidentiality provision contained therein was void for public policy reasons, as the consideration supporting the payment provision was separate and apart from the confidentiality provision. *Unami v. Roshan*, 290 Ga. App. 317, 659 S.E.2d 724 (2008).

If contract contains illegal and unenforceable clauses within restrictive covenant, entire covenant must fall. *Wesley-Jessen, Inc. v. Armento*, 519 F. Supp. 1352 (N.D. Ga. 1981).

Conveyance, partly to secure debt, and partly to defraud creditors is void as to creditors. *Parrott v. Baker*, 82 Ga. 364, 9 S.E. 1068 (1889).

Mother's agreement to surrender infant child void as part consideration as being against public policy. — Agreement by mother to surrender possession of infant child, as part consideration for receipt of benefit for herself and her other children is void as being against public policy. *Hanley v. Savannah Bank & Trust Co.*, 208 Ga. 585, 68 S.E.2d 581 (1952).

Invalid lease provisions for free water and sewerage not fatal to remaining provisions. — Invalidity of clauses providing free water and free sewerage in lease of airport by county to private party was not fatal to remaining valid portions of lease. *Southern Airways Co. v. DeKalb County*, 102 Ga. App. 850, 118 S.E.2d 234 (1960).

Refinancing of prior loan which had been made in violation of the Georgia Industrial

Loan Act, O.C.G.A. § 7-3-1 et seq., did not invalidate promises and considerations of new note insofar as they related to new cash received by maker. *Henson v. Dixie Fin. Corp.*, 250 Ga. 132, 296 S.E.2d 593 (1982).

Cited in *Houser v. Planters' Bank*, 57 Ga. 95 (1876); *Brown v. Baer*, 79 Ga. 347, 5 S.E. 72 (1887); *Frick & Co. v. Moore*, 82 Ga. 159, 8 S.E. 80 (1888); *Allen v. Pearce*, 84 Ga. 606, 10 S.E. 1015 (1890); *Bartow Guano Co. v. Adair*, 29 Ga. App. 644, 116 S.E. 342 (1923); *Stafford v. Birch*, 189 Ga. 405, 5 S.E.2d 744 (1939); *Pittsburgh Plate Glass Co. v. Jarrett*, 42 F. Supp. 723 (M.D. Ga. 1942); *Littlegreen v. Gardner*, 208 Ga. 523, 67 S.E.2d 713 (1951); *Iteld v. Karp*, 85 Ga. App. 835, 70 S.E.2d 378 (1952); *Morris v. Jones*, 128 Ga. App. 847, 198 S.E.2d 354 (1973); *Douglas v. Dixie Fin. Corp.*, 139 Ga. App. 251, 228 S.E.2d 144 (1976); *Lowe v. Termplan, Inc.*, 144 Ga. App. 671, 242 S.E.2d 268 (1978); *Morgan v. Hawkins*, 155 Ga. App. 836, 273 S.E.2d 221 (1980); *Llop v. McDaniel, Chorey & Taylor*, 171 Ga. App. 400, 320 S.E.2d 244 (1984); *Borison v. Christian*, 257 Ga. App. 257, 570 S.E.2d 696 (2002).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 230, 231.

C.J.S. — 17 C.J.S., Contracts, § 130. 17A C.J.S., Contracts, § 288.

13-346. Effect of inadequacy of consideration.

Mere inadequacy of consideration alone will not void a contract. If the inadequacy is great, it is a strong circumstance to evidence fraud; and, in an action for damages for breach of a contract, the inadequacy of consideration will always enter as an element in estimating the damages. (Orig. Code 1863, § 2706; Code 1868, § 2700; Code 1873, § 2742; Code 1882, § 2742; Civil Code 1895, § 3659; Civil Code 1910, § 4244; Code 1933, § 20-307.)

Cross references. — Additional provisions regarding inadequacy of consideration, § 23-2-2.

Law reviews. — For article discussing effect of contracts involving fraud or inadequate consideration, see 4 Ga. L. Rev. 469 (1970). For article discussing the anachronistic nature of the Georgia Contracts Code

as dramatized by comparing the doctrine of consideration as it is formulated in the Restatement of Contracts and in Code 1933, Title 20 (now this title), and the interpretative approach Georgia courts have taken in dealing with such Code, see 13 Ga. L. R. v 499 (1979). (But see amendments by Ga. L. 1981, p. 876.)

JUDICIAL DECISIONS

Courts not authorized to declare contract void merely because contract may be unwise or foolish. *Equitable Loan & Sec. Co. v. Waring*, 117 Ga. 599, 44 S.E. 320, 97 Am. St. R. 177, 62 L.R.A. 93 (1903); *Singer v. Grand Rapids Match Co.*, 117 Ga. 86, 43 S.E. 755 (1903).

Adequacy determined at time of execution of contract. *Wilson v. Strange*, 235 Ga. 156, 219 S.E.2d 88 (1975).

Adequacy or inadequacy is subject to be considered by parties at time parties make contract. There is no law regulating amount of consideration necessary to support a particular promise. If parties have capacity to contract, and there is no fraud or misplaced confidence, and there is any valuable consideration, courts will enforce contract according to contract's terms. *Atlanta & W.P.R.R. v. Camp*, 130 Ga. 1, 60 S.E. 177, 124 Am. St. R. 151, 15 L.R.A. (n.s.) 594, 14 Ann. Cas. 439 (1908).

Regarding contracts generally, great inadequacy of consideration is strong circumstance to evidence fraud, but inadequacy of consideration alone will not void contract. *Pacific Nat'l Fire Ins. Co. v. Beavers*, 87 Ga. App. 294, 73 S.E.2d 765 (1952).

Inadequacy of price, combined with circumstances of suspicious nature, may void contract. — Inadequacy of price, as a general proposition, will not, per se, be sufficient ground to set aside conveyance in court of equity; yet, that circumstance, taken in connection with others of suspicious nature, may afford such vehement presumption of fraud, as will authorize court to set contract aside. *Lasater v. Petty*, 220 Ga. 592, 140 S.E.2d 864 (1965).

Gross inadequacy of consideration in contract, when coupled with other circumstances indicative of fraud, will authorize setting aside of contract. *Sumner v. Sumner*, 121 Ga. 1, 48 S.E. 727 (1904).

Inadequacy of consideration could establish breach of contract. — While mere inadequacy of consideration alone will not void a contract, O.C.G.A. § 13-3-46, it can support a breach of contract claim. As there was a jury question as to whether a billboard advertising company's failure to provide advertising for a campground resulted in a partial failure of consideration, the company was

not entitled to summary judgment on the campground's claim of breach of the parties' sign lease. *Merritt v. Marlin Outdoor Adver., LTD.*, 298 Ga. App. 87, 679 S.E.2d 97 (2009).

When inadequacy of consideration shocks moral sense, other circumstances seized upon to void agreement. — Inadequacy of price not sufficient per se to set aside sale, unless so gross as, when combined with other circumstances, to amount to fraud; but if it be great, it is of itself a strong circumstance to evidence fraud; and this is true where it is attended by any other fact showing transaction to be unfair or unjust, or against good conscience. *Parker v. Glenn*, 72 Ga. 637 (1884).

Some other circumstance, such as fraud, mistake, misapprehension, surprise, irregularity, or anything else which conduces to inadequacy of price, will be readily seized upon to void agreement when inadequacy is such as to shock the moral sense. *Pacific Nat'l Fire Ins. Co. v. Beavers*, 87 Ga. App. 294, 73 S.E.2d 765 (1952).

Mere inadequacy of price not alone sufficient reason for setting aside deed to land, especially if allegation as to land's real value is uncertain as to time when land was of that value — whether at date of sale, or that of bringing suit. *Hickman v. Cornwell*, 145 Ga. 368, 89 S.E. 330 (1916).

Mere inadequacy of consideration will not authorize finding holder of note not bona fide purchaser. *Hartfelder & Cochran v. Clark*, 10 Ga. App. 422, 73 S.E. 608 (1912).

Absent fraudulent intent, deed from husband to wife for inadequate consideration valid as to creditors. — Mere inadequacy of consideration in deed from husband to wife, even if he was insolvent at time of its execution, will not of itself void deed at instance of creditors, if there was no intention to hinder, delay, or defraud the creditors. *Hawkinsville Bank & Trust Co. v. Walker*, 99 Ga. 242, 25 S.E. 205 (1896).

Contract reciting consideration of one dollar valid although consideration not actually paid. — If contract contains recital of payment of one dollar as its consideration, it is valid though sum named was not actually paid. It creates obligation to pay that sum, which can be enforced by other party.

Nathans v. Arkwright, 66 Ga. 179 (1880); Southern Bell Tel. & Tel. Co. v. Harris, 117 Ga. 1001, 44 S.E. 885 (1903).

O.C.G.A. § 13-346 will not open suit for breach to defense based on mere inadequacy of consideration. — Provision of law which says that on suit for damages for breach of contract, inadequacy of consideration will always enter as element in estimating damages, will not open action for breach of contract to defense which is grounded in mere inadequacy of consideration alone. Yaryan Rosin & Turpentine Co. v. Haskins, 29 Ga. App. 753, 116 S.E. 913 (1923).

O.C.G.A. § 13-346 not controlling where creditor attacks deed of debtor to third party for fraud. — Generally speaking, mere inadequacy of consideration alone will not void contract, and inadequacy of price is no ground for rescission of contract of sale, unless it is so gross as combined with other circumstances to amount to fraud. However, these principles of law are not controlling if, as in instant case, issues involved affect creditor attacking deed executed by the debtor to third person, on ground of fraud. First Nat'l Bank v. Kelly, 190 Ga. 603, 10 S.E.2d 66 (1940).

O.C.G.A. § 13-356 inapplicable in determining damages if inadequacy of consideration not pleaded. — When, in an action for damages for the breach of a contract, there was nothing in the plea filed by the defendants with reference either to fraud or inadequacy of consideration, the law was not applicable in determining the amount of damages which should be awarded to the plaintiff. Pitcher & Manda v. Lowe, 95 Ga. 423, 22 S.E. 678 (1895).

Cited in Hardin v. Baynes, 198 Ga. 683, 32 S.E.2d 384 (1944); Littlegreen v. Gardner, 208 Ga. 523, 67 S.E.2d 713 (1951); Childers v. Ackerman Constr. Co., 211 Ga. 350, 86 S.E.2d 227 (1955); Titshaw v. Carnes, 224 Ga. 57, 159 S.E.2d 420 (1968); Wellcraft Mfg., Inc. v. Troutman, 123 Ga. App. 321, 180 S.E.2d 588 (1971); Horner v. Savannah Valley Enterprises, Inc., 234 Ga. 371, 216 S.E.2d 113 (1975); Ford Motor Credit Co. v. Moulder, 137 Ga. App. 527, 224 S.E.2d 435 (1976); Graham v. Cook, 179 Ga. App. 603, 347 S.E.2d 623 (1986); Garbutt v. Southern Clays, Inc., 894 F. Supp. 456 (M.D. Ga. 1995).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 98, 27 Am. Jur. 2d, Equity, § 20, 77 Am. Jur. 2d, Vendor and Purchaser, § 21.

C.J.S. — 17 C.J.S., Contracts, §§ 154, 188, 17A C.J.S., Contracts, § 419.

ALR. — Construction and effect of

“changed conditions” clause in public works or construction contract with state or its subdivision, 56 ALR4th 1042.

Enforceability of sale-of-business agreement not to compete against nonsigner or nonowning signer, 60 ALR4th 294.

13-347. Effect of impossible and possible but improbable consideration.

An impossible consideration is insufficient to sustain any promise; however, if the consideration is possible but improbable, it is sufficient to sustain the promise. (Orig. Code 1863, § 2710; Code 1868, § 2704; Code 1873, § 2746; Code 1882, § 2746; Civil Code 1895, § 3663; Civil Code 1910, § 4248; Code 1933, § 20-309.)

JUDICIAL DECISIONS

If impossibility of performance results from act of law, nonperformance of contract excused. Macon & B.R.R. v. Gibson, 85 Ga. 1, 11 S.E. 442, 21 Am. St. R. 135 (1890).

Cited in LaGrange Lumber & Supply Co.

v. Farmers & Traders Bank, 37 Ga. App. 409, 140 S.E. 766 (1927); Golden v. National Life & Accident Ins. Co., 189 Ga. 79, 5 S.E.2d 198 (1939); Norris v. Johnson, 209 Ga. 293, 71 S.E.2d 540 (1952).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 104, 106, 418, 424, 425.

C.J.S. — 17 C.J.S., Contracts, § 129.

ALR. — Promise of additional compensation for completing building or construction contract, 138 ALR 136.

CHAPTER 4

MODIFICATION, EXTINGUISHMENT, AND RENEWAL

Article 1		Sec.	
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13-440.	Payment to creditor or agent.		

Cross references. — Remedies of purchaser under contract for sale of business opportunity where seller uses untrue or misleading statements in sale, fails to give proper disclosure, § 10-1-417. Right of person to cancel contract in which he agrees to become member of buying club, § 10-1-590 et seq. Right of purchaser of securities to rescind such purchase, § 10-5-5(b)(4). Modification, rescission, of contracts for sale of goods, § 11-2-209. Breach or repudiation of contracts for sale of goods, § 11-2-601 et seq. Discharge of parties from liability on negotiable instrument, § 11-3-601 et seq.

RESEARCH REFERENCES

ALR. — Effect on contract of sale of subsequent agreement to exchange, 53 ALR 207.

Effect, after lapse of full period, of attempt to terminate contract without previous notice, or upon notice allowing shorter period than that stipulated, 126 ALR 1110.

What amounts to waiver of termination of real estate broker's contract, 140 ALR 1019.

Construction of §§ 301 and 700 of Soldiers' and Sailors' Civil Relief Act of 1940, as amended, relating to installment contracts for purchase of property, 24 ALR2d 1074.

Asserted right to rescission or cancellation of contract with decedent as claim which must be presented to his personal representative, 73 ALR2d 883.

Rights and liabilities as between employer and employee with respect to general bonus or profit-sharing plan, 81 ALR2d 1066.

Enforceability of contract to make will in return for services, by one who continues performance after death of person originally undertaking to serve, 84 ALR3d 930.

ARTICLE 1

GENERAL PROVISIONS

RESEARCH REFERENCES

ALR. — Effect on contract of sale of subsequent agreement to exchange, 53 ALR 207.

Effect, after lapse of full period, of attempt to terminate contract without previous notice, or upon notice allowing shorter period than that stipulated, 126 ALR 1110.

What amounts to waiver of termination of real estate broker's contract, 140 ALR 1019.

Failure of vendor to comply with statute or

ordinance requiring approval or recording of plat prior to conveyance of property as rendering sale void or voidable, 77 ALR3d 1058.

Failure of building and construction artisan or contractor to procure business or occupational license as affecting enforceability of contract or right of recovery for work done—modern cases, 44 ALR4th 271.

13-4-1. Alteration of written contract — Effect generally.

If a written contract is altered intentionally and in a material part thereof by a person claiming a benefit under it with intent to defraud the other party, the alteration voids the whole contract, at the option of the other party. If the alteration is unintentional or by mistake or in an immaterial matter or not with intent to defraud and if the contract as originally executed can be discovered and is still capable of execution, it shall be enforced by the court. If the alteration is made by a stranger and not at the instance or by collusion of a party or privy and if the original words can be restored, the contract shall be enforced. (Orig. Code 1863, § 2793; Code 1868, § 2801; Code 1873, § 2852; Code 1882, § 2852; Civil Code 1895, § 3702; Civil Code 1910, § 4296; Code 1933, § 20-802.)

Cross references. — Discharge of surety for changes in contract without his consent, § 10-7-21. Effect of alteration of negotiable instrument, § 11-3-407.

JUDICIAL DECISIONS

Regarding to ordinary contracts, common-law rule was changed by this statute. *Overcash v. First Nat'l Bank*, 117 Ga. App. 818, 162 S.E.2d 210 (1968).

Section applies to written, executed agreement which before agreement's alteration was effective, but does not apply to paper which never became a contract because it was never delivered. *Anderson Banking Co. v. Chandler*, 151 Ga. 408, 107 S.E. 60 (1921).

Application only to executed agreements. *Winkles v. Guenther & Co.*, 98 Ga. 472, 25 S.E. 527 (1896).

Application to release of surety. — See *Paulk v. Williams*, 28 Ga. App. 183, 110 S.E. 632 (1922).

If completed instrument is altered, alteration voids whole contract, at option of other party. *Atlanta Nat'l Bank v. Bateman*, 21 Ga. App. 624, 94 S.E. 853 (1918); *Craig v. National City Bank*, 26 Ga. App. 128, 105 S.E. 632 (1921).

Alteration by authorized agent voids contract at option of other party. — If alteration was made by person claiming benefit under contract, or by the person's agent authorized to represent the person in transaction, such alteration voids whole contract at option of other party. *Shaw v. Probasco*, 139 Ga. 481, 77 S.E. 577 (1913).

If material alteration is made by stranger, that alteration will not vitiate contract. *Probasco v. Shaw*, 144 Ga. 416, 87 S.E. 466 (1915).

Addition of language to a guaranty agreement, to the effect that upon the death of either of the guarantors, the guarantors' heirs or estates would not be responsible for subsequent sales to the principal, added at the guarantors' request and obviously intended for guarantors' their benefit, did not constitute an attempt to defraud them, thus voiding the agreement. *Columbia Nitrogen Corp. v. Mason*, 171 Ga. App. 685, 320 S.E.2d 838 (1984).

Repudiation of contract due to alteration must be in toto. — Offending party, in action at law against maker, is not entitled to recover anything upon instrument, where defendant sets up alteration as defense. But rescission of contract by injured party must be in toto; one cannot affirm contract in part and repudiate the contract in part.

Thompson v. Growers' Fin. Corp., 49 Ga. App. 119, 174 S.E. 192 (1934).

To avail oneself of right to treat note as void because of alterations, maker must elect to rescind whole contract of which note forms a part. One cannot enforce for one's benefit a portion of that contract, and repudiate another portion of the contract. *Glover v. Green*, 96 Ga. 126, 22 S.E. 664 (1895); *Shaw v. Probasco*, 139 Ga. 481, 77 S.E. 577 (1913).

If option to void exercised, party making alteration loses all rights the party may have had. *Rives v. Thompson*, 41 Ga. 68 (1870).

Although restitution not required of injured party upon rescission, affirmative relief on rescinded contract denied. — While defendant may, at least in action at law upon instrument, raise defense of fraudulent alteration to defeat action, without offering to restore consideration or benefits which defendant has received, defendant is not entitled, in such action at law, to obtain affirmative relief upon rescinded contract, or to restore defendant's own status quo without regard to status quo of plaintiff. *Thompson v. Growers' Fin. Corp.*, 49 Ga. App. 119, 174 S.E. 192 (1934).

Result under statute is same although altered note transferred before due to one without notice. *Shaw v. Probasco*, 139 Ga. 481, 77 S.E. 577 (1913).

Elements essential to void instrument. — Before alteration in written instrument will vitiate whole instrument, three things must appear: Alteration must be material, must have been made by one claiming benefit under it, and must have been made with intent to defraud. Unless all three of these things appear, contract as originally executed will be enforced, if it can be discovered and is still capable of execution. *Lowry v. McLain*, 75 Ga. 372 (1885); *Hotel Lanier Co. v. Johnson*, 103 Ga. 604, 30 S.E. 558 (1898); *Burch v. Pope*, 114 Ga. 334, 40 S.E. 227 (1901); *Morgan v. Nashville Grain Co.*, 12 Ga. App. 574, 77 S.E. 913 (1913); *International Harvester Co. v. Davis*, 13 Ga. App. 1, 78 S.E. 770 (1913); *Vaughn v. Farmers & Merchants Bank*, 20 Ga. App. 725, 93 S.E. 228 (1917); *Watkins Medical Co. v. Harrison*, 33 Ga. App. 585, 126 S.E. 909 (1925).

Essential elements must be alleged. *Gwin v. Anderson & Bros.*, 91 Ga. 827, 18 S.E. 43

(1893); *Miller v. Slade & Farish*, 116 Ga. 772, 43 S.E. 69 (1902).

Intentional alteration of contract. — Beneficiary's intentional alteration of contract and fraud claims under O.C.G.A. § 13-4-1 failed because there was insufficient evidence to support either claim in that there was no evidence that the insured actually answered "yes" to a question as to whether the insured had been convicted of driving under the influence and there was no evidence that the insurer's agent intentionally altered the application that the insured had responded "no" instead of "yes." *Dracz v. Am. Gen. Life Ins. Co.*, 427 F. Supp. 2d 1165 (M.D. Ga. 2006).

Allegation of material alteration with intent to defraud required. — Where, in suit by obligee in bond against principal and surety therein, principal denied liability, and surety contended that there had been change in terms of bond after the surety had signed the bond, which was made without the surety's knowledge or consent, and that the surety was therefore discharged from liability thereunder, and, where there was no contention by either principal or surety that there was material intentional alteration in bond, made by obligee with intent to defraud the principal or surety, it was error for court to charge jury the provisions of this statute. *Smith v. Georgia Battery Co.*, 46 Ga. App. 840, 169 S.E. 381 (1933) (see O.C.G.A. § 13-4-1).

Change of amount payable to larger sum ordinarily per se material, fraudulent alteration. — To change promise to pay, from one amount to larger sum, without maker's consent, is ordinarily to be considered, per se, as materially and fraudulently altering instrument. *Howard Piano Co. v. Glover*, 7 Ga. App. 548, 67 S.E. 277 (1910).

Insertion of additional property in chattel mortgage by mortgagee renders instrument void. *Bedgood-Howell Co. v. Moore*, 123 Ga. 336, 51 S.E. 420 (1905).

Addition of words "or bearer" to note, after name of payee, is material alteration. *McCauley v. Gordon*, 64 Ga. 221, 37 Am. R. 68 (1879).

Insertion of interest rate and name of bank as place of payment is material alteration. *International Harvester Co. v. Davis*, 13 Ga. App. 1, 78 S.E. 770 (1913).

Alteration in promissory note after the

note's execution, so as to make the note bear more than statutory rate, is material alteration. *Shaw v. Probasco*, 139 Ga. 481, 77 S.E. 577 (1913).

Materially altered deed. — Deed was materially altered when an attachment containing the description of one of two parcels of property was removed, the deed was ineligible for recordation, and the buyer's failure to object to the recording of the altered deed did not support a finding that the buyer accepted the altered deed without objection as: (1) the seller did not re-sign the deed and the deed was not re-attested; (2) the buyer was not sent the altered deed or land description; (3) there was no evidence that the buyer consented to the alteration or that the buyer otherwise agreed to accept only one parcel of land; (4) the delivery of the altered deed to the bank's attorney was not constructive delivery to the buyer as the attorney represented the bank and the buyer had not authorized the attorney to accept and retain the recorded deed on the buyer's behalf; and (5) the buyer never received a copy of the altered deed or land description before or after the deed was recorded. *Z & Y Corp. v. Indore C. Stores, Inc.*, 282 Ga. App. 163, 638 S.E.2d 760 (2006).

Removing provision giving purchaser six-month trial period voids contract. — Expunging from instrument of agreement whereby purchaser was given six months to test commodity purchased, with option of return if not satisfactory, would void contract. *Colt Co. v. Butler*, 29 Ga. App. 396, 115 S.E. 503 (1923).

Cited in *Banks v. Lee*, 73 Ga. 25 (1884); *Smith v. Wrightsville & T.R.R.*, 83 Ga. 671, 10 S.E. 361 (1889); *Mozley v. Reagan*, 109 Ga. 182, 34 S.E. 34 (1899); *Shirley v. Swafford*, 119 Ga. 43, 45 S.E. 772 (1903); *Hipp v. Fidelity Mut. Life Ins. Co.*, 128 Ga. 491, 57 S.E. 892, 12 L.R.A. (n.s.) 319 (1907); *Knight v. Forbes*, 19 Ga. App. 320, 91 S.E. 445 (1917); *Avera Loan & Inv. Co. v. Jackson*, 30 Ga. App. 504, 118 S.E. 432 (1923); *Watkins Medical Co. v. Harrison*, 33 Ga. App. 585, 126 S.E. 909 (1925); *Blaylock v. Walker County Bank*, 36 Ga. App. 377, 136 S.E. 924 (1927); *Gardner v. Fleetwood*, 39 Ga. App. 51, 146 S.E. 127 (1928); *Aspinwall v. Holland*, 39 Ga. App. 603, 147 S.E. 897 (1929); *Miller v. Griffin*, 39 Ga. App. 705, 148 S.E. 354 (1929); *Cook v. Parks*, 46 Ga. App. 749,

169 S.E. 208 (1933); *Hamby v. Crisp*, 48 Ga. App. 418, 172 S.E. 842 (1934); *Mann v. Carter*, 213 Ga. 85, 97 S.E.2d 137 (1957); *Van Norden v. Auto Credit Co.*, 109 Ga. App. 208, 135 S.E.2d 477 (1964); *Overcash v. First Nat'l Bank*, 115 Ga. App. 499, 155 S.E.2d 32 (1967); *Duval & Co. v. Malcom*, 233 Ga. 784, 214 S.E.2d 356 (1975); *Phillips v. Hertz Com. Leasing Corp.*, 138 Ga. App. 441, 226 S.E.2d

287 (1976); *James Talcott, Inc. v. Dettlebach*, 138 Ga. App. 475, 226 S.E.2d 309 (1976); *Price v. Mitchell*, 154 Ga. App. 523, 268 S.E.2d 743 (1980); *Tyson v. Henson*, 159 Ga. App. 684, 285 S.E.2d 27 (1981); *Olympic Dev. Group, Inc. v. American Druggists' Ins. Co.*, 175 Ga. App. 425, 333 S.E.2d 622 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 458 et seq., 505.

C.J.S. — 17A C.J.S., Contracts, §§ 373 et seq., 535, 578, 579, 588, 598, 607.

ALR. — What constitutes reservation of right to terminate, rescind, or modify con-

tract, as against third party beneficiary, 44 ALR2d 1270.

Construction and effect of "changed conditions" clause in public works or construction contract with state or its subdivision, 56 ALR4th 1042.

13-4-2. Alteration of written contract — Determination of materiality of alteration; determination of fact of alteration.

The materiality of an alteration is a question of law for the court; the fact of an alteration is a question for the jury. (Orig. Code 1863, § 2794; Code 1868, § 2802; Code 1873, § 2853; Code 1882, § 2853; Civil Code 1895, § 3703; Civil Code 1910, § 4297; Code 1933, § 20-803.)

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Elements essential to void instrument. — For alteration to void instrument three things must appear: alteration must be material; alteration must have been made by one claiming benefit under the instrument; and the alteration must have been made with intent to defraud. Unless all three of these things appear, contract as originally executed will be enforced. *Busby v. Sea Island Bank*, 151 Ga. App. 412, 260 S.E.2d 485 (1979).

Correction of typographical error will not void instrument. — If contract alteration was made only to correct typographical error, requirements are not met to void instrument. *Busby v. Sea Island Bank*, 151 Ga. App. 412, 260 S.E.2d 485 (1979).

Error to submit question of materiality of alteration to jury. — Because materiality of alteration is question of law, it is error to submit question of materiality to jury. *James Talcott, Inc. v. Dettlebach*, 138 Ga. App. 475, 226 S.E.2d 309 (1976).

Proof required to take case to jury. — See *Howard Piano Co. v. Glover*, 7 Ga. App. 548, 67 S.E. 277 (1910).

Cited in *Pritchard v. Smith, Stewart & Co.*, 77 Ga. 463 (1886); *Heard v. Tappan & Merritt*, 116 Ga. 930, 43 S.E. 375 (1903); *Bedgood-Howell Co. v. Moore*, 123 Ga. 336, 51 S.E. 420 (1905); *McConnell Bros. v. Slappey*, 134 Ga. 95, 67 S.E. 440 (1910); *Peeples v. Berrien County Bank*, 19 Ga. App. 319, 91 S.E. 436 (1917); *Craig v. National City Bank*, 26 Ga. App. 128, 105 S.E. 632 (1921); *May v. Sorrell*, 153 Ga. 47, 111 S.E. 810 (1922); *Colt Co. v. Butler*, 29 Ga. App. 396, 115 S.E. 503 (1923); *Jones v. Bank of Powder Springs*, 31 Ga. App. 263, 120 S.E. 422 (1923); *Morris v. Bullock*, 185 Ga. 12, 194 S.E. 201 (1937); *Langan v. Cheshire*, 208 Ga. 107, 65 S.E.2d 415 (1951); *Nassau v. Sheffield*, 211 Ga. 66, 84 S.E.2d 4 (1954); *Howard v. Cotton*, 223 Ga. 118, 153 S.E.2d 557 (1967); *Duval & Co. v. Malcom*, 233 Ga. 784, 214 S.E.2d 356 (1975); *Price v. Mitchell*, 154 Ga. App. 523, 268 S.E.2d 743 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 459, 465.

13-4.3. Alteration of written contract — Requirement of preliminary proof as to material alteration.

If the contract is not set forth as the basis of the action, so as to require a denial under oath, an alteration in a material part requires explanation before it can be admitted as evidence. This preliminary proof shall be submitted to the court. (Orig. Code 1863, § 2795; Code 1868, § 2803; Code 1873, § 2854; Code 1882, § 2854; Civil Code 1895, § 3704; Civil Code 1910, § 4298; Code 1933, § 20-804.)

JUDICIAL DECISIONS

O.C.G.A. § 13-4-3 inapplicable to changes made prior to execution. — Law refers to alterations made after instrument has been executed. The law has no reference to any change made prior to that event. They are not, in fact, alterations, if made before. *Thrasher v. Anderson*, 45 Ga. 538 (1872).

Alterations, though apparent on face, are ordinarily presumed to have been made prior to execution. *Thrasher v. Anderson*, 45 Ga. 538 (1872).

Plaintiff must explain any alteration on face when plea of non est factum filed. — It is incumbent on plaintiff to explain any alteration on face of note when plea of non est factum has been filed. This statute was not intended to repeal the common-law rule of evidence in such cases by implication. *Wheat v. Arnold*, 36 Ga. 479 (1867).

Cited in *Wheat v. Arnold*, 36 Ga. 479 (1867).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 145.

C.J.S. — 17A C.J.S., Contracts, §§ 577, 607, 628.

13-4.4. Effect of mutual departure from contract terms.

Where parties, in the course of the execution of a contract, depart from its terms and pay or receive money under such departure, before either can recover for failure to pursue the letter of the agreement, reasonable notice must be given to the other of intention to rely on the exact terms of the agreement. The contract will be suspended by the departure until such notice. (Civil Code 1895, § 3642; Civil Code 1910, § 4227; Code 1933, § 20-116.)

History of Code section. — This Code section is derived from the decision in *Eaves & Collins v. Cherokee Iron Co.*, 73 Ga. 459 (1885).

Cross references. — Retraction of waiver or modification of contract terms under Uniform Commercial Code, § 11-2-209.

Course of performance as modification or waiver of contract terms under Uniform Commercial Code, § 11-2-208.

Law reviews. — For article surveying Georgia cases dealing with commercial law from June 1977 through May 1978, see 30 Mercer L. Rev. 15 (1978). For article survey-

ing Georgia cases in the area of commercial law from June 1979 through May 1980, see 32 Mercer L. Rev. 11 (1980). For article

surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981).

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SUFFICIENCY A JURY QUESTION

General Consideration

Scope of section. — O.C.G.A. § 13-4-4 merely sets forth a plain statutory consequence of the receipt or payment of money under a departure. It does not purport to supplant the other legal circumstances that will effect a novation or modification. *Turem v. Sinowski & Jones*, 195 Ga. App. 829, 395 S.E.2d 60 (1990).

Applicability to workers' compensation. — Law of mutual departure, as applied to insurance policies, applies in the context of workers' compensation insurance. *Travelers Ins. Co. v. Adkins*, 200 Ga. App. 278, 407 S.E.2d 775 (1991).

Applicability to loan or lease. — Nothing in the language of O.C.G.A. § 13-4-4 limits the statute's applicability to payments made under a loan or lease agreement. *Snyder v. Time Warner, Inc.*, 179 F. Supp. 2d 1374 (N.D. Ga. 2001).

Under certain circumstances there may be mutual disregard of executory contract between parties. *Southern Feed Stores v. Sanders*, 193 Ga. 884, 20 S.E.2d 413 (1942).

To effectuate new agreement, departure from original terms must be mutual. — Although failure to require strict compliance with the terms of a contract may create quasi new agreement, to effectuate such a new agreement, the departure from the terms of the original agreement must be mutual. *Crowley v. Ford Motor Credit Co.*, 168 Ga. App. 162, 308 S.E.2d 417 (1983).

When a county contracted with a landfill construction company to relocate parts of a landfill, and the contract provided for a certain method of compensating the company, and when the county orally agreed to make interim payments to the company using a different method, with the final payment to be adjusted according to the pay-

ment method specified in the contract, the company was not entitled to summary judgment in the company's breach of contract suit against the county for not using a method other than that stated in the contract to determine the company's compensation, because there was no evidence that the parties mutually agreed to depart from this contract provision so as to require notice, pursuant to O.C.G.A. § 13-4-4, that one party insisted on strict compliance with the original contract terms. *Handex of Fla., Inc. v. Chatham County*, 268 Ga. App. 285, 602 S.E.2d 660 (2004).

Waiver by course of conduct. — Waiver results from relinquishment of known right, and where, by course of conduct, one leads another to believe that one will not insist upon strict terms of contract, one will not be heard to complain because other contracting party relies upon one's acquiescence as evidenced by course of conduct in similar situations. *Southern Life Ins. Co. v. Citizens Bank*, 91 Ga. App. 534, 86 S.E.2d 370 (1955).

As a general rule, a party to a contract may not waive stipulations in favor of the other party, or rights to which the other party is entitled. However, such provisions may be waived by the conduct of both parties intended to result in the mutual disregard of, or mutual departure from the contract terms. *Cho v. South Atlanta Assocs.*, 200 Ga. App. 737, 409 S.E.2d 674, cert. denied, 200 Ga. App. 895, 409 S.E.2d 674 (1991).

A contract provision may be waived by the conduct of both parties intended to result in the mutual disregard of, or mutual departure from, the contract terms. *Hughes v. Great S. Midway, Inc.*, 265 Ga. 94, 454 S.E.2d 130 (1995).

Through course of dealing, entirely new verbal contract may be substituted for valid written contract, and mutual acquiescence

General Consideration (Cont'd)

in such course of dealing may constitute sufficient consideration for new contract. *Long Tobacco Harvesting Co. v. Brannen*, 98 Ga. App. 142, 105 S.E.2d 390 (1958), later appeal, 99 Ga. App. 541, 109 S.E.2d 90 (1959).

Quasi new agreement. — Georgia law labels a departure from the terms of a contract under which money has been paid or received a "quasi new agreement." *National Serv. Indus., Inc. v. Vafila Corp.*, 694 F.2d 246 (11th Cir. 1982).

While a quasi new agreement may arise where the parties mutually depart from the terms of an executory contract, to support such a departure there must be evidence that money was paid or received under such departure. *Gibson v. Gainesville Bank & Trust*, 226 Ga. App. 679, 487 S.E.2d 460 (1997).

Modification requires circumstances showing mutual intention to treat stipulations as no longer binding and must be such as, in law, to make practically a new agreement. *Pittsburgh Plate Glass Co. v. Jarrett*, 42 F. Supp. 723 (M.D. Ga. 1942), modified, 131 F.2d 674 (5th Cir. 1942).

While distinct stipulation in contract may be waived by conduct of parties, it must appear that it was intention of parties to treat such stipulations as no longer binding. Mere fact that one party so intended would not bring about this result. It must appear that there was mutual intention. *Southern Feed Stores v. Sanders*, 193 Ga. 884, 20 S.E.2d 413 (1942).

Provision of contract is not changed where only one party elects to treat stipulation as no longer binding unless other party concurs in such change. *Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973).

To create quasi new agreement, parties to original agreement must mutually consent to departure. *Crawford v. First Nat'l Bank*, 137 Ga. App. 294, 223 S.E.2d 488 (1976).

There must be more than simple breach by a party, there must be mutual departure. *Crawford v. First Nat'l Bank*, 137 Ga. App. 294, 223 S.E.2d 488 (1976).

Though quasi new agreement arises where parties mutually depart from terms of original agreement and pay or receive money

under such departure there must be more than simple breach on part of one party; there must be mutual departure. *Vaughn & Co. v. Saul*, 143 Ga. App. 74, 237 S.E.2d 622 (1977); *Fair v. General Fin. Corp.*, 147 Ga. App. 706, 250 S.E.2d 9 (1978).

When only one party disregards terms, other party may rely on exact contract terms.

— If only one party disregards terms of contract and other party did not concur in such changes, then nonconcurring party may rely on exact terms of contract. *Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973).

Mutual departure from some terms does not affect other executory terms. — Mutual departure from terms of executory contract requires notice of intention to return to original terms before those terms can be enforced. But such mutual departure affects only particular terms impliedly excused, and other executory terms remain enforceable, absent such mutual departure as to those terms also. *State Mut. Ins. Co. v. Strickland*, 218 Ga. 94, 126 S.E.2d 683 (1962).

A mutual departure from one contract term does not affect the enforceability of the other contractual provisions. *Southwest Plaster & Drywall Co. v. R.S. Armstrong & Bros. Co.*, 166 Ga. App. 373, 304 S.E.2d 500 (1983).

Even if an oral agreement to vary the payment amounts and duration was a mutual departure from the original contract terms of a student loan agreement, the remaining provisions of the original contract remained in full force. *United States v. Salzillo*, 694 F. Supp. 1560 (N.D. Ga. 1988).

Distinction between departure and novation or abrogation. — Departure differs from novation or abrogation of contract, in that, under novation or abrogation, there can be no return to original terms of contract. *American Iron & Metal Co. v. National Cylinder Gas Co.*, 105 Ga. App. 458, 125 S.E.2d 106 (1962).

For section to apply, circumstances must be such as to imply mutual new agreement whereby new, distinct and definite terms are supplied in lieu of those provided in original contract. *Ball v. Foundation Co.*, 25 Ga. App. 126, 103 S.E. 422 (1920); *Jones v. Lawman*, 56 Ga. App. 764, 194 S.E. 416 (1937); *Pittsburgh Plate Glass Co. v. Jarrett*, 42 F. Supp. 723 (M.D. Ga. 1942), modified, 131 F.2d 674

(5th Cir. 1942); *Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973); *Vaughn & Co. v. Saul*, 143 Ga. App. 74, 237 S.E.2d 622 (1977); *Fair v. General Fin. Corp.*, 147 Ga. App. 706, 250 S.E.2d 9 (1978).

While it is true that where parties, in course of performance of contract, depart from the contract's terms and pay or receive money under such departure, modification by way of quasi new agreement will be implied, in order for this rule to have application, it is necessary that circumstances be such as will in law imply a mutual new agreement, so that modification, when taken in connection with original contract, will provide new and distinct agreement complete in its terms. *Morrison v. Roberts*, 195 Ga. 45, 23 S.E.2d 164 (1942).

For a party to succeed on a claim that the parties had entered a quasi new contract pursuant to O.C.G.A. § 13-4-4, it would have to demonstrate that the parties mutually agreed to a new contract with distinct and definite terms. However, a jury should determine whether a new contract is created. *Massachusetts Bay Ins. Co. v. Photographic Assistance Corp.*, 732 F. Supp. 1572 (N.D. Ga. 1990).

While parties may agree to depart from the terms of a contract, to support such a departure, there must be some evidence that an agreement to do so had been reached. *Cloud v. Georgia Cent. Credit Union*, 214 Ga. App. 594, 448 S.E.2d 913 (1994); *Georgia Color Farms, Inc. v. K.K.L., Ltd. Partnership*, 234 Ga. App. 849, 507 S.E.2d 817 (1998).

Whether parties' conduct creates quasi new agreement, ordinarily jury question. — Question whether there has been such mutual temporary disregard of terms of contract as contemplated in law presents issue for determination by jury in light of testimony submitted as to statements and conduct of parties with relation to execution of contract. *Mauldin v. Gainey*, 15 Ga. App. 353, 83 S.E. 276 (1914).

Whether or not there has been mutual disregard of original contract provisions is question for jury or auditor. *Southern Feed Stores v. Sanders*, 193 Ga. 884, 20 S.E.2d 413 (1942).

Whether or not there has been such mutual disregard of terms of written contract as

to create quasi new contract is ordinarily question of fact for jury. *Haynie v. Murray*, 74 Ga. App. 253, 39 S.E.2d 567 (1946).

Question as to whether or not there has been mutual intention, and in fact mutual departure from terms of original contract, is ordinarily one of fact for determination by jury. *Prothro v. Walker*, 202 Ga. 71, 42 S.E.2d 114 (1947); *Powell v. Mars Oil Co.*, 214 Ga. 710, 107 S.E.2d 208 (1959); *Phoenix Air Conditioning Co. v. Towne House Developers, Inc.*, 124 Ga. App. 782, 186 S.E.2d 429 (1971).

Whether there has been mutual and intended departure so as to make practically new agreement is generally question for jury to determine. *Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973); *Travelers Ins. Co. v. Adkins*, 200 Ga. App. 278, 407 S.E.2d 775 (1991).

Whether conduct of parties causes waiver of contract provisions, and creates quasi new agreement is ordinarily question of fact for jury. *Crawford v. First Nat'l Bank*, 137 Ga. App. 294, 223 S.E.2d 488 (1976).

Generally, alteration or modification of a contract is a jury question, that is, as to whether there has been a mutual departure from terms thereof. *Norair Eng'g Corp. v. Porter Trucking Co.*, 163 Ga. App. 780, 295 S.E.2d 155 (1982).

Whether the conduct of the parties constitutes a mutual departure from and a waiver of a contract provision ordinarily is a question of fact for the jury. *Southwest Plaster & Drywall Co. v. R.S. Armstrong & Bros. Co.*, 166 Ga. App. 373, 304 S.E.2d 500 (1983).

Whether there has been such a mutual and intended departure as to make practically a new agreement is generally a question for a jury to determine and such a finding, made by the jury under proper instructions and supported by any evidence is conclusive on this court. *United Servs. Auto. Ass'n v. Gottschalk*, 212 Ga. App. 88, 441 S.E.2d 281 (1994).

Notice of intent to rely on original agreement. — Whether creditor's requests for payment and attorney's collection letter were sufficient notice of intention to rely on original terms of note was a disputed issue of fact which required determination by a jury. *Vaughan v. Wrenn Bros.*, 163 Ga. App. 383, 294 S.E.2d 609 (1982).

General Consideration (Cont'd)

Evidence of a departure from the terms of previous contracts has no bearing upon the outcome of the case sub judice. *Choice Hotels Int'l, Inc. v. Ocmulgee Fields, Inc.*, 222 Ga. App. 185, 474 S.E.2d 56 (1996).

Any evidence of a departure from the terms of previous loans has no bearing upon the outcome of the controversy concerning the present loan. *Minor v. Citizens & S. Nat'l Bank*, 177 Ga. App. 115, 338 S.E.2d 466 (1985).

Evidence of repeatedly late payments creates factual dispute as to creation of quasi new agreement. — Evidence of the buyer's repeatedly late, irregular payments, which are accepted by the seller creates a factual dispute as to whether a quasi new agreement was created. *Greater Leasing, Inc. v. Hill*, 158 Ga. App. 547, 281 S.E.2d 303 (1981).

Cited in *Hasbrouck v. Bondurant & McKinnon*, 127 Ga. 220, 56 S.E. 241 (1906); *Mathis v. Harrell*, 1 Ga. App. 358, 58 S.E. 207 (1907); *Bush v. West Yellow Pine Co.*, 2 Ga. App. 295, 58 S.E. 529 (1907); *Fitzgerald Cotton Oil Co. v. Farmers Supply Co.*, 3 Ga. App. 212, 59 S.E. 713 (1907); *Kennesaw Guano Co. v. Miles & Co.*, 132 Ga. 763, 64 S.E. 1087 (1909); *Strickland v. Bank of Cartersville*, 141 Ga. 565, 81 S.E. 886 (1914); *McNatt v. Clarke Bros.*, 143 Ga. 159, 84 S.E. 447 (1915); *Atlanta Oil & Fertilizer Co. v. Phosphate Mining Co.*, 144 Ga. 75, 86 S.E. 216 (1915); *Standard Coal Co. v. Eclipse Coal Co.*, 24 Ga. App. 717, 102 S.E. 137 (1920); *Smith v. Harrison*, 26 Ga. App. 325, 106 S.E. 191 (1921); *Rauschenberg v. Peeples*, 30 Ga. App. 384, 118 S.E. 409 (1923); *Kennedy v. Walker*, 156 Ga. 711, 120 S.E. 105 (1923); *Breman v. Rodbell*, 31 Ga. App. 358, 120 S.E. 697 (1923); *Buckeye Cotton Oil Co. v. Malone*, 33 Ga. App. 519, 126 S.E. 913 (1925); *Stoddard v. Churchill Line*, 37 Ga. App. 347, 140 S.E. 778 (1927); *Gooze v. York*, 38 Ga. App. 62, 142 S.E. 562 (1928); *White v. Dotson*, 41 Ga. App. 436, 153 S.E. 233 (1930); *Smith v. Gholstun*, 45 Ga. App. 287, 164 S.E. 217 (1932); *Eaves v. Georgian Co.*, 47 Ga. App. 37, 169 S.E. 519 (1933); *Craig v. Craig*, 53 Ga. App. 632, 186 S.E. 755 (1936); *Byrd v. Prudential Ins. Co. of Am.*, 182 Ga. 800, 187 S.E. 1 (1936); *Commercial Cas. Ins. Co. v. Campbell*, 54 Ga. App. 530, 188 S.E. 362 (1936); *Byrd v.*

Prudential Ins. Co. of Am., 185 Ga. 625, 196 S.E. 72 (1938); *Southern Sav. Bank v. Dickey*, 58 Ga. App. 718, 199 S.E. 546 (1938); *Sovereign Camp, W.O.W. v. Hart*, 187 Ga. 304, 200 S.E. 296 (1938); *Christian v. Bremer*, 199 Ga. 285, 34 S.E.2d 40 (1945); *Arnold v. Selman*, 83 Ga. App. 145, 62 S.E.2d 915 (1950); *Sachs v. Jones*, 83 Ga. App. 441, 63 S.E.2d 685 (1951); *Gaulding v. Courts*, 90 Ga. App. 472, 83 S.E.2d 288 (1954); *Maguire v. Ivey*, 212 Ga. 151, 91 S.E.2d 35 (1956); *ABC Sch. Supply, Inc. v. Brunswick-Balke-Collender Co.*, 97 Ga. App. 84, 102 S.E.2d 199 (1958); *Few v. Automobile Financing, Inc.*, 101 Ga. App. 783, 115 S.E.2d 196 (1960); *In re Wilder*, 225 F. Supp. 67 (M.D. Ga. 1963); *Hewitt Contracting Co. v. Bridgeboro Lime & Stone Co.*, 111 Ga. App. 261, 141 S.E.2d 211 (1965); *Commonwealth United Corp. v. Rothberg*, 221 Ga. 175, 143 S.E.2d 741 (1965); *Lunsford v. Wilson*, 113 Ga. App. 602, 149 S.E.2d 515 (1966); *Chalkley v. Ward*, 119 Ga. App. 227, 166 S.E.2d 748 (1969); *Hughes v. Town Fin. Corp.*, 129 Ga. App. 571, 200 S.E.2d 366 (1973); *Hutcheson v. American Mach. & Foundry Co.*, 129 Ga. App. 602, 200 S.E.2d 371 (1973); *Ryder Truck Lines v. Scott*, 129 Ga. App. 871, 201 S.E.2d 672 (1973); *Abercrombie v. Howard, Weil, Labouisse, Fredericks, Inc.*, 136 Ga. App. 79, 220 S.E.2d 275 (1975); *Marsh v. Frederick W. Berens, Inc.*, 237 Ga. 135, 227 S.E.2d 36 (1976); *Roberts v. Cameron-Brown Co.*, 556 F.2d 356 (5th Cir. 1977); *Linch v. McNeil Real Estate Fund VI, Ltd.*, 146 Ga. App. 505, 246 S.E.2d 718 (1978); *Hayes v. Fidelity Acceptance Corp.*, 147 Ga. App. 144, 248 S.E.2d 209 (1978); *Auerbach v. First Nat'l Bank*, 147 Ga. App. 288, 248 S.E.2d 551 (1978); *Tobler v. Yoder & Frey Auctioneers, Inc.*, 462 F. Supp. 788 (S.D. Ga. 1978); *Ford Motor Credit Co. v. Ledbetter*, 582 F.2d 1012 (5th Cir. 1978); *Reese v. Robins Fed. Credit Union*, 150 Ga. App. 1, 256 S.E.2d 604 (1979); *Smith v. General Fin. Corp.*, 150 Ga. App. 269, 257 S.E.2d 302 (1979); *Browning v. Rewis*, 152 Ga. App. 45, 262 S.E.2d 174 (1979); *Williams v. Doster*, 153 Ga. App. 174, 264 S.E.2d 707 (1980); *Rewis v. Browning*, 153 Ga. App. 352, 265 S.E.2d 316 (1980); *McKinney v. South Boston Sav. Bank*, 156 Ga. App. 114, 274 S.E.2d 34 (1980); *Ballenger Corp. v. Dresco Mechanical Contractors*, 156 Ga. App. 425, 274 S.E.2d 786 (1980); *Heard v. Decatur Fed. Sav. & Loan Ass'n*, 157 Ga.

App. 130, 276 S.E.2d 253 (1980); *In re Bagley*, 6 Bankr. 387 (Bankr. N.D. Ga. 1980); *Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n*, 247 Ga. 730, 279 S.E.2d 442 (1981); *Jones v. First Carolina Fin. Corp.*, 158 Ga. App. 818, 282 S.E.2d 364 (1981); *Newby v. Bank of Pinehurst*, 159 Ga. App. 890, 285 S.E.2d 605 (1981); *Decatur Invs. Co. v. McWilliams*, 162 Ga. App. 181, 290 S.E.2d 526 (1982); *Brookhaven Landscape & Grading Co. v. J.F. Barton Contracting Co.*, 676 F.2d 516 (11th Cir. 1982); *Shalom Farms, Inc. v. Columbus Bank & Trust Co.*, 169 Ga. App. 145, 312 S.E.2d 138 (1983); *Barnett v. First Fed. Sav. & Loan Ass'n*, 169 Ga. App. 396, 313 S.E.2d 115 (1984); *Duncan v. Lagunas*, 253 Ga. 61, 316 S.E.2d 747 (1984); *Computer Maintenance Corp. v. Tilley*, 172 Ga. App. 220, 322 S.E.2d 533 (1984); *Thomas v. Ralston Purina Co.*, 43 Bankr. 201 (Bankr. M.D. Ga. 1984); *Exxon Corp. v. Butler*, 173 Ga. App. 146, 325 S.E.2d 806 (1984); *Eaves v. J.C. Bradford & Co.*, 173 Ga. App. 470, 326 S.E.2d 830 (1985); *Georgia Income Property Corp. v. Murphy*, 182 Ga. App. 101, 354 S.E.2d 859 (1987); *Dennis v. Independent Fire Ins. Co.*, 187 Ga. App. 261, 370 S.E.2d 24 (1988); *Gibbs v. Green Tree Acceptance, Inc.*, 188 Ga. App. 633, 373 S.E.2d 637 (1988); *Main Station, Inc. v. Atel I, Inc.*, 190 Ga. App. 205, 378 S.E.2d 393 (1989); *Hill v. Federal Employees Credit Union*, 193 Ga. App. 44, 386 S.E.2d 874 (1989); *Borden v. Pope Jeep-Eagle, Inc.*, 200 Ga. App. 176, 407 S.E.2d 128 (1991); *Gordon v. South Cent. Farm Credit*, 213 Ga. App. 816, 446 S.E.2d 514 (1994); *Allstate Ins. Co. v. Ackley*, 227 Ga. App. 104, 488 S.E.2d 85 (1997); *McCarter v. Bankers Trust Co.*, 247 Ga. App. 129, 543 S.E.2d 755 (2000); *Holy Fellowship Church of God in Christ v. First Community Bank*, 248 Ga. App. 372, 545 S.E.2d 164 (2001).

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Evidence admissible for purpose of determining whether there is quasi new agreement. — In determining whether or not there is quasi new agreement based upon bank's acceptance of late and irregular payments such that debtor was entitled to notice that bank was going to accelerate for default, finder of fact was restricted to evidence of course of dealings between parties up to

date of acceleration. *Adamson v. Trust Co. Bank*, 155 Ga. App. 646, 271 S.E.2d 899 (1980).

New contract of insurance was not created upon an insured's move to Georgia from the state where the policy was issued, and the original contract remained in effect. *World Ins. Co. v. Branch*, 966 F. Supp. 1203 (N.D. Ga. 1997), vacated on other grounds, 156 F.3d 1142 (11th Cir. 1998).

Settlement negotiations are not admissible in evidence, and do not constitute a "waiver" of either party's claim or defense. *Citadel Corp. v. Sun Chem. Corp.*, 212 Ga. App. 875, 443 S.E.2d 489 (1994).

Subsequent performance by parties is sufficient consideration to support quasi new agreement. — Although attempt at modification of original written contract may not satisfy statute of frauds, where modification of written contract has been agreed to by all parties, performed by one and accepted by other, there is waiver of provisions of original contract. *Lester v. Trust Co.*, 144 Ga. App. 526, 241 S.E.2d 633 (1978).

Delay in deposit of payment checks. — Evidence that holder of note deposited some payment checks after the due date is not evidence of a mutual disregard of the due date so as to create a quasi new agreement. *Shick Moulding & Frame Co. v. Edwards*, 163 Ga. App. 879, 296 S.E.2d 161 (1982).

Subsequent performance sufficient consideration for new agreement. — When both parties clearly agreed to the substitution of the diesel-powered forklift for the gasoline-powered lift described in a written contract, and, regardless of the reason lessee requested replacement of the original forklift, the lessor complied with the request and the lessee continued to pay the regular monthly rentals, such subsequent performance was sufficient consideration to support the "quasi new agreement" defined by O.C.G.A. § 13-4-4. *Southwest Plaster & Drywall Co. v. R.S. Armstrong & Bros. Co.*, 166 Ga. App. 373, 304 S.E.2d 500 (1983).

Debtor's failure to make half of installment payments entitled creditor to institute foreclosure proceedings. — Since the debtor was not merely late and irregular in making the debtor's payments, but had failed altogether to make five of the ten monthly installment payments which had become due as of the time the notice of

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foreclosure was published, the creditor clearly was entitled pursuant to the terms of the security agreement to accelerate the entire balance due and to institute foreclosure proceedings. *Lewis v. Citizens & S. Nat'l Bank*, 174 Ga. App. 847, 332 S.E.2d 11 (1985).

Payments made after acceleration are considered payments on amount of full indebtedness rather than installment payments made pursuant to any quasi new contract between the parties. *Adamson v. Trust Co. Bank*, 155 Ga. App. 646, 271 S.E.2d 899 (1980).

Acceptance of partial payment of past-due indebtedness does not nullify prior acceleration. — Since debtor was several payments behind at time note was accelerated, acceptance of partial payment by bank thereafter did not nullify acceleration of debt nor maturity of remainder of indebtedness. *Adamson v. Trust Co. Bank*, 155 Ga. App. 646, 271 S.E.2d 899 (1980).

Acceptance of benefits after notice of anticipated breach waives breach. — One having accepted benefits arising under contract after being notified of anticipated breach, and not having given notice of intention to rely on its exact terms, but having continued to accept benefits thereunder, may not recover for such alleged breach or failure to perform fully the complete terms of original agreement. Acceptance of such benefits after notice of alleged breach will constitute waiver of breach. *B-Lee's Sales Co. v. Shelton*, 141 Ga. App. 870, 234 S.E.2d 702 (1977).

Time limit for performance waived when performance accepted after such time. — When performance accepted after expiration of time limit, the failure to comply with this condition of contract will be considered waived. *ABC Sch. Supply, Inc. v. Brunswick-Balke-Collender Co.*, 97 Ga. App. 84, 102 S.E.2d 199 (1958).

Accepting benefits and continuing performance after deviation prevents subsequent suit for benefits under original agreement. — When petition discloses that defendant violated and changed terms of contract, and plaintiff elected to accept breach and abide by changes by continuing to perform services thereunder and receive benefits there-

from without objection or protest, plaintiff cannot thereafter, upon terminating the plaintiff's services with the defendant, maintain suit for benefits which the plaintiff claims accrued to the plaintiff under original contract but after alleged breach and changes in contract occurred. *Luke v. McGuire Ins. Agency of Ga., Inc.*, 133 Ga. App. 948, 212 S.E.2d 889 (1975).

Oral agreements and understandings that the note could be paid upon a mutually agreeable schedule cannot be used by the defendant to contradict the plain and unambiguous language of the note. *Minor v. Citizens & S. Nat'l Bank*, 177 Ga. App. 115, 338 S.E.2d 466 (1985).

Immaterial variations. — In contract for inspection of pipeline, plaintiff's purchase orders quoting per foot rate only were not sufficiently and clearly at variance with defendant's offer as to unambiguously evince a clear intention of plaintiff to depart from offer's basis and from custom in trade that per foot rate was based on projected production hours and that extra inspection work for fault in production would earn extra pay. *Colonial Pipeline Co. v. Robert W. Hunt Co.*, 164 Ga. App. 91, 296 S.E.2d 633 (1982).

Occasional maintenance sufficient to vary lease is jury question. — After lessor admitted that the lessor had performed occasional maintenance and repair on a leased forklift, although it attempted to explain that such conduct was strictly voluntary and done primarily to protect the lessor's investment in the equipment, this performance conflicted with the written lease provision which required lessee to maintain and repair the machine, and it posed a question for the jury as to whether this conduct resulted in a waiver of that provision. *Southwest Plaster & Drywall Co. v. R.S. Armstrong & Bros. Co.*, 166 Ga. App. 373, 304 S.E.2d 500 (1983).

If a pattern or course of conduct has been established which departs from the express contractual provisions for the payment of premiums on a health insurance policy, and the insurer never gives the insured notice of the insurer's intent to return to and rely upon the exact terms of the policy regarding the payment of premiums, the insurer cannot rely upon the insured's failure to make payment of a premium by the date specified in the policy as the basis for asserting an automatic termination of the policy as a

matter of law. *General Am. Life Ins. Co. v. Samples*, 167 Ga. App. 622, 307 S.E.2d 51 (1983).

By reinstating insurance coverage "without interruption" upon receipt of the premium on several previous occasions after the policy had supposedly been cancelled for nonpayment of premium, the insurer may have led the insured to believe the insurer would continue to follow this practice in the future, thereby creating a quasi-new agreement with the insured to that effect. The issue, then, was not whether the insurance was properly cancelled for nonpayment of premium but whether, as a result of a quasi-new agreement created by the past conduct of the parties, the policy was reinstated following such cancellation. *Holland v. Allstate Ins. Co.*, 200 Ga. App. 668, 409 S.E.2d 79 (1991).

When a bank opened a corporate account without a contemporaneous corporate resolution, the bank was required to notify the customer of the bank's intent to rely on strict compliance with the contract terms on the deposit agreement requiring such resolution when the customer sought to change authorized signers on the account. *First Union Nat'l Bank v. Davies-Elliott, Inc.*, 215 Ga. App. 498, 452 S.E.2d 132 (1994).

In a civil action arising from a creditor's repossession of a debtor's vehicle, summary judgment on a debtor's conversion and punitive damages claims against a creditor was reversed as the trial court erroneously found that the debtor's failure to demand that the creditor return the subject vehicle was fatal to the claim, given that the creditor wrongfully repossessed and then sold the car subject to the parties' finance agreement, and hence no demand was necessary; moreover, by repeatedly accepting late payments, the creditor could have willingly departed from the terms of the agreement and thus be precluded from enforcing the strict letter of the agreement without first giving reasonable notice to the debtor of the creditor's intent to do so, and there was evidence on which a jury could find that the creditor's failure to give the debtor reasonable notice of the creditor's intent to strictly enforce the payment provisions rendered the repossession and subsequent sale unlawful. *Williams v. Nat'l Auto Sales, Inc.*, 287 Ga. App. 283, 651 S.E.2d 194 (2007).

No default had occurred, based on the fact that the payees had established a practice of accepting late payments on a note in the past and had then declared a default without granting "reasonable notice" of the payees' intention to rely on the strict terms of the note, a letter requiring strict compliance never having been received. *Williams v. Sessions*, 171 Ga. App. 662, 320 S.E.2d 791 (1984).

Performance deviating from terms, accepted as mere indulgence, not considered mutual departure. — If one of party to contract, in accepting performance by other party not strictly in accordance with terms of contract, does so merely gratuitously or by way of indulgence, then it cannot be said that acceptance of performance under those circumstances supplies requisite intent on part of party so accepting performance as to render departure mutual. *Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973).

One acceptance of late premium payment not enough to require notice. — For conditional acceptance of overdue premium to amount to waiver, condition must be fulfilled; and one acceptance of a late payment is not enough to require insurer to give notice to insured of intention to rely on exact terms of agreement as provided by law. *Sovereign Camp, W.O.W. v. Whitaker*, 57 Ga. App. 418, 195 S.E. 584 (1938).

Mere acceptance of two or three late premium payments not waiver of due date provision. — When seller, on more than one occasion and without any express agreement to modify original contract, and without additional consideration moving the seller to do so, accepts from purchaser several partial payments, this would not be such departure from terms of contract as to necessitate notice from vendor to vendee of intention to rely upon exact terms of original contract relating to payments as condition precedent to bringing of suit in trover to recover property. *Sewell v. C.I.T. Corp.*, 43 Ga. App. 676, 160 S.E. 99 (1931).

Mere acceptance by insurer on two or three occasions of monthly or periodic premium payments after their due date or beyond grace period provided in policy would not, standing alone, constitute waiver of provisions of policy respecting time of payment of premium nor make for parties a new

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contract in that regard upon which insured would be entitled to rely and insist. *Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973).

Acceptance of some installments after due date not sufficient deviation to require notice. — Mere fact that defendant paid some installments after the installments were due and in amounts less than stipulated sum, without any subsequent agreement to do so and without any consideration therefor, would not be sufficient to show such departure from original contract as to require notice from plaintiff of intention to comply with strict terms thereof before plaintiff could insist upon forfeiture. *Hill v. Sterchi Bros. Stores*, 50 Ga. App. 193, 177 S.E. 353 (1934).

Continued acceptance of installments of half the amount required was an insufficient departure to require notice. *Young v. Durham*, 15 Ga. App. 678, 84 S.E. 165 (1915).

Seller's acceptance of repeated irregular payments creates factual issue as to quasi new agreement. — Evidence of seller's acceptance of buyer's repeated, late, irregular, payments, creates factual dispute as to whether quasi new agreement was created. *Smith v. General Fin. Corp.*, 243 Ga. 500, 255 S.E.2d 14 (1979).

As a general rule, evidence of acceptance by a creditor of repeated, late, irregular payments from a debtor creates a factual question as to the formation of a quasi new agreement. *Lewis v. Citizens & S. Nat'l Bank*, 174 Ga. App. 847, 332 S.E.2d 11 (1985).

Acceptance of late premium payments. — A life insurer which did not solicit premium payments outside of the grace period, but on two occasions accepted late payments after expiration of grace period, did not by these actions change the original contract agreement which required that payments be made within grace period in order for the policy to be valid. *Prudential Ins. Co. of Am. v. Nessmith*, 174 Ga. App. 39, 329 S.E.2d 249 (1985).

When a policy was cancelled due to non-payment, there was no material issue of fact under O.C.G.A. § 13-4-4 based on the insurer's practice of accepting late premium payments. The insured did not show that the

insurer had ever reinstated the policy after the insured sent a notice of cancellation or that any reinstatement following cancellation was without interruption of coverage; moreover, in the insurer's cancellation notice, the insurer had provided advance written notice of the insurer's intent to expressly rely on the policy terms. *Zilka v. State Farm Mut. Auto. Ins. Co.*, 291 Ga. App. 665, 662 S.E.2d 777 (2008).

Acceptance of late rental payment. — When the evidence showed only one instance of defendants' acceptance of a late rental payment, such was not enough to invoke the notice requirement of O.C.G.A. § 13-4-4. *Spooner v. Lossiah*, 185 Ga. App. 876, 366 S.E.2d 236 (1988).

No evidence of toleration of failure to make payments. — Payee was entitled to recover the accelerated unpaid balance on a note since there was no evidence that the payee tolerated a previous three-month failure to make any payments on the note such that the payor would be entitled to receive notice before the payee could effect a valid acceleration. *Booth v. Gwinnett Fed. Sav. & Loan Ass'n*, 200 Ga. App. 60, 406 S.E.2d 568 (1991).

Record was devoid of any evidence that the bank agreed to tolerate the debtor's non-payment or intended to forego the bank's enforcement rights under the note; the debtor made required payments until the debtor completely stopped making any payments. Thus, the guarantor's claim of waiver under O.C.G.A. § 13-4-4 was meritless. *Salahat v. FDIC*, 298 Ga. App. 624, 680 S.E.2d 638 (2009).

Departure from a no-pet clause. — Mutual departure from a no-pet clause in a lease did not provide a defense to a dispossessory action against a tenant. *Father & Son Moving & Storage Co. v. Peachtree Airport Park Joint Venture*, 229 Ga. App. 860, 495 S.E.2d 87 (1998).

Question of fact as to default. — Since evidence indicated that lessees were in default during many months of the lease and evidence was in dispute as to lessor's notice that it intended to adhere to the strict terms of the lease, a question of fact arose as to the applicability of O.C.G.A. § 13-4-4 and the trial court erred in issuing a directed verdict in lessor's favor. *Ford v. Rollins Protective Servs. Co.*, 171 Ga. App. 882, 322 S.E.2d 62 (1984).

Jury instruction. — A pattern jury instruction suggesting that acceptance of past due payments is not the sort of variance deemed to be a mutual departure, that it must somehow be more “substantial,” ignored the language of O.C.G.A. § 13-4-4; however, the giving of such instruction was harmless where the mutual departure from the due date terms was not the result of a course of conduct or business practice, but was based on a new agreement deferring specific payments. *Wright Carriage Co. v. Business Dev. Corp. of Ga., Inc.*, 221 Ga. App. 49, 471 S.E.2d 218 (1996).

A pattern jury instruction stating the requirement that a jury may only find that terms established by the course of conduct or business practices of the parties have replaced written express terms if the new terms are definite and clear does not conflict with O.C.G.A. § 13-4-4. *Wright Carriage Co. v. Business Dev. Corp. of Ga., Inc.*, 221 Ga. App. 49, 471 S.E.2d 218 (1996).

Departure from terms so as to remove agreement from statute of frauds. — See *Williamson & Co. v. Dodd*, 31 Ga. App. 572, 121 S.E. 523 (1924).

Immaterial variations. — See *Yancey v. Warner Elevator Mfg. Co.*, 6 Ga. App. 125, 64 S.E. 663 (1909).

Notice

Notice required only where it appears there was mutual intention to depart from contract terms. *Selman v. Manis*, 100 Ga. App. 422, 111 S.E.2d 747 (1959).

Since the evidence showed that there was no deviation from the contract terms, notice under O.C.G.A. § 13-4-4 was not required. *Cloud v. Georgia Cent. Credit Union*, 214 Ga. App. 594, 448 S.E.2d 913 (1994).

Lessor did not have to provide notice of lessor’s intention to hold lessees to terms of the original lease after the parties agreed to an assignment, since the lease contemplated the possibility of assignment and provided that the original lessees remained liable for the payment of rent and other obligations thereunder. *Mullis v. Shaheen*, 217 Ga. App. 277, 456 S.E.2d 764 (1995).

After mutual departure from terms, until notice given, departure constitutes quasi new agreement. *Verner v. McLarty*, 213 Ga. 472, 99 S.E.2d 890 (1957).

Intent to require strict compliance after mutual departure. — Mutual departure by the parties from the terms of a workers’ compensation policy required the insurer to give reasonable notice of an intent to require strict compliance since there was some evidence that in handling disputes over the audited amounts of premiums due, the insurer typically cancelled the policy but reinstated the policy once an agreement on the premium was reached and the money paid. *Travelers Ins. Co. v. Adkins*, 200 Ga. App. 278, 407 S.E.2d 775 (1991).

Agency was not entitled to summary judgment in the general contractor’s breach of contract action; there was evidence to support the contractor’s claim, under O.C.G.A. § 13-4-4, that the parties mutually departed from the contractual requirement that the contractor demonstrate insurance coverage before each stage and that the agency, therefore, waived its right to terminate the agreement on this basis absent notice of its reliance on the original terms. *Vakilzadeh Enters. v. Hous. Auth.*, 281 Ga. App. 203, 635 S.E.2d 825 (2006).

After giving notice, one may insist upon rights accruing to one under original agreement. — In event of departure, one party to contract may, upon giving reasonable notice to other of intention to return to and pursue letter of agreement, insist upon any rights accruing to that party under original agreement after such notice has been given. *American Iron & Metal Co. v. National Cylinder Gas Co.*, 105 Ga. App. 458, 125 S.E.2d 106 (1962).

In mortgage contracts, reasonable notice requires more than assertion of acceleration clause, for other party must be given reasonable opportunity to cure any deviations from exact terms before foreclosure can be commenced due to defaults which were tolerated under quasi new agreement. *Curl v. Federal Sav. & Loan Ass’n*, 241 Ga. 29, 244 S.E.2d 812 (1978).

Sufficiency a Jury Question

Notice as jury question. — Since contract was mutually departed from regarding rent and responsibility for taxes, whether or not notice of default was properly given became a jury question. *Brackett v. Cartwright*, 231 Ga. App. 536, 499 S.E.2d 905 (1998).

Sufficiency a Jury Question (Cont'd)

Acceptance of late note payments. — Trial court's grant of summary judgment to a decedent's estate executrix in an action against note debtors, finding that due to the debtors' untimely payments to the decedent, the debtors could not rely on a self-executing cancellation provision that provided that the debtors obligations under a promissory note to the decedent terminated upon death, was error, as the decedent's acceptance of untimely payments on the note raised an issue of fact as to whether the decedent waived the timely payment requirement pursuant to O.C.G.A. § 13-4-4; however, the debtors were not entitled to judgment as a matter of law where the decedent, who was 90 years old and had Alzheimer's Disease at the time of the note and cancellation execution, may not have had the capacity to enter into those agreements. *Callahan v. Cox*, 279 Ga. App. 368, 631 S.E.2d 405 (2006).

OPINIONS OF THE ATTORNEY GENERAL

For section to apply, circumstances must be such as to imply mutual new agreement. — While it was true, as recognized by former Code 1933, §§ 20-115 and 20-116 (see O.C.G.A. §§ 13-4-4 and 13-4-5), that parties may depart from terms of original contract, and that such departure will imply modifica-

tion of contract, in order for rule to apply it was necessary that circumstances be such as will in law imply mutual new agreement, so that modification, when taken in connection with new contract will provide new and distinct agreement, complete in its terms. 1948-49 Op. Att'y Gen. p. 27.

RESEARCH REFERENCES

ALR. — Effect, after lapse of full period, or attempt to terminate contract without notice, or upon notice allowing a shorter period than that stipulated, 35 ALR 893.

Waiver or estoppel by previous custom of insurer to accept premiums upon tender not in compliance with provisions of policy as applicable where tender according to previous custom was refused, 136 ALR 1219.

Existence of more than one contract between owner and contractor as affecting notice or filing of mechanic's lien by materialman or subcontractor, 175 ALR 330.

Effect, as between landlord and tenant, of lease clause restricting the keeping of pets, 114 ALR5th 443.

13-4-5. Effect of execution of second contract upon same matter; novation.

A simple contract regarding the same matter and based on no new consideration does not destroy another simple contract between the same parties; but, if new parties are introduced so as to change the person to whom the obligation is due, the original contract is at an end. (Orig. Code 1863, § 2686; Code 1868, § 2682; Code 1873, § 2724; Code 1882, § 2724; Civil Code 1895, § 3641; Civil Code 1910, § 4226; Code 1933, § 20-115.)

Law reviews. — For comment on *Acree v. Kay*, 188 Ga. 783, 4 S.E.2d 820 (1939), see 2 Ga. B.J. 61 (1940).

JUDICIAL DECISIONS

Change of nature of terms of contract is called a novation. Stallings v. Bank of Americus, 59 Ga. 701 (1877); Central Ga. Bank v. Cleveland Nat'l Bank, 59 Ga. 667 (1877).

"Novation" is a term of art, signifying a very particular type of accord or modification. Lindenberg v. First Fed. Sav. & Loan Ass'n, 528 F. Supp. 440 (N.D. Ga. 1981), aff'd, 691 F.2d 974 (11th Cir. 1982).

Section incorporates common-law motion of novation. — Common-law idea of a novation is when A is indebted to B, and B to C, and by mutual agreement B is dropped out, and in consideration of this, A becomes debtor to C. Such agreement constitutes a novation; a new person is introduced to whom obligation is due. Wofford v. Gaines, 53 Ga. 485 (1874).

Four essential requisites of a novation. — In every novation there are four essential requisites: (1) previous valid obligation; (2) agreement of all parties to new contract; (3) extinguishment of old contract; and (4) validity of new one. Savannah Bank & Trust Co. v. Wolff, 191 Ga. 111, 11 S.E.2d 766 (1940); Cowart v. Smith, 78 Ga. App. 194, 50 S.E.2d 863 (1948); Franchise Enters., Inc. v. Ridgeway, 157 Ga. App. 458, 278 S.E.2d 33 (1981); City of Buford v. International Sys., 158 Ga. App. 682, 282 S.E.2d 165 (1981).

In every novation there are four essential requisites: (1) a previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the extinguishment of the old contract; and (4) the validity of the new one. If these essentials, or any one of them, are wanting, there can be no novation. M.W. Buttrill, Inc. v. Air Conditioning Contractors, 158 Ga. App. 122, 279 S.E.2d 296 (1981); Lindenberg v. First Fed. Sav. & Loan Ass'n, 528 F. Supp. 440 (N.D. Ga. 1981), aff'd, 691 F.2d 974 (11th Cir. 1982).

Prerequisite termination agreement. — Prerequisite to effecting a novation, the express terms of a termination agreement must support the contention that the parties intended that agreement to supersede all previous obligations and, furthermore, the termination agreement must purport to cover the subject matter of any previous agreement. Farris v. Pazol, 166 Ga. App. 760, 305 S.E.2d 472 (1983).

Novation is itself a contract and must have all elements of de novo contract. Savannah Bank & Trust Co. v. Wolff, 191 Ga. 111, 11 S.E.2d 766 (1940).

A novation or accord and satisfaction is in itself a contract and must have all the elements of a de novo contract. Therefore, there must be a meeting of the minds if the novation or accord and satisfaction is to be valid and binding. M.W. Buttrill, Inc. v. Air Conditioning Contractors, 158 Ga. App. 122, 279 S.E.2d 296 (1981).

Novation is a complete contract in itself. Franchise Enters., Inc. v. Ridgeway, 157 Ga. App. 458, 278 S.E.2d 33 (1981).

There must be a mutual intent to create a novation. Lindenberg v. First Fed. Sav. & Loan Ass'n, 528 F. Supp. 440 (N.D. Ga. 1981), aff'd, 691 F.2d 974 (11th Cir. 1982).

To discharge existing contract, subsequent, inconsistent agreement covering same subject matter must be valid contract, and not nudum pactum. Carter v. Rich's, Inc., 83 Ga. App. 188, 63 S.E.2d 241 (1951).

Novation must be supported by some new consideration. Bradbury v. Morrison, 93 Ga. App. 704, 92 S.E.2d 607 (1956).

Consideration for novation is not original indebtedness, but change in obligation of parties. Cherry v. Jones, 41 Ga. 579 (1871); Mayor of Brunswick v. Dure, 60 Ga. 457 (1878).

Agreement to pay more for same performance required by prior contract between same parties is unenforceable. Carter v. Rich's, Inc., 83 Ga. App. 188, 63 S.E.2d 241 (1951).

All parties need not expressly agree that new contract shall take place of original contract to constitute a novation, but only that the parties agree that new contract itself be executed. Acree v. Kay, 188 Ga. 783, 4 S.E.2d 820 (1939).

Contracts under seal, if facts bring the contracts under this statute must be controlled thereby. Acree v. Kay, 188 Ga. 783, 4 S.E.2d 820 (1939).

Novation must not prejudice rights of parties to lis pendens. Whatley v. Marshall, 139 Ga. 148, 76 S.E. 1025 (1912).

To constitute novation, enforceable contract must be made between creditor and new debtor. — To constitute a novation, by

which original debtor is released, creditor being bound thereby to discharge debt as to original debtor and look to another for payment of creditor's demand, it is essential that a contract be made between new debtor and creditor by which claim can be enforced against new debtor. *FDIC v. Thompson*, 54 Ga. App. 611, 188 S.E. 737 (1936); *Cowart v. Smith*, 78 Ga. App. 194, 50 S.E.2d 863 (1948).

Novation requires contract, for consideration, containing other and different terms from original. — To allege novation it is necessary to show that another contract containing other and different terms from original contract has been agreed upon and that there is consideration for novation. *Maguire v. Ivey*, 212 Ga. 151, 91 S.E.2d 35 (1956).

Execution of new contract for purchase and sale of same article may satisfy former agreement. *Poland Paper Co. v. Foote & Davies Co.*, 118 Ga. 458, 45 S.E. 374 (1903).

For new note between same parties to displace preexisting one, different consideration or collateral necessary. — In order that the taking of a new note and new lien to secure the note, between the same parties, will operate to discharge or displace the preexisting lien, it is essential that the new lien embrace different property, or that the new lien be based upon a new and distinct consideration. *Albany Loan & Fin. Co. v. Tift*, 43 Ga. App. 789, 160 S.E. 661 (1931).

Note given for existing indebtedness, although for greater interest and later maturity, not novation. — New note, given in lieu of existing note between same parties and for same indebtedness, at higher rate of interest and due at later date, is not given for a new consideration, and therefore does not constitute a novation. *Georgia Nat'l Bank v. Fry*, 32 Ga. App. 695, 124 S.E. 542 (1924); *Cohen's Dep't Stores, Inc. v. Siegel*, 60 Ga. App. 79, 2 S.E.2d 762 (1939); *Motor Contract Div. v. Southern Cotton Oil Co.*, 76 Ga. App. 199, 45 S.E.2d 291 (1947).

Note given for existing indebtedness, even at higher rate of interest and due at later date, is not given for new consideration, and therefore does not constitute novation. *Brooks v. Jackins*, 38 Ga. App. 57, 142 S.E. 574 (1928).

Note given for existing indebtedness, although at greater interest, not novation unless so agreed. — New notes given for exist-

ing indebtedness, although providing for additional interest and, in former case, additional carrying charges, do not operate to extinguish indebtedness on original notes, in absence of express agreement that the notes should so operate. *Carter v. Rich's, Inc.*, 83 Ga. App. 188, 63 S.E.2d 241 (1951).

Renewal between same parties with subject matter and consideration remaining same, not necessarily novation. — Law is well recognized that a contract may be renewed between same parties as to same subject matter, and upon same consideration, without working a novation. *Albany Loan & Fin. Co. v. Tift*, 43 Ga. App. 789, 160 S.E. 661 (1931); *Cohen's Dep't Stores, Inc. v. Siegel*, 60 Ga. App. 79, 2 S.E.2d 762 (1939); *Wilson v. Nauman*, 88 Ga. App. 782, 77 S.E.2d 756 (1953).

Renewal note not a novation, unless so agreed. — Renewal note or instrument is not a novation extinguishing first one, unless there is agreement between parties to that effect. *Cohen's Dep't Stores, Inc. v. Siegel*, 60 Ga. App. 79, 2 S.E.2d 762 (1939).

Renewal of note to executor of deceased payee does not make novation by substitution of new parties. *Collins v. Collins*, 44 Ga. 128 (1871).

Novation of debtors. — There may be a novation of debtors, but the novation must be such as to release the original debtor and substitute a new debtor in the original debtor's place. This release and substitution may be by express terms, or may be inferred from the acts of the parties or by necessary implication from a construction of the new agreement. *Franchise Enters., Inc. v. Ridgeway*, 157 Ga. App. 458, 278 S.E.2d 33 (1981).

Acceptance of substituted performance insufficient to establish novation, absent intention to release original obligor. — Mere acceptance by obligee of performance by assignee, or substituted obligor, is not sufficient to establish novation in absence of words or conduct tending to show intention or agreement on part of obligee to release original obligor and extinguish original obligor's liability. *Cowart v. Smith*, 78 Ga. App. 194, 50 S.E.2d 863 (1948).

Substitution of payor with parties, terms and conditions remaining the same was not a novation. — Change in only one term of original contract which merely substitutes another payor, the parties, terms, and con-

ditions of original contract remaining the same, does not constitute novation. *Melton v. Lowe*, 117 Ga. App. 783, 161 S.E.2d 912 (1968).

Assumption of debt by third party not novation absent intention to release first obligor. — Mere assumption of debt by third party is not sufficient to establish novation since it is essential that intention to release first obligor and extinguish the obligor's liability should definitely appear. Otherwise assumption of debt by third party will be presumed to be merely additional security. *Cowart v. Smith*, 78 Ga. App. 194, 50 S.E.2d 863 (1948).

Consolidating two companies does not necessarily work dissolution of both, and creation of new corporation. Whether such be its effect depends upon legislative intent manifested in statute under which consolidation takes place. *Central R.R. & Banking Co. v. Georgia*, 92 U.S. 665, 23 L. Ed. 757 (1875).

Arbitration agreements. — O.C.G.A. § 13-4-5 is not at odds with the general rule that contractual termination does not extinguish an agreement to arbitrate; to the contrary, O.C.G.A. § 13-4-5 codifies the principle that the effect of a novation on an arbitration clause is equivalent to the effect of contractual termination. *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I, Inc.*, 466 F. Supp. 2d 1293 (N.D. Ga. 2006).

Cited in *Wofford v. Gaines*, 53 Ga. 485 (1874); *Carmichael v. Foster*, 69 Ga. 372

(1882); *Partridge v. Williams' Sons*, 72 Ga. 807 (1884); *Foy-Adams Co. v. Smith*, 19 Ga. App. 172, 91 S.E. 242 (1917); *Hiatt v. Tumlin*, 46 Ga. App. 105, 166 S.E. 836 (1932); *First Nat'l Bank v. Simmons*, 48 Ga. App. 728, 173 S.E. 241 (1934); *Kelley v. Spivey*, 182 Ga. 507, 185 S.E. 783 (1936); *Standard Oil Co. v. Jasper County*, 53 Ga. App. 804, 187 S.E. 307 (1936); *Board of Educ. v. Southern Mich. Nat'l Bank*, 184 Ga. 641, 192 S.E. 382 (1937); *Garvin v. Worthington Pump & Mach. Corp.*, 62 Ga. App. 240, 8 S.E.2d 589 (1940); *Pittsburgh Plate Glass Co. v. Jarrett*, 42 F. Supp. 723 (M.D. Ga. 1942); *Manry v. Selph*, 77 Ga. App. 808, 50 S.E.2d 27 (1948); *Green v. Johns*, 86 Ga. App. 646, 72 S.E.2d 78 (1952); *White v. Williams*, 87 Ga. App. 496, 74 S.E.2d 363 (1953); *Swanson v. Chase*, 107 Ga. App. 295, 129 S.E.2d 873 (1963); *Allstate Ins. Co. v. Moody*, 128 Ga. App. 300, 196 S.E.2d 482 (1973); *Edwards v. Gold Kist, Inc.*, 137 Ga. App. 42, 223 S.E.2d 12 (1975); *Sportsman Camping Ctrs. of Am., Inc. v. Bagwell*, 140 Ga. App. 312, 231 S.E.2d 118 (1976); *Mauldin v. Lowe's of Macon, Inc.*, 146 Ga. App. 539, 246 S.E.2d 726 (1978); *Leasing Systems v. Easy St., Inc.*, 161 Ga. App. 756, 288 S.E.2d 879 (1982); *Lindenberg v. First Fed. Sav. & Loan*, 691 F.2d 974 (11th Cir. 1982); *Olympic Dev. Group, Inc. v. American Druggists' Ins. Co.*, 175 Ga. App. 425, 333 S.E.2d 622 (1985); *Mitchell v. Mitchell*, 191 Ga. App. 139, 381 S.E.2d 84 (1989); *Brack Rowe Chevrolet Co. v. Walls*, 201 Ga. App. 822, 412 S.E.2d 603 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, Novation, §§ 1, 2. 67 Am. Jur. 2d, Sales, §§ 206.

C.J.S. — 17A C.J.S., Contracts, § 409. 66 C.J.S., Novation, §§ 1 et seq., 14 et seq.

ALR. — Judgment against seller of chattels for breach of warranty as conclusive upon prior warrantor, 8 ALR 667.

Applicability of protective provisions of Uniform Conditional Sales Act or similar statutes where there has been a novation of the contract, 83 ALR 998.

Creditor's knowledge of, or consent to, assumption by third person of debtor's obligation as release of original debtor or extinguishment of original debt essential to novation, 87 ALR 281.

Accepted offer to give or take less than full amount of liquidated claim as a novation or an accord executory, 96 ALR 1133.

Necessity or proof of original obligor's consent to, or ratification of, third person's assumption of obligation, in order to effect a novation, 124 ALR 1498.

What constitutes reservation of right to terminate, rescind, or modify contract, as against third party beneficiary, 44 ALR2d 1270.

Creditor's acceptance of obligation of third person as constituting novation, 61 ALR2d 755.

ARTICLE 2

PERFORMANCE

Cross references. — Performance of contracts for sales of goods, § 11-2-501 et seq.

RESEARCH REFERENCES

ALR. — Appointment of receiver as excuse for nonperformance of contract, 3 ALR 627; 12 ALR 1079; 33 ALR 499.

Time for performance of contract for sale or exchange of land where time fixed by contract has been waived, 4 ALR 815.

Service of government as excuse for failure of carrier to discharge duty to individual, 8 ALR 162.

Is actual tender excused by inability of other party to produce paper or other thing to be surrendered as condition of tender, 14 ALR 1120.

Liability of employer for acts or omissions of independent contractor in respect of positive duties of former arising from or incidental to contractual relationships, 29 ALR 736.

Who must bear loss from destruction of or damage to building during performance of building contract, without fault of either party, 53 ALR 103.

Acceptance by municipality of street improvement as binding on property owners as

regards contractor's performance of his obligations, 79 ALR 1107.

Unaccepted tender as affecting lien of real estate mortgage, 93 ALR 12.

Rights of parties to contract the performance of which is interfered with or prevented by war conditions or acts of government in prosecution of war, 153 ALR 1417; 154 ALR 1445; 155 ALR 1447; 156 ALR 1446; 157 ALR 1446; 158 ALR 1446.

Enlistment or mustering of minors into military service, 153 ALR 1420; 155 ALR 1451; 157 ALR 1449.

Basis of recovery for partial performance of contract, full performance of which is prevented by destruction of subject matter, 170 ALR 980.

Public contracts: duty of public authority to disclose to contractor information, allegedly in its possession, affecting cost or feasibility of project, 86 ALR3d 182.

Husband's death as affecting periodic payment provision of separation agreement, 5 ALR4th 1153.

13-4-20. Requirements as to performance of contractual obligations generally.

Performance, to be effectual, must be accomplished by the party bound to perform, or by his agent where personal skill is not required, or by someone substituted, by consent, in his place, and must be substantially in compliance with the spirit and the letter of the contract and completed within a reasonable time. (Orig. Code 1863, § 2811; Code 1868, § 2819; Code 1873, § 2870; Code 1882, § 2870; Civil Code 1895, § 3724; Civil Code 1910, § 4318; Code 1933, § 20-1101.)

Cross references. — Delegation of performance under Uniform Commercial Code, § 11-2-210. Effect of absence of specific time provision in sales contracts under Uniform Commercial Code, § 11-2-309. Duty of administrator or executor to fulfill, when possible, decedent's contractual obligations, § 53-7-9.

Law reviews. — For article discussing failure of consideration, see 4 Mercer L. Rev. 327 (1953). For article surveying recent legislative and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SUBSTANTIAL COMPLIANCE

REASONABLE TIME FOR PERFORMANCE

General Consideration

Law leans against destruction of contracts on ground of uncertainty, and a contract which is originally and inherently too indefinite may later acquire precision and become enforceable by virtue of the subsequent acts, words, or conduct of the parties. Thus, the objection of indefiniteness may be obviated by performance and acceptance of performance. *M.W. Buttrill, Inc. v. Air Conditioning Contractors*, 158 Ga. App. 122, 279 S.E.2d 296 (1981).

Performance as curing lack of mutuality or definiteness. — Even though a contract may be lacking in mutuality or definiteness, on account of the uncertainty, still when that party has entered into performance of the contract, and the other party has accepted as fulfilling the terms of the proposal, the contract becomes mutual, binding, and enforceable. *M.W. Buttrill, Inc. v. Air Conditioning Contractors*, 158 Ga. App. 122, 279 S.E.2d 296 (1981).

Tender of performance must be by party bound or someone acting in that party's behalf. *Ferguson v. Bank of Dawson*, 57 Ga. App. 639, 196 S.E. 195 (1938).

Elements of right to recover are breach and resultant damages. — The elements of a right to recover for a breach of contract are the breach and the resultant damages to the party who has the right to complain about the contract being broken. *Graham Bros. Constr. Co. v. C.W. Matthews Contracting Co.*, 159 Ga. App. 546, 284 S.E.2d 282 (1981).

Contract to bore artesian well may be performed by agent. — Absent stipulation to contrary, one who obligates oneself by written contract to bore artesian well for another is under no obligation to perform any of the labor or to give one's personal attention to work. *Council v. Teal*, 122 Ga. 61, 49 S.E. 806 (1905).

Duty imposed on providers of skilled services. — The law imposes upon building contractors and others performing skilled

services the obligation to exercise a reasonable degree of care, skill, and ability, which is generally taken and considered to be such a degree of care and skill as, under similar conditions and like surrounding circumstances, is ordinarily employed by others of the same profession. *Kuhlke Constr. Co. v. Mobley, Inc.*, 159 Ga. App. 777, 285 S.E.2d 236 (1981).

Liability in tort to third party. — The mere failure of a party to a contract to carry out the contract's terms will not give rise to a cause of action ex delicto in favor of a third person who has contracted with the opposite party to such contract, although in breaching the contract the party so failing may be charged with notice that the opposite party will not be able to perform the contract with such third person. *First Mtg. Corp. v. Felker*, 158 Ga. App. 14, 279 S.E.2d 451 (1981).

Liability in tort for breach procured by nonparty. — A person not a party to a contract may, without justification, procure the contract's breach, and be liable therefor in tort. *First Mtg. Corp. v. Felker*, 158 Ga. App. 14, 279 S.E.2d 451 (1981).

Good faith implied in unilateral contract. — Where an agreement permits one party to unilaterally determine the extent of the other's required performance, an obligation of good faith in making such a determination may be implied. *Kleiner v. First Nat'l Bank*, 581 F. Supp. 955 (N.D. Ga. 1984).

Strict compliance required of cancellation provision. — In a lessor's action to enforce the provisions of a commercial lease pursuant to O.C.G.A. § 13-1-11, because a lessee's predecessor in interest failed to strictly comply with a cancellation option in the lease, and time was of the essence, the trial court erred in ruling otherwise, resulting in an expiration of the option due to the failure to timely exercise the option; thus, on remand the lessor was entitled to summary judgment on the lessor's possession claim and to the past rent due under the lease for the term sought. *Piedmont Ctr. 15, LLC v. Aquent, Inc.*, 286 Ga. App. 673, 649 S.E.2d 733

General Consideration (Cont'd)

(2007), cert. denied, 2007 Ga. LEXIS 749 (Ga. 2007).

Plaintiff's failure to fully perform is complete defense to action for partial performance. *Main v. Simmons*, 2 Ga. App. 821, 59 S.E. 85 (1907); *Bateman v. Bateman*, 135 Ga. 32, 68 S.E. 795 (1910).

Banking transactions. — Plaintiff bank customers alleged defendant bank imposed overdraft fees when an account contained sufficient funds, in contravention of the Deposit Agreement as modified by the implied duty of good faith; thus, the customers sufficiently stated a breach of contract claim in connection with O.C.G.A. § 13-4-20. *White v. Wachovia Bank, N.A.*, 563 F. Supp. 2d 1358 (N.D. Ga. 2008).

Cited in *Feltham v. Sharp*, 99 Ga. 260, 25 S.E. 619 (1896); *Johnson v. Bass*, 142 Ga. 351, 82 S.E. 1053 (1914); *Kraft v. Hendry*, 150 Ga. 155, 103 S.E. 169 (1920); *Morgan v. Colt Co.*, 34 Ga. App. 630, 130 S.E. 600 (1925); *Townsend v. Hames*, 40 Ga. App. 834, 151 S.E. 665 (1930); *Campbell v. Rybert*, 178 Ga. 28, 172 S.E. 52 (1933); *Preston v. National Life & Accident Ins. Co.*, 196 Ga. 217, 26 S.E.2d 439 (1943); *Tyson v. Nimick*, 99 Ga. App. 722, 109 S.E.2d 627 (1959); *Friedman v. Goodman*, 222 Ga. 613, 151 S.E.2d 455 (1966); *State Hwy. Dep't v. Hall Paving Co.*, 127 Ga. App. 625, 194 S.E.2d 493 (1972); *Elkins v. Willett Lincoln-Mercury, Inc.*, 141 Ga. App. 458, 233 S.E.2d 851 (1977); *Davis v. Davis*, 243 Ga. 421, 254 S.E.2d 370 (1979); *Tallman v. Tallman*, 161 Ga. App. 447, 287 S.E.2d 703 (1982); *Dennard v. Freeport Minerals Co.*, 250 Ga. 330, 297 S.E.2d 222 (1982); *TRST Atlanta, Inc. v. 1815 The Exchange, Inc.*, 220 Ga. App. 184, 469 S.E.2d 238 (1996); *Najem v. Classic Cadillac Atlanta Corp.*, 241 Ga. App. 661, 527 S.E.2d 259 (1999); *Stephens v. Trust for Pub. Land*, 479 F. Supp. 2d 1341 (N.D. Ga. 2007).

Substantial Compliance

Substantial compliance with terms of agreement suffices. — O.C.G.A. § 13-4-20 requires that substantial compliance with terms of agreement is all that is required of either of party. *First Nat'l Bank v. Wynne*, 149 Ga. App. 811, 256 S.E.2d 383 (1979).

Compliance with spirit as well as letter of agreement. — When one party has the power to unilaterally set terms in a contract, the discretion to do so is limited by a requirement that the creditor's action uphold both the spirit as well as the letter of the agreement. *In re Royal*, 75 Bankr. 50 (Bankr. S.D. Ga. 1987).

Obligation of good faith is implied in every contract in Georgia. *In re Royal*, 75 Bankr. 50 (Bankr. S.D. Ga. 1987).

Good faith comparable to substantial compliance. — Good faith is merely a shorter way of saying substantial compliance with spirit, and not letter only, of contract. *Crooks v. Chapman Co.*, 124 Ga. App. 718, 185 S.E.2d 787 (1971).

Where plaintiffs entered into a three-year "Output and Requirements Contract and Security Agreement" with defendant, under which defendant was to furnish all the supplies, materials, labor, advice, and other services needed to produce and harvest pecans from pecan groves owned and leased by plaintiffs and to market all the pecans produced from the groves, regardless of whether this contract falls under O.C.G.A. § 11-2-306 or O.C.G.A. § 13-4-20, defendant had a duty to perform in good faith. *Flynn v. Gold Kist, Inc.*, 181 Ga. App. 637, 353 S.E.2d 537 (1987).

Arbitration award in dispute over substantial compliance enforced. — When a party delivered cots, substantially the same as ordered, and a dispute arose that was submitted to arbitration, it was held that the plaintiff was entitled to recover the award. *Sasseen, Whitaker & Co. v. Weakley & Warren*, 34 Ga. 560 (1866).

Employment contract. — Issue of fact existed as to whether plaintiff substantially complied with the subject conditions of employment contract, and the trial court did not err in denying defendant's motion for directed verdict on this claim. *Building Materials Whsle., Inc. v. Reeves*, 209 Ga. App. 361, 433 S.E.2d 346 (1993).

Termination clause. — Trial court did not err in instructing a jury that only substantial compliance, rather than strict compliance, was required with a termination clause. *Rome Healthcare LLC v. Peach Healthcare Sys.*, 264 Ga. App. 265, 590 S.E.2d 235 (2003).

Reasonable Time for Performance

Reasonable time implied when not specified. — When contract fixes no time for performance, it is to be construed as allowing reasonable time for that purpose. *Bearden Mercantile Co. v. Madison Oil Co.*, 128 Ga. 695, 58 S.E. 200 (1907).

Under contract providing no specific time for performance, reasonable time is to be allowed. *Ferguson v. Bank of Dawson*, 57 Ga. App. 639, 196 S.E. 195 (1938).

When no definite time is stated for the performance of a contract, the presumption is that the parties intended that performance would be had within a reasonable time. *Parker v. Futures Unlimited, Inc.*, 157 Ga. App. 520, 278 S.E.2d 99 (1981).

When the contract does not specify a time for performance, the law implies that the parties contemplated that performance would be initiated within a reasonable time. *Jeff Goolsby Homes Corp. v. Smith*, 168 Ga. App. 218, 308 S.E.2d 564 (1983).

Because a real estate sales contract did not specify a closing date other than the date that the seller was able to obtain clear title, performance under the contract was required to be completed within a reasonable time. *Weeks v. Rowell*, 289 Ga. App. 507, 657 S.E.2d 881 (2008).

What is a reasonable time is to be determined by jury under all circumstances. *Bearden Mercantile Co. v. Madison Oil Co.*, 128 Ga. 695, 58 S.E. 200 (1907); *Berman v. Berman*, 239 Ga. 443, 238 S.E.2d 27 (1977); *Dwoskin v. Rollins, Inc.*, 634 F.2d 285 (5th Cir. 1981); *Parker v. Futures Unlimited, Inc.*, 157 Ga. App. 520, 278 S.E.2d 99 (1981).

It is the general rule that what is a reasonable time, under circumstances attending transaction, is a matter for determination by jury. *Ferguson v. Bank of Dawson*, 57 Ga. App. 639, 196 S.E. 195 (1938).

Stipulation "to be delivered as needed" construed as meaning within reasonable time. — Contract whereby plaintiff agreed to deliver to defendant 100,000 cans at stipulated price per thousand, which under terms of contract, were "to be delivered as needed," necessarily contemplated that cans would be needed in business of defendant,

and time as to when the cans would be needed being left indefinite by terms of contract, it will be construed as having meant within reasonable time. *Newbro Mfg. Co. v. American Can Co.*, 56 Ga. App. 58, 192 S.E. 74 (1937).

Construction of term "immediately." — "Immediately" has been construed in many cases to mean within reasonable diligence and within reasonable length of time in view of attending circumstances of each particular case. *Dwoskin v. Rollins, Inc.*, 634 F.2d 285 (5th Cir. 1981).

Construction of term "presently." — The word "presently" or its synonyms should be given a reasonable and substantial construction, in view of the thing to be done, and not to be considered as equivalent to instant. *Dwoskin v. Rollins, Inc.*, 634 F.2d 285 (5th Cir. 1981).

Delivery of goods shortly means within reasonable time. — In contract for sale of personal property to be delivered shortly, it is duty of the seller to tender delivery within a reasonable time. *Cincinnati Glass & China Co. v. Stephens*, 3 Ga. App. 766, 60 S.E. 360 (1908).

Time to obtain financing. — It was unreasonable as a matter of law for the plaintiff not to obtain financing for seven and one-half years, during which time, based on plaintiff's own evidence, the property was available to the plaintiff. *Grier v. Brogdon*, 234 Ga. App. 79, 505 S.E.2d 512 (1998).

Tender of stock certificates six months after execution of contract, unreasonable as matter of law. *Ferguson v. Bank of Dawson*, 57 Ga. App. 639, 196 S.E. 195 (1938).

Demand for immediate payment on note by its terms payable in future. — When a promissory note executed pursuant to the divorce settlement agreement and the agreement itself specifically set forth the time for payment of the note by the former husband to his former wife upon the occurrence of certain specified events, one of which will necessarily occur at some future date, there is no error in a trial court's denial of the former wife's demand for immediate payment on the note. *McCafferty v. Herring*, 157 Ga. App. 699, 278 S.E.2d 436 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, § 355 et seq.

C.J.S. — 17A C.J.S., Contracts, § 451 et seq.

ALR. — Liability of one contracting to make repairs for damages from improper performance of the work, 1 ALR 1654; 44 ALR 824.

Right to enforce purchaser's promise to pay mortgage when the grantor or promisee was not himself liable, 12 ALR 1528.

Substantial performance of contract for manufacture or sale of article, 19 ALR 815.

Measure of recovery by building contractor where contract is substantially, but not exactly, performed, 23 ALR 1435; 38 ALR 1383; 65 ALR 1297.

Rights of parties to a timber contract upon failure of purchaser to remove timber within time fixed or within a reasonable time, 31 ALR 944; 42 ALR 641; 71 ALR 143; 164 ALR 423.

Option to pay purchase price in cash or on terms, 36 ALR 857.

Assignability of contract to furnish all of buyer's requirement or to take all of seller's output, 39 ALR 1192.

Liability on the contract of one who without authority assumes to contract for another, 42 ALR 1310; 60 ALR 1348.

Death of contractor as terminating building contract, 44 ALR 1345.

Notice after close of period as satisfying requirement that it be given at end of period, 45 ALR 725.

Early death of vendor as affecting enforcement of contract to convey in consideration of contract for his or her support for life, 49 ALR 601.

Parties or obligations to which time-of-essence clause in contract applies, 107 ALR 275.

Personal liability for repayment of loan or advance under contract which expressly provides for repayment from proceeds of crop or other property and contains no express promise for repayment otherwise, 111 ALR 1062.

Time factor in purchase or sale of corporate stock under contract not fixing a definite time for demand or performance, 144 ALR 895.

Construction and effect of provision in private building and construction contract that work must be done to satisfaction of owner, 44 ALR2d 1114.

Partial payment on private building or construction contract as waiver of defects, 66 ALR2d 570.

Insurer's acceptance of defaulted premium payment or defaulted payment on premium note, as affecting liability for loss which occurred during period of default, 7 ALR3d 414.

Enforceability of contract to make will in return for services, by one who continues performance after death of person originally undertaking to serve, 84 ALR3d 930.

Timeliness of notice of exercise of option to purchase realty, 87 ALR3d 805.

13-4-21. Effect of act of God.

If performance of the terms of a contract becomes impossible as a result of an act of God, such impossibility shall excuse nonperformance, except where, by proper prudence, such impossibility might have been avoided by the promisor. (Orig. Code 1863, § 2812; Code 1868, § 2820; Code 1873, § 2871; Code 1882, § 2871; Civil Code 1895, § 3725; Civil Code 1910, § 4319; Code 1933, § 20-1102.)

Cross references. — Duty of administrator or executor to fulfill, when possible, decedent's contractual obligations, § 53-7-9.

Law reviews. — For article discussing the anachronistic nature of the Georgia Con-

tracts Code as dramatized by comparing the doctrine of consideration as it is formulated in the Restatements of Contracts and in Code 1933, Title 20 (now this title), and the interpretative approach Georgia courts have

taken in dealing with such Code, see 13 Ga. L. Rev. 499 (1979). (But see amendments by Ga. L. 1981, p. 876.)

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Act of God defined. — Act of God means any accident produced by physical causes which are irresistible; such as lightning, storms, perils of sea, earthquakes, inundations, sudden death, or illness. Act of God excludes all idea of human agency. *Cannon v. Hunt*, 113 Ga. 501, 38 S.E. 983 (1901).

If act of God makes performance impossible, it constitutes a defense equivalent to performance. *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 345 F. Supp. 1066 (S.D. Ga. 1972), later proceeding, 401 F. Supp. 1051 (S.D. Ga. 1975).

Impossibility does not amount to performance save where it is set up as a defense. *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 345 F. Supp. 1066 (S.D. Ga. 1972), later proceeding, 401 F. Supp. 1051 (S.D. Ga. 1975).

Impossibility may be defense, but not basis for recovery. — Impossibility of performance may be defense to action but it does not stand for performance so as to enable such party to sue and recover as if the party had performed. *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 345 F. Supp. 1066 (S.D. Ga. 1972), later proceeding, 401 F. Supp. 1051 (S.D. Ga. 1975).

Wars not acts of God. — World War II can in no sense be said to be an act of God. War is not an unforeseen casualty or misfortune; on the contrary, war is something which may be anticipated, as unpleasant as it is to do so, and against which parties can protect themselves by contract. *Felder v. Oldham*, 199 Ga. 820, 35 S.E.2d 497 (1945).

Impossibility not due to act of God nor other party. — If the plaintiff contracts to perform covenants that are impossible, not because of an act of God or the conduct of the defendant, the failure to perform such covenants is as fatal to the plaintiff's right to recover as a breach of the contract for any other reason. *J.C. Penney Co. v. Davis & Davis, Inc.*, 158 Ga. App. 169, 279 S.E.2d 461 (1981).

Nonperformance attributable to natural, reasonably expected rains, not excused. — Nonperformance of contract not excused because one of party is prevented from

performing that party's obligations in premises by rains which are naturally and reasonably to be expected. In no sense could interference with work, attributable to rains which were neither unusual nor unprecedented, be an excuse for noncompliance with the contract. *Tasker v. Baugh & Johnson*, 124 Ga. 846, 53 S.E. 266 (1906). See also *Cannon v. Hunt*, 113 Ga. 501, 38 S.E. 983 (1901).

Sickness of defendant is good defense to scire facias issued to forfeit defendant's bond alleged to be defaulted. *McArdle v. McDaniel*, 75 Ga. 270 (1885).

Liability for error in transmitting telegram during storm. — Telegraph company may be excused for nontransmission of message due to storms, but if message be transmitted and alteration occurs, causing damage to sender, company is liable for damage. However, a sudden storm rendering it impossible for company to determine whether message, as received, was same as that sent may excuse company. *Western Union Tel. Co. v. Cohen*, 73 Ga. 522 (1884).

Injury not caused by act of God if negligence plays part. — No injury can be said to be caused by act of God which can, under any fair view, be attributed to negligence of man. *Georgia S. & F. Ry. v. Barfield*, 1 Ga. App. 203, 58 S.E. 236 (1907).

Section inapplicable where purpose for which premises rented later becomes illegal. — After tenant rented hotel that included saloon and later sale of liquor was prohibited by legislature, tenant was liable for full amount of rent, and the act of God provisions were inapplicable. *Lawrence v. White*, 131 Ga. 840, 63 S.E. 631, 19 L.R.A. (n.s.) 966, 15 Ann. Cas. 1097 (1909).

Cited in *Griggs v. Swift*, 82 Ga. 392, 9 S.E. 1062 (1889); *Young v. Waldrip*, 91 Ga. 765, 18 S.E. 23 (1893); *Bank of Wrightsville v. Merchants & Farmers Bank*, 119 Ga. 288, 46 S.E. 94 (1903); *Cooley v. Moss*, 123 Ga. 707, 51 S.E. 625 (1905); *White v. Sailors*, 17 Ga. App. 550, 87 S.E. 831 (1916); *Campbell v. Rybert*, 178 Ga. 28, 172 S.E. 52 (1933); *Allstate Ins. Co. v. Moody*, 128 Ga. App. 300,

196 S.E.2d 482 (1973); *Valley Place, Ltd. v. T.I. Equity Fund, L.P.*, 246 Ga. App. 378, 541 S.E.2d 37 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, § 404 et seq.

Am. Jur. Proof of Facts. — Act of God, 6 POF3d 319.

C.J.S. — 17A C.J.S., Contracts, §§ 459, 463.

ALR. — Appointment of receiver as excuse for nonperformance of contract, 12 ALR 1079; 33 ALR 499.

Destruction or loss of specific property which is the subject or basis of a contract, after the inception of the contract, as excuse for nonperformance, 12 ALR 1273; 74 ALR 1289.

Destruction of or damage to building as affecting rights of parties to option, 23 ALR 1225.

Demurrage as affected by impossibility of performing shipper's obligation, due to act of God or weather conditions, 26 ALR 1431.

Death of obligor as affecting executory obligation in consideration of promise to marry obligor, 34 ALR 86.

Demurrage as affected by insurrection or act of public authorities, 44 ALR 829.

Death of contractor as terminating building contract, 44 ALR 1345.

Construction and effect of provision excusing performance of contract in case of crop failure, 67 ALR 1432.

Insolvency of insurer as affecting liability of one under duty by statute or contract to carry or maintain insurance for another's protection, 106 ALR 248.

Rights of parties to contract the perfor-

mance of which is interfered with or prevented by war conditions or acts of government in prosecution of war, 137 ALR 1199; 147 ALR 1273; 148 ALR 1382; 149 ALR 1447; 150 ALR 1413; 151 ALR 1445; 151 ALR 1447; 152 ALR 1445; 152 ALR 1447; 153 ALR 1413; 153 ALR 1417; 154 ALR 1445; 155 ALR 1445; 155 ALR 1447; 156 ALR 1445; 156 ALR 1446; 157 ALR 1445; 157 ALR 1446; 158 ALR 1445; 158 ALR 1446.

Price ceiling, adopted as a war measure, as affecting pre-existing contracts, 147 ALR 1286; 149 ALR 1451; 151 ALR 1450.

Modern status of the rules regarding impossibility of performance as defense in action for breach of contract, 84 ALR2d 12.

Liabilities or risks of loss arising out of contract for repairs or additions to, or installations in, existing building which, without fault of either party, is destroyed pending performance, 28 ALR3d 788.

Construction and operation of parking-space provision in shopping-center lease, 56 ALR3d 596.

Enforceability of contract to make will in return for services, by one who continues performance after death of person originally undertaking to serve, 84 ALR3d 930.

Inability to obtain license, permit, or charter required for tenant's business as defense to enforcement of lease, 89 ALR3d 329.

Right of architect to compensation under contractual provision that fee is to be paid from construction loan funds, 92 ALR3d 509.

13-4-22. Effect of refusal of party to perform concurrent condition upon offer of performance by other party.

Where the conditions as to performance of a contract are concurrent, if one party offers to perform and the other refuses to perform, the first shall be discharged from the performance of his part of the contract and may maintain an action against the other. (Civil Code 1895, § 3708; Civil Code 1910, § 4302; Code 1933, § 20-903.)

History of Code section. — This Code section is derived from the decision in *Ensign v. Sharp*, 72 Ga. 708 (1884).

Law reviews. — For note, “Contingency

Financing Clauses in Real Estate Sales Contracts in Georgia,” see 8 Ga. L. Rev. 186 (1973).

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Party voluntarily placing oneself in position where one cannot perform releases other party from any further duty to comply with contingencies as condition precedent to suit. *Rollins v. Gault*, 153 Ga. App. 781, 266 S.E.2d 560 (1980).

Rescission of contract must go to the whole. There can be no rescission of the contract in part. *Baker v. Corbin*, 148 Ga. 267, 96 S.E. 428 (1918).

Cited in *Biggers v. Pace*, 5 Ga. 171 (1848); *Ensign v. Sharp*, 72 Ga. 708 (1884); *Collier v. Weyman & Connors*, 114 Ga. 944, 41 S.E. 50

(1902); *McLeod v. Hendry*, 126 Ga. 167, 54 S.E. 949 (1906); *Baker v. Corbin*, 148 Ga. 267, 96 S.E. 428 (1918); *Garrison Motor Co. v. Parrish*, 52 Ga. App. 766, 184 S.E. 766 (1936); *Gibbs v. H.T. Henning Co.*, 189 Ga. 675, 7 S.E.2d 238 (1940); *James H. Craggs Constr. Co. v. King*, 274 F.2d 1 (5th Cir. 1960); *American Fletcher Mtg. Co. v. First Am. Inv. Corp.*, 463 F. Supp. 186 (N.D. Ga. 1978); *Eastview Healthcare, LLC v. Synertx, Inc.*, 296 Ga. App. 393, 674 S.E.2d 641 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 321 et seq., 355 et seq., 359, 362.

C.J.S. — 17A C.J.S., Contracts, § 345.

ALR. — Presence of noxious weeds as ground for rescission of contract for purchase of land, 2 ALR 511.

Motive as affecting the exercise of a contractual right, as between parties to the contract, 25 ALR 977.

Party who insisted that contract be performed notwithstanding total breach or re-

pudiation by other party as entitled to change his position and decline to perform on his own part, where other party did not proceed with performance or otherwise alter his position in reliance on a supposition of performance, 143 ALR 489.

Measure or basis of attorney’s recovery on express contract fixing noncontingent fees, where he is discharged without cause or fault on his part, 54 ALR2d 604.

13-4-23. Effect of nonperformance caused by conduct of other party.

If the nonperformance of a party to a contract is caused by the conduct of the opposite party, such conduct shall excuse the other party from performance. (Orig. Code 1863, § 2814; Code 1868, § 2822; Code 1873, § 2873; Code 1882, § 2873; Civil Code 1895, § 3727; Civil Code 1910, § 4321; Code 1933, § 20-1104.)

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When defendant’s anticipatory breach is established, plaintiff has legal excuse for failure to fully perform. *Whitley Constr. Co. v. Virginia Supply & Well Co.*, 99 Ga. App. 419, 108 S.E.2d 819 (1959).

Offer to perform by one and refusal to perform by other, gives former right of action. *Booth v. Saffold*, 46 Ga. 278 (1872).

Right of action on mutual covenant accrues on performance or offer thereof. — When covenants are mutual and dependent, a right of action accrues to either party on one’s performance or on one’s offer to perform, if performance is defeated by fault of other party. *Booth v. Saffold*, 46 Ga. 278 (1872).

Refusal of proper tender negates collateral benefits of agreement. — If the debtor makes a proper tender of the full amount due and the tender is refused, the creditor loses any collateral benefits the creditor may have under the agreement and the tender constitutes payment in full. *Gaston v. Tate*, 169 Ga. App. 298, 312 S.E.2d 372 (1983).

Performance or tender excused by other party's repudiation or conduct rendering it useless or impossible. — When contract provides that there must be tender of money or performance of some obligation, party bound to make the tender or perform obligation may be relieved, and tender and obligation held to have been waived, if other party to contract repudiates it, by act or word, or takes position which would render tender or performance of obligation imposed useless or impossible. *Rives E. Worrell Co. v. Key Sys.*, 147 Ga. App. 383, 248 S.E.2d 686 (1978).

To constitute a defense to breach of a lease action the defendant's nonperformance must have been caused by conduct of the plaintiff which made the defendant's performance useless or impossible. *Ott v. Vineville Mkt., Ltd.*, 203 Ga. App. 80, 416 S.E.2d 362 (1992).

Since the parties' verbal expressions and conduct demonstrated an intent to be bound by an oral agreement for the sale of two sports teams and the operating rights to a sports arena, the seller's argument that the oral contract failed because the buyer had not obtained required approvals from the respective sports leagues failed because the seller's conduct in executing an agreement with another entity prevented the buyer from obtaining the league approvals. *Turner Broad. Sys. v. McDavid*, No. A09A2314, 2010 Ga. App. LEXIS 317 (Mar. 26, 2010).

No evidence to show competition made business impossible or useless. — Although nearby competition seemingly could hamper a business' profitability, defendant's evidence failed to create a credible issue of fact on whether this competition made defendant's business' operation impossible or useless, therefore, the trial court did not err in granting summary judgment to the plaintiff. *Ott v. Vineville Mkt., Ltd.*, 203 Ga. App. 80, 416 S.E.2d 362 (1992).

One prevented from full performance by actions of other party may recover for part

performed. — *Coppedge v. Financial Servs. Group Corp.*, 150 Ga. App. 849, 258 S.E.2d 654 (1979).

If both parties contributed to the delay in performance, but defendant's breaches were in no way caused by plaintiff's conduct, O.C.G.A. § 13-4-23 did not apply to excuse defendant's breaches. *CRS Sirrinc, Inc. v. Dravo Corp.*, 219 Ga. App. 301, 464 S.E.2d 897 (1995).

Section permits one to waive breach and sue in quantum meruit for services performed. — Party to contract who has partly performed by rendering valuable services may, if it appears that opposite party has repudiated and abandoned contract, or has prevented former from further performance, waive one's right to recover for breach of contract, and, by treating contract as rescinded, maintain action in quantum meruit against other contracting party for value of services rendered. *Weathercraft Co. v. Byrd*, 32 Ga. App. 369, 123 S.E. 180 (1924).

Improper tender excused when opposite party's conduct waives obligation to tender. — Even when one party does not properly tender materials, the tendering party is relieved of that obligation when other party instructs the tendering party to keep materials where they are. Such conduct by receiving party amounts to waiver of tendering party's contractual obligation to perform. *Rives E. Worrell Co. v. Key Sys.*, 147 Ga. App. 383, 248 S.E.2d 686 (1978).

No recovery of damages where delay in performance proximately caused by both parties. — When each party to contract proximately contributed to delay in performance, law does not provide for recovery or apportionment of damages occasioned thereby to either party. *J.A. Jones Constr. Co. v. Greenbriar Shopping Ctr.*, 332 F. Supp. 1336 (N.D. Ga. 1971), *aff'd*, 461 F.2d 1269 (5th Cir. 1972).

Impossibility not due to act of God nor other party. — When the plaintiff contracts to perform covenants that are impossible, not because of an act of God or the conduct of the defendant, the failure to perform such covenants is as fatal to the plaintiff's right to recover as a breach of the contract for any other reason. *J.C. Penney Co. v. Davis & Davis, Inc.*, 158 Ga. App. 169, 279 S.E.2d 461 (1981).

Guarantor estopped after guarantor acknowledged existence of actionable default.

— Guarantor's post-default agreements, in which guarantor acknowledged the existence of an actionable default in the payment of notes, estopped the guarantor from subsequently asserting that the initial declaration of the default was "wrongful and meritless." *Harrell v. Huntington Assocs.*, 190 Ga. App. 421, 379 S.E.2d 194 (1989).

Demand for performance. — When an employee presented evidence showing performance on the employee's part until the time the employee was allegedly terminated by the employer, it is immaterial whether the employee demanded performance by the employer under an employment contract. *Gram Corp. v. Wilkinson*, 210 Ga. App. 680, 437 S.E.2d 341 (1993).

Offer to perform insufficient tender of performance. — When a seller failed to pay the closing costs under a buy-back provision in its contract with the buyers, the buyers were properly granted a declaratory judgment which held that the seller was responsible to pay the closing costs, and an offer to do so was insufficient to satisfy this duty, and did not satisfy O.C.G.A. § 13-4-24. *Tullis Devs., Inc. v. 3M Constr., Inc.*, 282 Ga. App. 335, 638 S.E.2d 787 (2006).

Failure to meet sales thresholds. — Defendant properly terminated the distributor's agreement because plaintiff failed to meet certain sales thresholds in the agreement. *Imps. Serv. Corp. v. GP Chems. Equity, LLC*, 652 F. Supp. 2d 1292 (N.D. Ga. 2009).

Lease contracts. — Because evidence was presented that a commercial lessee successfully terminated its lease only because it was forced out of business when the lessor refused to pay for stone it received from the lessee, the trial court properly held that the lessor was required to mitigate its damages. *Allen v. Harkness Stone Co.*, 271 Ga. App. 397, 609 S.E.2d 647 (2004).

Obligation to act excused. — Obligation of plaintiffs, a debtor, its affiliate, and a subsidiary, to act within a certain time under the terms of a securities purchase agreement was excused, under O.C.G.A. § 13-4-23, due to defendant's failure to respond fully to plaintiffs' requests for information because (1) an employee of plaintiffs could not have determined whether plaintiffs agreed or disagreed with defendant's figures in two work-

ing capital statements without the information the employee requested from defendant; (2) the evidence did not establish that defendant cooperated with plaintiffs when they requested additional documentation and clarification; and (3) plaintiffs' ability to perform their obligations under the agreement was hampered by defendant's failure to provide necessary documents and answers to plaintiffs' questions about defendant's calculations. *Allied Holdings, Inc. v. Cox* (In re Allied Holdings, Inc.), No. 05-12515-CRM through 05-12537-CRM, 2009 Bankr. LEXIS 3603 (Bankr. N.D. Ga. Sept. 30, 2009).

Cited in Cincinnati Glass & China Co. v. Stephens, 3 Ga. App. 766, 60 S.E. 360 (1908); *Chamberlin v. Booth & McLeroy*, 135 Ga. 719, 70 S.E. 569, 35 L.R.A. (n.s.) 1223 (1911); *Johnson v. Bass*, 142 Ga. 351, 82 S.E. 1053 (1914); *White v. Sailors*, 17 Ga. App. 550, 87 S.E. 831 (1916); *Flake v. Bowman*, 28 Ga. App. 443, 111 S.E. 747 (1922); *Grolier Soc'y v. Freeman*, 45 Ga. App. 465, 165 S.E. 290 (1932); *Prudential Ins. Co. of Am. v. Ferguson*, 51 Ga. App. 341, 180 S.E. 503 (1935); *Bancroft v. Conyers Realty Co.*, 63 Ga. App. 106, 10 S.E.2d 286 (1940); *McCoy v. Scarborough*, 73 Ga. App. 519, 37 S.E.2d 221 (1946); *Lloyd v. Norman*, 77 Ga. App. 598, 49 S.E.2d 131 (1948); *Anagnostis v. Alexandrou*, 77 Ga. App. 742, 49 S.E.2d 774 (1948); *Ellis v. Von Kamp*, 100 Ga. App. 60, 110 S.E.2d 97 (1959); *James H. Craggs Constr. Co. v. King*, 274 F.2d 1 (5th Cir. 1960); *Swanson v. Chase*, 107 Ga. App. 295, 129 S.E.2d 873 (1963); *State Hwy. Dep't v. W.L. Cobb Constr. Co.*, 111 Ga. App. 822, 143 S.E.2d 500 (1965); *Stokes v. Walker*, 131 Ga. App. 550, 206 S.E.2d 564 (1974); *Swindell v. Georgia State Dep't of Educ.*, 138 Ga. App. 57, 225 S.E.2d 503 (1976); *Cel-Ko Bldrs. & Developers, Inc. v. BX Corp.*, 140 Ga. App. 501, 231 S.E.2d 361 (1976); *Trimier v. Atlanta Univ., Inc.*, 141 Ga. App. 546, 234 S.E.2d 342 (1977); *United Car & Truck Leasing, Inc. v. Roberts*, 150 Ga. App. 369, 257 S.E.2d 905 (1979); *Complete Trucklease, Inc. v. Auto Rental & Leasing, Inc.*, 160 Ga. App. 568, 288 S.E.2d 75 (1981); *Starling v. Housing Auth.*, 162 Ga. App. 852, 293 S.E.2d 392 (1982); *Thompson v. Crouch Contracting Co.*, 164 Ga. App. 532, 297 S.E.2d 524 (1982); *Georgia Power Co. v. Maxwell*, 169 Ga. App. 324, 312 S.E.2d 645

(1983); Southern Bus. Machs. of Savannah, Inc. v. Norwest Fin. Leasing, Inc., 194 Ga. App. 253, 390 S.E.2d 402 (1990); Williams Tile & Marble Co. v. Ra-Lin & Assocs., 206 Ga. App. 750, 426 S.E.2d 598 (1992); TMS Ins. Agency, Inc. v. Mitchell, 208 Ga. App. 614, 431 S.E.2d 391 (1993); Roberson v. Eichholz, 218 Ga. App. 511, 462 S.E.2d 382 (1995); C & S/Sovran Corp. v. First Fed. Sav.

Bank, 266 Ga. 104, 463 S.E.2d 892 (1995); Taliafaro, Inc. v. Rose, 220 Ga. App. 249, 469 S.E.2d 246 (1996); Raburn Bonding Co. v. State, 244 Ga. App. 386, 535 S.E.2d 763 (2000); Camp v. Peetluk, 262 Ga. App. 345, 585 S.E.2d 704 (2003); Eudy v. Universal Wrestling Corp., 272 Ga. App. 142, 611 S.E.2d 770 (2005).

RESEARCH REFERENCES

ALR. — Appointment of receiver as excuse for nonperformance of contract, 33 ALR 499.

Claim in receivership for breach of contract which was still executory when receiver was appointed, 33 ALR 508.

Early death of vendor as affecting enforce-

ment of contract to convey in consideration of contract for his or her support for life, 49 ALR 601.

Necessity of showing damage to establish fraud as defense to action on contract, 91 ALR2d 346.

13-4-24. Requirements for and effect of tender generally.

A tender properly made may be equivalent to performance. The tender must be certain and unconditional, except for a receipt in full or delivery of the obligation, and may be made by an agent and to an agent authorized to receive. The tender must be in full payment of the specific debt, and not in part, and may be made at any time before trial. If tender is rejected on grounds unrelated to informality, informality cannot afterward be raised in objection to the tender. (Orig. Code 1863, § 2815; Code 1868, § 2823; Code 1873, § 2874; Code 1882, § 2874; Civil Code 1895, § 3728; Civil Code 1910, § 4322; Code 1933, § 20-1105.)

Law reviews. — For article discussing the historical background of the doctrine of

tender and its application in Georgia, see 21 Mercer L. Rev. 413 (1969).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
MEDIUM OR FORM OF TENDER
INCOMPLETE TENDER
CONDITIONAL TENDER
WHEN TENDER EXCUSED

General Consideration

To constitute valid tender, amount offered must be certain, unconditional, and in full of obligation. Irvin v. Locke, 200 Ga. 675, 38 S.E.2d 289 (1946).

Valid unconditional continuous tender

stops running of interest. Bank of Early v. Broun, 156 Ga. App. 445, 274 S.E.2d 802 (1980).

Merely evidencing willingness to pay, or offer or intention to make tender not sufficient. Jolly v. Jones, 201 Ga. 532, 40 S.E.2d 558 (1946).

Mere written proposal to pay money, with no offer of cash, not tender. *Angier v. Equitable Bldg. & Loan Ass'n*, 109 Ga. 625, 35 S.E. 64 (1900).

Borrower under deed to secure debt cannot prevent sale under power unless borrower tenders debt. — Borrower who has executed deed to secure debt is not entitled to injunction against sale of property under power in deed unless borrower first pays or tenders to creditor amount admittedly due. Same rule applies where one standing in place of borrower seeks injunction to prevent transferee or assignee of such deed from selling property for purpose of satisfying secured debt. *Crockett v. Oliver*, 218 Ga. 620, 129 S.E.2d 806 (1963).

Tender of fine equivalent to payment if made before past due. — Proper tender of a fine would be equivalent to the fine's payment, when such tender is made after time which law allows for paying fine, it does not have effect of payment. *Pappas v. Aldredge*, 192 Ga. 482, 15 S.E.2d 718 (1941).

How tender on offer to redeem property from taxes should be made. — Tender on offer to redeem property from taxes not only must be made in due time and manner, but be continuous, with continuous offer to pay; and if such continuity is not otherwise shown, at least bringing of money into court on filing of suit is necessary in place of continuous offer by pleading. *Durham v. Crawford*, 196 Ga. 381, 26 S.E.2d 778 (1943).

Worthless check, where worthlessness unknown to person to whom tendered, cannot constitute valid legal tender of a debt, even though person to whom check is tendered has waived fact that tender is made in form of a check. *Manry v. Phoenix Mut. Life Ins. Co.*, 42 Ga. App. 24, 155 S.E. 43 (1930).

Tender of check, worthless at time written or any time thereafter, not valid legal tender. — Tender of check drawn upon bank in which drawer had not on deposit, either at that time or at any time afterwards, funds sufficient to pay check, does not constitute valid legal tender. *Manry v. Phoenix Mut. Life Ins. Co.*, 42 Ga. App. 24, 155 S.E. 43 (1930).

Check, worthless when tendered, not valid legal tender, although made with intent to cover. — It is immaterial that person tendering worthless check intends to make check good by deposit of sufficient funds in bank

before check is presented for payment, and will do so if check is accepted, and that check if accepted will be paid; the check nevertheless is at the time, by reason of insufficiency of funds in bank to cover the check, of no value, and for this reason is not a valid legal tender. *Manry v. Phoenix Mut. Life Ins. Co.*, 42 Ga. App. 24, 155 S.E. 43 (1930).

Effect of refusal of proper tender. — When creditor refuses to accept proper tender, claim is not extinguished, nor is debtor harmed by refusal. Debtor still has the debtor's money. The debtor may lend it or use it in business. If, however, the debtor wishes to stop running of interest, or to prevent accrual of costs, the debtor must keep the tender good. But where creditor has collateral, mortgage, or other form of security upon property of debtor, failure to accept legal tender discharges lien which was intended to secure payment. *Bourquin v. Bourquin*, 120 Ga. 115, 47 S.E. 639 (1904); *Ragan v. Newton*, 27 Ga. App. 534, 109 S.E. 412 (1921).

When creditor refuses to accept proper tender in payment of debt, refusal does not extinguish debt, but creditor loses collateral benefits under security deed given to secure the debt; however, if proper tender is refused by creditor under claim of right bona fide because of mistake on creditor's part as to creditor's legal rights, refusal does not operate as discharge of security. *Lanier v. Mandeville Mills*, 183 Ga. 716, 189 S.E. 532 (1937).

Refusal of creditor to accept proper tender in payment of debt does not extinguish debt, but creditor loses collateral benefits under deed given to secure debt. *Ward v. McGuire*, 213 Ga. 563, 100 S.E.2d 276 (1957).

Refusal of proper tender discharges lien. Creditor, by refusing to accept, does not forfeit the creditor's right to the thing tendered, but the creditor does lose all collateral benefits or securities. *Lanier v. Romm*, 131 Ga. App. 531, 206 S.E.2d 588 (1974).

If payment is refused when legally tendered, such tender satisfies statutory requirement of payment. *Anderson v. Barron*, 208 Ga. 785, 69 S.E.2d 874 (1952).

Plea of tender must state time when made and aver continuity of tender. *Cothrans & Elliott v. Mitchell*, 54 Ga. 498 (1875);

General Consideration (Cont'd)

Toomey v. Read & Gresham, 133 Ga. 855, 67 S.E. 100 (1910).

Bringing money into court is equivalent to continuous tender in bill. Clower v. Fleming, 81 Ga. 247, 7 S.E. 278 (1888).

Payment of funds into court constituted a valid tender. Bank of Early v. Broun, 156 Ga. App. 445, 274 S.E.2d 802 (1980).

Willingness to pay not sufficient for tender. — When a seller failed to pay the closing costs under a buy-back provision in its contract with the buyers, the buyers were properly granted a declaratory judgment which held that the seller was responsible to pay the closing costs, and an offer to do so was insufficient to satisfy this duty, and did not satisfy O.C.G.A. § 13-4-24. Tullis Devs., Inc. v. 3M Constr., Inc., 282 Ga. App. 335, 638 S.E.2d 787 (2006).

Additional "tender" held unnecessary. — When the trial court ordered specific performance of an obligation to sell land, the owner refused to convey the land when the purchaser offered to pay a sum less than the stated contract price, and the trial court again ordered specific performance, and made further direction concerning payment of the purchase price, no additional "tender," was necessary to preserve the buyer's right to acquire the property. Gallogly v. Bradco, Inc., 260 Ga. 311, 392 S.E.2d 529 (1990).

Cited in Doe v. Roe, 39 Ga. 91 (1869); Hiller v. Howell, 74 Ga. 174 (1884); Cutter-Tower Co. v. Clements, 5 Ga. App. 291, 63 S.E. 58 (1908); Wiggins v. Sheppard, 145 Ga. 835, 90 S.E. 56 (1916); Clyde v. Stegers & Sons Piano Mfg. Co., 22 Ga. App. 192, 95 S.E. 734 (1918); Turner v. Williams, 29 Ga. App. 751, 116 S.E. 553 (1923); Jeanes v. Atlanta & Lowry Nat'l Bank, 34 Ga. App. 568, 130 S.E. 353 (1925); Bigham v. Bank of Madison, 51 Ga. App. 643, 181 S.E. 197 (1935); Forrester v. Lowe, 192 Ga. 469, 15 S.E.2d 719 (1941); Renfroe v. Butts, 192 Ga. 720, 16 S.E.2d 551 (1941); Lively v. Munday, 201 Ga. 409, 40 S.E.2d 62 (1946); Anagnostis v. Alexandrou, 77 Ga. App. 742, 49 S.E.2d 774 (1948); Battles v. Anchor Rome Mills, Inc., 80 Ga. App. 47, 55 S.E.2d 156 (1949); B-X Corp. v. Jeter, 210 Ga. 250, 78 S.E.2d 790 (1953); Drennon Food Prods. Co. v. Drennon, 104 Ga. App. 19, 120 S.E.2d 902

(1961); Burnam v. Wilkerson, 217 Ga. 657, 124 S.E.2d 389 (1962); Smith v. Bank of Acworth, 218 Ga. 643, 129 S.E.2d 857 (1963); Smith v. Agan, 111 Ga. App. 536, 142 S.E.2d 291 (1965); State Hwy. Dep't v. Hewitt Contracting Co., 115 Ga. App. 606, 155 S.E.2d 422 (1967); Hall v. Heard, 223 Ga. 659, 157 S.E.2d 445 (1967); Pharr v. Woodall, 226 Ga. 1, 172 S.E.2d 404 (1970); White v. Turbidity, 227 Ga. 825, 183 S.E.2d 363 (1971); Stokes v. Walker, 131 Ga. App. 550, 206 S.E.2d 564 (1974); Security Mgt. Co. v. King, 132 Ga. App. 618, 208 S.E.2d 576 (1974); Joines v. Shady Acres Trailer Court, Inc., 132 Ga. App. 854, 209 S.E.2d 268 (1974); New House Prods., Inc. v. Commercial Plastics & Supply Corp., 141 Ga. App. 199, 233 S.E.2d 45 (1977); Hall v. First Nat'l Bank, 145 Ga. App. 267, 243 S.E.2d 569 (1978); Head v. Walker, 243 Ga. 108, 252 S.E.2d 440 (1979); Jessee v. First Nat'l Bank, 154 Ga. App. 209, 267 S.E.2d 803 (1980); Cotton States Mut. Ins. Co. v. McFather, 255 Ga. 13, 334 S.E.2d 673 (1985); Beckworth v. Beckworth, 255 Ga. 241, 336 S.E.2d 782 (1985); Porter v. City of Atlanta, 259 Ga. 526, 384 S.E.2d 631 (1989); Great S. Midway, Inc. v. Hughes, 223 Ga. App. 643, 478 S.E.2d 400 (1996).

Medium or Form of Tender

Failure to object at time of tender amounts to waiver of form of tender, and form of tender cannot afterwards be urged as invalidating tender. Manry v. Phoenix Mut. Life Ins. Co., 42 Ga. App. 24, 155 S.E. 43 (1930).

It is immaterial that actual cash was not tendered where creditor failed to object to tender on that ground and at first opportunity waived the creditor's right to insist on payment in cash. Capital Auto. Co. v. Rick, 134 Ga. App. 830, 216 S.E.2d 601 (1975).

Though check is not legal tender, acceptance by creditor waives form of tender. — While strictly speaking a check is not legal tender, if creditor accepts the check and makes no objection to specie of payment, this constitutes waiver of form of tender. Brock v. Baker, 128 Ga. App. 397, 196 S.E.2d 875 (1973).

Money order suffices as medium of payment absent objection, although contract calls for legal tender. Associates Disct. Corp.

v. Gentry, 95 Ga. App. 26, 96 S.E.2d 640 (1957).

Refusal of tender, without giving reason, not waiver of defect in tender. — If plaintiff merely refused check tendered without giving reason, which plaintiff had a right to do, it cannot be said that plaintiff waived defect which rendered tender ineffective. *Carter v. Whatley*, 97 Ga. App. 10, 101 S.E.2d 899 (1958).

Refusing defective tender without stating reason waives defect which could have been cured. — If performance of either condition or promise requires payment of money, and tender is made of valid check or of some form of currency which is not legal tender for purpose, and tender is rejected without statement that ground of objection is medium of payment, tender is not thereafter open to that objection, if legal tender could have been obtained and seasonably tendered had objection to medium of tender been stated. *Smith v. Standard Oil Co.*, 226 Ga. 339, 175 S.E.2d 14 (1970).

Incomplete Tender

Tender of less than full claim at time made is not a good tender. *Allstate Ins. Co. v. Austin*, 120 Ga. App. 430, 170 S.E.2d 840 (1969), cert. dismissed, 226 Ga. 93, 172 S.E.2d 602 (1970).

Check offered as part payment not valid tender. — Tender of check offered merely as part payment to be applied as credit to amount due on note is invalid. *Jones v. Peacock*, 29 Ga. App. 240, 114 S.E. 646 (1922).

Incomplete tender has no effect upon position of parties. — Incomplete, and consequently ineffectual tender can create no rights, and position of parties remains same as if none had been made. *Smith v. Pilcher*, 130 Ga. 350, 60 S.E. 1000 (1908).

Surety not released by incomplete tender, made by surety's principal and rejected by creditor. *Hiller v. Howell*, 74 Ga. 174 (1884).

Conditional Tender

Only proper conditions attached to valid tender are receipt in full or surrender of obligation, and such tender cannot be predicated on a condition unauthorized by law. *Edwards-Warren Tire Co. v. Coble*, 102 Ga. App. 106, 115 S.E.2d 852 (1960).

Section's two exceptions are the only proper conditions to a valid tender. *Adcock v. Sutton*, 224 Ga. 505, 162 S.E.2d 732 (1968).

Tender of money not vitiated by being coupled with demand for receipt for amount paid, or, if indebtedness be represented by writing, by being coupled with demand for writing, if extinguished by payment. *Lanier v. Romm*, 131 Ga. App. 531, 206 S.E.2d 588 (1974).

Conditional tender invalid, even though condition is performance of duty actually owing. — Tender must be absolute and, if not so, it fails, even though only condition accompanying it is such as to impose performance of duty actually owing by one to whom purported tender is made. *Southern Motors of Savannah, Inc. v. Krieger*, 86 Ga. App. 574, 71 S.E.2d 884 (1952), disapproved sub nom. *Brown v. Techdata Corp.*, 238 Ga. 622, 234 S.E.2d 787 (1977).

Taxpayer may not attach condition to tender that money be received in full payment of claim. If one owes money, one should pay it without restrictions. *Adcock v. Sutton*, 224 Ga. 505, 162 S.E.2d 732 (1968).

Tender conditioned on release of all claims, including other than that under consideration was invalid. — When release attached in this case as condition to be accepted prior to cashing check was not only receipt in full for amount of check, but also contained release of all claims, including other claims than that under consideration, tender was invalid because it was conditioned on improper demand. *Edwards-Warren Tire Co. v. Coble*, 102 Ga. 106, 115 S.E.2d 852 (1960).

Tender made upon condition that certain security deed be transferred to plaintiff is incomplete tender. *Henderson v. Willis*, 160 Ga. 638, 128 S.E. 807 (1925).

Tender under bond for title conditioned upon conveyance called for in bond, invalid. — Tender to holder of bond of title, conditioned upon conveyance called for in bond, is invalid. *De Graffenreid v. Menaed*, 103 Ga. 651, 30 S.E. 560 (1898); *Elder v. Johnson*, 115 Ga. 691, 42 S.E. 51 (1902).

Tender of amount due by the obligee in bond for title on condition that obligor make and deliver to obligee conveyance called for by bond for title is not a valid tender in that it is not unconditional. *Heath*

Conditional Tender (Cont'd)

v. Miller, 205 Ga. 699, 54 S.E.2d 432 (1949).

Ineffective conditional tender. — Insurer's offer of the amount of the insurer's policy limits in exchange for a release of the remaining amount owed by the insurer's insureds was ineffective as a conditional tender. *Southern Gen. Ins. Co. v. Ross*, 227 Ga. App. 191, 489 S.E.2d 53 (1997).

Trial court properly granted summary judgment to a used vehicle seller in an action by a purchaser seeking rescission of the sale due to alleged fraudulent inducement in representing the vehicle as new rather than used because the purchaser did not make an unconditional tender of the vehicle to the seller pursuant to O.C.G.A. §§ 13-4-24 and 13-4-60; rather, the seller offered to give back the vehicle upon payment of damages that were more than twice the purchase price, and such a conditioned tender did not meet the condition precedent of unconditional tender required by the purchaser in order to bring the rescission action. *Scott v. Team Toyota*, 276 Ga. App. 257, 622 S.E.2d 925 (2005).

When Tender Excused

Tender excused when party to whom due declares it will be refused. — Formal tender unnecessary where express declarations are made by party to whom money is payable that the party will not accept it if tendered. *Arnold v. Empire Mut. Annuity & Life Ins. Co.*, 3 Ga. App. 685, 60 S.E. 470 (1908).

To entitle plaintiff to specific performance of contract for purchase of land, plaintiff must make unconditional tender of purchase money due; but tender by vendee

before suit is excused if vendor, by conduct or declaration, proclaims that if a tender should be made, acceptance would be refused. *Smith v. Standard Oil Co.*, 226 Ga. 339, 175 S.E.2d 14 (1970).

Tender by the vendee before suit is excused if the vendor, by conduct or declaration, proclaims that if a tender should be made, acceptance would be refused. *Good v. Tri-Cep, Inc.*, 248 Ga. 684, 285 S.E.2d 527 (1982).

When party gives written notice of absolute refusal to comply with contract, tender is excused. *Hunt v. Formby*, 43 Ga. 79 (1871).

Improper tender excused where opposite party's conduct waives obligation to tender.

— Even when one party does not properly tender materials, that party is relieved of that obligation when the other party instructs the party to keep the materials where the materials are. Such conduct by a receiving party amounts to a waiver of the tendering party's contractual obligation to perform. *Rives E. Worrell Co. v. Key Sys.*, 147 Ga. App. 383, 248 S.E.2d 686 (1978).

Tender excused by other party's repudiation or conduct rendering it useless or impossible. — When contract provides that there must be tender of money or performance of some obligation, party bound to make tender or perform obligation may be relieved, and tender and obligation held to have been waived, where other party to contract repudiates the tender, by act or word, or takes position which would render tender or performance of obligation imposed useless or impossible. *Rives E. Worrell Co. v. Key Sys.*, 147 Ga. App. 383, 248 S.E.2d 686 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Tender, § 6 et seq.

C.J.S. — 17A C.J.S., Contracts, §§ 452, 480 et seq., 630.

ALR. — Tender as affected by insufficiency of amount offered, 5 ALR 1226.

Necessity of keeping tender good in equity, 12 ALR 938.

Meaning of "by" as fixing time for performance of an act or happening of an event, 21 ALR 1543.

Right of purchaser to opportunity to pay

in cash where tender has been made in other medium, 23 ALR 630; 46 ALR 914.

When instrument deemed payable at a "special place" within the provision of the Uniform Negotiable Instruments Law making ability and willingness to pay at such place equivalent to tender, 24 ALR 1050.

Payment or tender of unpaid purchase money as condition precedent to the right of a purchaser of land to rescind on the ground of defects in or want of title, 40 ALR 693.

Tender by check, 51 ALR 393.

Necessity that tender required as condition of enforcement of right or remedy under contract for sale of real property be made to an assignee of the other party, 88 ALR 196.

Creditor's failure to disclose correct amount due as affecting sufficiency of debt-

or's tender of amount which debtor believes to be due, but which is less than amount actually due, 82 ALR3d 1178.

Right of judgment creditor to demand that debtor's tender of payment be in cash or by certified check rather than by uncertified check, 82 ALR3d 1199.

13-4-25. Tender of chattels.

A valid tender of chattels transfers the title thereto to the person bound to receive; and the possession of the promisor, if he retains possession from that time, is for the benefit of the owner but without liability to account for profits or for more than ordinary prudence in preservation and protection of the chattels. (Orig. Code 1863, § 2818; Code 1868, § 2826; Code 1873, § 2877; Code 1882, § 2877; Civil Code 1895, § 3731; Civil Code 1910, § 4325; Code 1933, § 20-1108.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Tender, § 33.

C.J.S. — 17A C.J.S., Contracts, § 486.

13-4-26. Delivery on demand; delivery at certain time and place.

If the promise of a party is to deliver on demand, the demand must be reasonable as to time, place, and manner; if the promise is to deliver at a certain time and place, a tender at the time and place is effective though the receiver is not present. (Orig. Code 1863, § 2817; Code 1868, § 2825; Code 1873, § 2876; Code 1882, § 2876; Civil Code 1895, § 3730; Civil Code 1910, § 4324; Code 1933, § 20-1107.)

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Cited in Gold Kist, Inc. v. Martin, 164 Ga. App. 364, 297 S.E.2d 313 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 334, 356, 357, 359, 428, 499, 503, 508.

C.J.S. — 17A C.J.S., Contracts, §§ 456, 478 et seq., 503, 590, 630.

ALR. — When instrument deemed payable at a "special place" within the provision

of the Uniform Negotiable Instruments Law making ability and willingness to pay at such place equivalent to tender, 24 ALR 1050.

Timeliness of notice of exercise of option to purchase realty, 87 ALR3d 805.

ARTICLE 3

PAYMENT

13-440. Payment to creditor or agent.

Payment of money due to a creditor or his agent shall be sufficient to discharge the debtor upon the obligation; and, if such agent receives property other than currency in satisfaction of the obligation, the creditor is bound thereby. (Orig. Code 1863, § 2805; Code 1868, § 2813; Code 1873, § 2864; Code 1882, § 2864; Civil Code 1895, § 3717; Civil Code 1910, § 4311; Code 1933, § 20-1001.)

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Term payment, in term's legal import, means full satisfaction of debt by money, not by exchange or compromise, or accord and satisfaction, and it is only where words used in connection with it plainly manifest a different intention, that legal import of term can be rejected. *Clafin & Co. v. Continental Jersey Works*, 85 Ga. 27, 11 S.E. 721 (1890).

Agent may not make payment in other than money absent express authorization. — Fact that the law allows an agent to take payment in property other than money, gives no support to contention that the agent can make payment in same way, without express authority to do so. This forms an exception to the well-settled rule that if an agent is given power in general terms to do an act, the agent is restricted in manner of performing it to that which is usual in course of business. *Clafin & Co. v. Continental Jersey Works*, 85 Ga. 27, 11 S.E. 721 (1890).

When general agent receives property other than money as payment, creditor bound as to debtor. — If general agent to collect money receives in payment property other than money, creditor, so far as debtor is concerned, is bound thereby. *Holmes v. Langston & Woodson*, 110 Ga. 861, 36 S.E. 251 (1900); *Armour Fertilizer Works v. Maddox*, 168 Ga. 429, 148 S.E. 152 (1929); *Star Furn. Co. v. Dubberly*, 46 Ga. App. 178, 167 S.E. 207 (1932); *Futch v. F.S. Royster Guano Co.*, 51 Ga. App. 305, 180 S.E. 368 (1935).

Receipt of property by agent binding. — Receipt by general agent to collect, of property in settlement of a debt, is as binding on principal as if it were paid in money. *McLaughlin v. Blount*, 61 Ga. 168 (1878).

Receipt by general agent to collect, of property in partial or full satisfaction of debt, is as binding on principal as if it were paid in money. *Futch v. F.S. Royster Guano Co.*, 51 Ga. App. 305, 180 S.E. 368 (1935).

When buyer makes payment to authorized agent, seller must look to agent for satisfaction. — When seller authorizes closing agent to receive payment of sales price and buyer, aware of that authorization, makes such payment to closing agent, seller must look to closing agent for satisfaction. *Hayes v. Gordon*, 240 Ga. 19, 239 S.E.2d 344 (1977).

Principal estopped, as against debtor, from denying agent's apparent authority. — When principal has placed agent in such situation that person of ordinary prudence, conversant with business usages and nature of particular business is justified in assuming that such agent has authority to perform a particular act and deals with agent upon that assumption, principal is estopped as against such third person from denying the agent's authority; one will not be permitted to prove that agent's authority was, in fact, less extensive than that with which the agent apparently was clothed. *General Acceptance Corp. v. Guintini*, 115 Ga. App. 723, 155 S.E.2d 722 (1967).

One holding another out as agent is estopped to deny acts within apparent scope of authority and about one's principal's business; such authority may be established by proof of long course of dealing by such agent in similar manner for one's principal. *Futch v. F.S. Royster Guano Co.*, 51 Ga. App. 305, 180 S.E. 368 (1935).

General principle is that payment to one of two joint creditors extinguishes joint

debt; this principle seems to be based upon idea that joint creditors are mutual agents of each other, as to the debt. *Long v. Cash*, 54 Ga. App. 764, 189 S.E. 73 (1936).

If one of joint payees on note is dead, payment may be made to survivor. *Long v. Cash*, 54 Ga. App. 764, 189 S.E. 73 (1936).

Partnership claim not settled by conveyance of land to one partner individually. *Rooks v. Stanaland*, 33 Ga. App. 8, 124 S.E. 904 (1924).

Attorney cannot, without special authority,

receive anything in discharge of client's claim but full amount in case. *Patterson v. Childs*, 9 Ga. App. 646, 72 S.E. 45 (1911).

Cited in *Cooper v. King*, 6 Ga. App. 76, 64 S.E. 288 (1909); *Powell v. Bank of Manchester*, 46 Ga. App. 264, 167 S.E. 343 (1933); *Federal Land Bank v. Fulcher*, 47 Ga. App. 602, 171 S.E. 152 (1933); *Commercial Credit Corp. v. Noles*, 85 Ga. App. 392, 69 S.E.2d 309 (1952); *Barton & Ludwig, Inc. v. Thompson*, 170 Ga. App. 187, 316 S.E.2d 786 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Payment, §§ 48, 102.

C.J.S. — 70 C.J.S., Payment, §§ 3, 4.

ALR. — Request to remit as authorizing payment by post, 2 ALR 1646.

Right of purchaser to opportunity to pay in cash where tender has been made in other medium, 11 ALR 811; 23 ALR 630; 46 ALR 914.

Construction of contract or regulations regarding time of payment for public utility service, 97 ALR 982.

Contract to pay when the financial condition of business permits, 99 ALR 1523.

Implied or ostensible authority to receive payments of principal of one who has authority to receive payments of interest, 111 ALR 578.

Conveyance or surrender of property as an accord and satisfaction of contract obligation, 59 ALR5th 665.

13-441. Payment by mail.

Payment by mail shall be made at the risk of the debtor unless done by direction, either express or implied, of the creditor or his agent. (Orig. Code 1863, § 2807; Code 1868, § 2815; Code 1873, § 2866; Code 1882, § 2866; Civil Code 1895, § 3719; Civil Code 1910, § 4313; Code 1933, § 20-1003.)

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Section refers to remittance of coin or currency which constitutes legal tender and recognizes right of party to remit money by mail to one's creditor in payment of debt. *McIntire v. Raskin*, 173 Ga. 746, 161 S.E. 363 (1931).

To protect oneself, one remitting payment by mail must show express authorization or business usage. — For debtor to protect oneself against loss, by remitting money to one's creditor by mail the debtor must show either express authority of creditor to send in that mode, or usage to that effect in business, from which creditor's authority may be inferred. *Illinois Life Ins. Co. v.*

McKay, 6 Ga. App. 285, 64 S.E. 1131 (1909); *McIntire v. Raskin*, 173 Ga. 746, 161 S.E. 363 (1931).

Tenant who mails rent accepts the risks. — Under O.C.G.A. § 13-441, a tenant, who mailed the tenant's rent payment to the landlord, accepted the risks attendant thereto, including not only the risk of non-delivery, but all potential risks, including the risk of nonacceptance by the landlord due to contract or course of dealing. *Baker v. Hous. Auth. of Waynesboro*, 268 Ga. App. 122, 601 S.E.2d 350 (2004).

Checks given in payment of debt or obligation do not constitute payment until them-

selves paid. *Salzburger Bank v. Standard Oil Co.*, 173 Ga. 722, 161 S.E. 584 (1931).

Cited in *Parker v. American Family Recre-*

ation Center, Inc., 229 Ga. 633, 193 S.E.2d 830 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, *Payment*, §§ 10, 118.

C.J.S. — 70 C.J.S., *Payment*, §§ 9, 107 et seq.

ALR. — *Request to remit as authorizing payment by post*, 2 ALR 1646.

Deposit of insurance dues in mail as payment preventing forfeiture, 47 ALR 886.

13-442. Appropriation of payments.

When a payment is made by a debtor to a creditor holding several demands against him, the debtor shall have the right to direct the claim to which it shall be appropriated. If the debtor fails to do so, the creditor shall have the right to appropriate the payment at his election. If neither party exercises the privilege, the law shall direct the application in such manner as shall be reasonable and equitable, both as to the parties and third persons, provided that, as a general rule, the oldest lien and the oldest item in an account shall be paid first, the presumption of law being that such is the intention of the parties. (Orig. Code 1863, § 2810; Code 1868, § 2818; Code 1873, § 2869; Code 1882, § 2869; Civil Code 1895, § 3722; Civil Code 1910, § 4316; Code 1933, § 20-1006; Ga. L. 1982, p. 3, § 13.)

Law reviews. — For article, "Caveat on a Construction Project," see 28 Ga. St. Venditor: The Material Supplier's Dilemma B.J. 154 (1992).

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ANALYSIS

GENERAL CONSIDERATION

APPLICATION BY PARTIES

APPLICATION BY COURT

General Consideration

Section applicable to part payments. *Giles v. Vandiver*, 91 Ga. 192, 17 S.E. 115 (1893).

O.C.G.A. § 13-442 is applicable to partial payments as well as payments in full. *Sweetapple Plastics, Inc. v. Philip Shuman & Sons*, 77 Bankr. 304 (Bankr. M.D. Ga. 1987).

Disposition of payment not merely a duty imposed by contract itself. — If the debtor directs payments pursuant to O.C.G.A. § 13-442, the creditor is obligated to apply the payments in accordance with this direction and has no authority to appropriate them in a different manner. This duty of the creditor is a duty imposed by law and not merely a duty imposed by the contract itself.

Breach of that duty gives rise to a cause of action in tort. *Waldrip v. Voyles*, 201 Ga. App. 592, 411 S.E.2d 765 (1991).

Section concerns voluntary payments, and is not changed because sale was not judicial sale under power. *Atkins v. Citizens & S. Nat'l Bank*, 127 Ga. App. 348, 193 S.E.2d 187 (1972).

Section inapplicable to distribution of proceeds in judicial proceedings. *Citizens & S. Bank v. Armstrong*, 22 Ga. App. 138, 95 S.E. 729 (1918).

Section inapplicable to distribution of proceeds from judicial sales. *Kyle v. Chattahoochee Nat'l Bank*, 96 Ga. 693, 24 S.E. 149 (1895).

Section inapplicable to order of payment

of claims of estate. *Yancey v. Citizens Bank & Trust Co.*, 14 Ga. App. 310, 80 S.E. 700 (1914).

Section inapplicable where portion of cash received was settlement of very claim sued upon. *LeCraw v. Atlanta Arts Alliance, Inc.*, 126 Ga. App. 656, 191 S.E.2d 572 (1972).

O.C.G.A. § 13-4-42 inapplicable where loan agreement governed disposition. — Since a provision in the loan agreement governed the disposition of funds applied to the loans, O.C.G.A. § 13-4-42 was inapplicable. *Citizens Bank v. Bowen*, 169 Ga. App. 896, 315 S.E.2d 437 (1984).

After suit has been filed, creditor may not then make application. *Thompson v. Bank of Buckhead*, 47 Ga. App. 767, 171 S.E. 465 (1933).

O.C.G.A. § 13-4-42 inapplicable if debtor's request for particular appropriation comes after default and demand for payment. — If debtor's request for direction of payments came after notes were in default and demand made for their payment in full, appropriation of payment provisions were not applicable. *Atkins v. Citizens & S. Nat'l Bank*, 127 Ga. App. 348, 193 S.E.2d 187 (1972).

Crime victim was not a creditor. — Contrary to a law firm's assertions, there was no legal authority for considering the firm, which had been a victim of an employee's theft of funds in a check-kiting scheme, as a "creditor" for purposes of applying three checks the employee deposited back into the firm's account to the employee's oldest "debts" pursuant to the debt payment rule established by O.C.G.A. § 13-4-42. *Lee, Black, Hart & Rouse, P. C. v. Travelers Indem. Co.*, 291 Ga. App. 838, 662 S.E.2d 889 (2008), cert. denied, 2008 Ga. LEXIS 782 (Ga. 2008).

Creditor not bound by directions of debtor's nonagent wife. — Directions as to application of payments by wife of the debtor, she not being agent of the debtor, do not bind creditor. *Neal v. Harber*, 35 Ga. App. 628, 134 S.E. 347 (1926).

Creditor's failure to follow debtor's direction as to application discharges debt. — It is duty of creditor to follow direction of payment by debtor, and failure to do so will discharge debt. *Hatcher & Baldwin v. Comer & Co.*, 73 Ga. 418 (1884).

Cited in *Bell v. Boyd & Brumley*, 53 Ga. 643 (1875); *Whitaker v. Groover, Stubbs & Co.*, 54 Ga. 174 (1875); *Killorin v. Bacon*, 57 Ga. 497 (1876); *Pritchard v. Comer & Co.*, 71 Ga. 18 (1883); *Coleman v. Slade & Etheridge*, 75 Ga. 61 (1885); *Hatcher & Baldwin v. Comer & Co.*, 75 Ga. 728 (1885); *Holley v. Hardeman & Gibson*, 76 Ga. 328 (1886); *Green v. Ford*, 79 Ga. 130, 3 S.E. 624 (1887); *Andrews v. Exchange Bank*, 108 Ga. 802, 34 S.E. 183 (1899); *Lowenstein v. Meyer*, 114 Ga. 709, 40 S.E. 726 (1902); *Bank of Wrightsville v. Merchants & Farmers Bank*, 119 Ga. 288, 46 S.E. 94 (1903); *Dye v. Peacock*, 5 Ga. App. 417, 63 S.E. 520 (1909); *Clarke Bros. v. McNatt*, 132 Ga. 610, 64 S.E. 795, 26 L.R.A. (n.s.) 585 (1909); *Baumgartner v. McKinnon*, 10 Ga. App. 219, 73 S.E. 519 (1912); *Scarsbrook v. Cohen*, 25 Ga. App. 702, 104 S.E. 512 (1920); *Van Valkenburg v. Wood*, 41 Ga. App. 564, 153 S.E. 924 (1930); *McDaniel v. Wynn*, 41 Ga. App. 788, 154 S.E. 720 (1930); *Rich v. Belcher*, 43 Ga. App. 377, 158 S.E. 643 (1931); *Smith v. Dalton Ice Co.*, 45 Ga. App. 447, 165 S.E. 144 (1932); *New York Life Ins. Co. v. Sumner*, 45 Ga. App. 792, 165 S.E. 920 (1932); *Massell Realty Co. v. Chamberlain*, 47 Ga. App. 718, 171 S.E. 311 (1933); *First Nat'l Bank v. Simmons*, 48 Ga. App. 728, 173 S.E. 241 (1934); *Mayor of Millen v. Clark*, 193 Ga. 132, 17 S.E.2d 742 (1941); *Bell v. Scarbrough*, 68 Ga. App. 63, 22 S.E.2d 113 (1942); *Colonial Oil Co. v. United States Guarantee Co.*, 56 F. Supp. 545 (S.D. Ga. 1944); *Roanoke City Mills, Inc. v. Whelchel*, 208 F.2d 66 (5th Cir. 1953); *Piedmont Eng'r & Constr. Corp. v. Hanna Paint Co.*, 95 Ga. App. 605, 98 S.E.2d 137 (1957); *Franklin Acceptance, Inc. v. Salter*, 102 Ga. App. 742, 118 S.E.2d 118 (1960); *Turner v. Kay Jewelry Co.*, 103 Ga. App. 176, 118 S.E.2d 726 (1961); *Downey v. Spainhour Oil & Equip. Co.*, 104 Ga. App. 325, 121 S.E.2d 794 (1961); *Goss v. Davenport*, 105 Ga. App. 386, 124 S.E.2d 485 (1962); *Lewis v. Sherwin-Williams Co.*, 141 Ga. App. 53, 232 S.E.2d 392 (1977); *Wood v. Wood*, 239 Ga. 120, 236 S.E.2d 68 (1977); *Ford Motor Credit Co. v. Spicer*, 144 Ga. App. 383, 241 S.E.2d 273 (1977); *J.J. Fowler, Inc. v. Fulton Nat'l Bank*, 145 Ga. App. 220, 243 S.E.2d 642 (1978); *Ford Motor Credit Co. v. Spicer*, 156 Ga. App. 541, 275 S.E.2d 116 (1980); *Walter E. Heller & Co. v. Aetna Bus. Credit, Inc.*,

General Consideration (Cont'd)

158 Ga. App. 249, 280 S.E.2d 144 (1981); *Turner v. Wood*, 162 Ga. App. 674, 292 S.E.2d 558 (1982); *Tidwell v. Atlanta Gas Light Co.* (In re *Ga. Steel, Inc.*), 38 Bankr. 829 (Bankr. M.D. Ga. 1984); *Haughton v. Namano, Inc.*, 222 Ga. App. 644, 476 S.E.2d 31 (1996).

Application by Parties

Application of part payment where no direction. — Partial payment must be applied solely against the oldest outstanding invoice at the time of the transfer when there is no direction as to how the payment is to be applied. *Sweetapple Plastics, Inc. v. Philip Shuman & Sons*, 77 Bankr. 304 (Bankr. M.D. Ga. 1987).

If parties have applied payments by joint consent this statute does not apply. *Mercer v. Tift*, 79 Ga. 174, 4 S.E. 114 (1887) (see O.C.G.A. § 13-4-42).

Contract fixing mode of application may be varied by parties, neither being entitled to reapplication. *Riverside Milling & Power Co. v. Bank of Cartersville*, 141 Ga. 578, 81 S.E. 892 (1914).

Creditor cannot apply payment to claim based on contract prohibited and penalized by law. *Gower v. Ozmer*, 55 Ga. App. 81, 189 S.E. 540 (1936).

It is improper to apply payment to discharge obligation incurred subsequent to time of payment. *Thompson v. Bank of Buckhead*, 47 Ga. App. 767, 171 S.E. 465 (1933).

Section applicable to payment to landlord by tenant owing rent and unsecured indebtedness. *Payne v. Seagars*, 13 Ga. App. 101, 78 S.E. 829 (1913).

In such case, landlord must follow tenant's direction as to application. *Milford v. Shackelford*, 17 Ga. App. 436, 87 S.E. 603 (1916).

In doing so, equities of subtenant must not be prejudiced. *Leonard v. Fields*, 143 Ga. 479, 85 S.E. 315 (1915).

Creditor, with notice of landlord's claim cannot interfere with creditor's right of appropriation. *Soluble Pac. Guano Co. v. Harris*, 78 Ga. 20 (1886).

Absent contrary direction, creditor may apply payments to debts otherwise barred by statute of limitations. — In absence of direc-

tion by debtor as to application of payments, creditor may apply payments, made upon running account covering transactions of several years, to oldest items, so as to avoid bar of statute of limitations. *Hobbs v. Crawford & Maxwell*, 4 Ga. App. 585, 62 S.E. 157 (1908).

When payments were made by debtor but no direction was given by debtor as to their application, creditor had right to apply payments to oldest items of indebtedness in running account, including those barred by statute of limitations. *Farmers' Hdwe. & Furn. Co. v. Amos*, 48 Ga. App. 818, 173 S.E. 872 (1934).

In absence of direction by debtor, creditor may apply payment as creditor pleases; creditor may even apply payments made on running account covering several years to items which otherwise would be barred by statute of limitations. *Gower v. Ozmer*, 55 Ga. App. 81, 189 S.E. 540 (1936).

Effect on application of suretyship or guarantee as to one debt. — This rule as to application of payments to several demands is not affected by fact that there is a surety or guarantor liable on one of the debts, and application of payments to other notes is not, within contemplation of law, an act which injures surety or guarantor or increases surety's risk or exposes the surety to a greater liability so as to discharge the surety. *Redfearn v. Citizens & S. Nat'l Bank*, 122 Ga. App. 282, 176 S.E.2d 627 (1970).

Creditor may apply payment derived from property upon which creditor holds lien to unsecured indebtedness. — In absence of direction by debtor, creditor may apply payment to any of several demands even though payment be derived from proceeds of property upon which creditor has a special lien, and is applied to unsecured indebtedness. *Bufford v. Wilkinson, Bolton & Co.*, 7 Ga. App. 443, 67 S.E. 114 (1910).

Law allows creditor, in absence of direction by debtor, to apply payment made by latter to any of several demands which former may hold against the debtor are applicable (where no rights of third parties will be affected), even though payment be derived from proceeds of property upon which creditor has special lien, and is applied to unsecured indebtedness. *Bank of Ga. v. Card*, 84 Ga. App. 142, 65 S.E.2d 841 (1951).

Effect of third party's lien on creditor's application of payment derived from encumbered property. — If one claim held by creditor is secured and another unsecured, one cannot appropriate payment first to one's unsecured claim, over objection of another creditor holding lien upon property or fund from which payment is made. *Cofer v. Benson*, 92 Ga. 793, 19 S.E. 56 (1894).

Creditor receiving payment from property on which another creditor holds a lien cannot apply payment to creditor's own unsecured or less secured claim against objection of other lien creditor. *Federal Land Bank v. Bank of Lenox*, 192 Ga. 543, 16 S.E.2d 9 (1941).

O.C.G.A. § 13-442 inapplicable to third person holding superior lien, priority, or claim to proceeds of payment. — Law does not apply if, by legal priority, rights of third person are involved which are superior to those of creditor. *Baumgartner v. McKinnon*, 10 Ga. App. 219, 73 S.E. 519 (1912).

Law has no application as against a third person holding a prior lien, priority, or claim against proceeds of payment, superior to rights of creditor and debtor, in which event, in controversy between such third person and creditor wherein prior rights of third person are shown, it is immaterial at whose direction payment was applied. *Loflin v. Howard*, 48 Ga. App. 373, 172 S.E. 831 (1934).

Application by Court

When neither debtor nor creditor directs application of payments, it is duty of court to do so. *Thompson v. Bank of Buckhead*, 47 Ga. App. 767, 171 S.E. 465 (1933).

If intent of parties is clear, law will direct application accordingly. — It is not necessary that debtor give express directions but, if facts and circumstances indicate intention of parties at time payment is presented, law will

direct credit of payment according to such intention. *Roswell Bank v. Bearse*, 118 Ga. App. 610, 164 S.E.2d 886 (1968).

Amount of check may infer that it is in payment of particular demand. *Roswell Bank v. Bearse*, 118 Ga. App. 610, 164 S.E.2d 886 (1968).

Although post-payment circumstances may be considered, court's application must relate to time of payment. — Circumstances which are to guide court may have arisen since payment was made, but application when made relates to time of payment. *Thompson v. Bank of Buckhead*, 47 Ga. App. 767, 171 S.E. 465 (1933).

Third party's inchoate lien does not change rule but must be consideration in court's application. — Fact that there is third party with inchoate lien involved will not change rule but will only enter into question of allocating payments when this is done by court in process of litigation. *Daniel v. Dixie Plumbing Supply Co.*, 112 Ga. App. 427, 145 S.E.2d 796 (1965).

Court may apply payments either to unsecured claim or to precarious claim. *Thompson v. Bank of Buckhead*, 47 Ga. App. 767, 171 S.E. 465 (1933).

It is equitable to direct application to unsecured debts before secured debts. — When some items of account are secured and other items are unsecured, it is equitable for law to direct payments to be applied first to extinguishment of unsecured debts. *J.M. High Co. v. Arrington*, 45 Ga. App. 392, 165 S.E. 151 (1932).

Rule of payment of oldest liens first not to be applied to defeat other lienors. — General rule that oldest lien and oldest item in account will be first paid, while usually appropriate in settlement between creditor and debtor, should not be given such application as will defeat lien of third person. *Federal Land Bank v. Bank of Lenox*, 192 Ga. 543, 16 S.E.2d 9 (1941).

OPINIONS OF THE ATTORNEY GENERAL

Tax collector may accept present taxes when tendered although there are back taxes

due by taxpayer so tendering. 1957 Op. Att'y Gen. p. 279.

RESEARCH REFERENCES

C.J.S. — 70 C.J.S., Payment, § 59 et seq.
ALR. — Application of payments made

without specific appropriation, as between secured and unsecured items, 97 ALR 345.

Application of payments as between debts for which a surety or guarantor is bound and those for which he is not, 57 ALR2d 855.

13-443. Provision requiring one party to reimburse other for federal manufacturer's excise tax; right of reimbursing party relating to timing of payments.

(a) When a contract calls for one party to reimburse the other party for the federal manufacturer's excise tax levied by Part III of Subchapter A of Chapter 32 of the United States Internal Revenue Code, whether as a separate item or as part of the price, there shall exist for the party making the reimbursement a contractual right relating to the timing of that payment which can be invoked at the option of such party as provided in subsection (b) of this Code section.

(b) The party making the reimbursement shall not be required to tender payment for such taxes more than one business day prior to the time that the other party is required to remit such taxes to the United States Internal Revenue Service.

(c) Should a party choose to exercise the option provided in subsections (a) and (b) of this Code section, the other party may demand security for the payment of the taxes in proportion to the amount such taxes represent compared to the security demanded on the contract as a whole. Such party, however, may not change the other payment terms of the contract without a valid business reason other than to exercise the option as provided in subsections (a) and (b) of this Code section except to require the payment of such taxes under such option to be made by electronic transfer of funds.

(d) The party exercising the option set out in subsections (a) and (b) of this Code section shall notify the other party in writing of the intent to exercise such payment option and the effective date of the exercise which shall be no earlier than 30 days after the notice of intent is received or the beginning of the next federal tax quarter, whichever is later.

(e) This Code section shall apply to all contracts now in effect which have no expiration date and are continuing contracts and to all other contracts entered into or renewed after July 1, 1993. Any contract in force and effect on July 1, 1993, which, by its own terms will terminate on a date subsequent thereto, shall be governed by the law as it existed prior to July 1, 1993.

(f) The option set out in subsections (a) and (b) of this Code section shall not be construed to impair the obligations arising under any contract executed prior to July 1, 1993. Should the option set out in subsections (a) and (b) of this Code section be exercised, it shall not relieve such party of the obligation to make the reimbursement as provided for in the contract but shall affect only the timing of when that reimbursement must be tendered. (Code 1981, § 13-443, enacted by Ga. L. 1993, p. 1028, § 1.)

ARTICLE 4
RESCISSION

Cross references. — Rescission of contract for unilateral mistake of fact, § 23-2-31. Error in the Law of Contracts,” see 33 Emory L.J. 41 (1984).
Law reviews. — For article, “Mistake and

13-4-60. Rescission for fraud.

A contract may be rescinded at the instance of the party defrauded; but, in order to rescind, the defrauded party must promptly, upon discovery of the fraud, restore or offer to restore to the other party whatever he has received by virtue of the contract if it is of any value. (Civil Code 1895, § 3711; Civil Code 1910, § 4305; Code 1933, § 20-906.)

History of Code section. — This Code section is derived from the decision in *East Tenn. & Ga. Ry. v. Hayes*, 83 Ga. 558, 10 S.E. 350 (1889).

Cross references. — Fraud generally, § 23-2-50 et seq.

Law reviews. — For article discussing the historical background of the doctrine of tender and the application in Georgia of tender requirements, and proposing reforms, see 21 Mercer L. Rev. 413 (1969). For article discussing ex parte rescission of sales contract for fraud and suit for fraud and deceit, in light of *City Dodge, Inc. v.*

Gardner, 232 Ga. 766, 208 S.E.2d 794 (1974), see 11 Ga. St. B.J. 172 (1975).

For note discussing rescission for fraud as a consumer remedy, see 25 Emory L.J. 445 (1976). For note, “Misrepresentations and Nondisclosures in the Insurance Application,” see 13 Ga. L. Rev. 876 (1979).

For comment discussing action of fraud where injured purchaser did not first seek rescission of contract, in light of *Mutual Home & Sav. Ass’n v. Westgerdes*, 33 Abs. 490, 35 N.E.2d 882 (1941), see 4 Ga. B.J. 69 (1941).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- WAIVER
- RESCISSION
- RESTORATION OF BENEFITS
 - 1. IN GENERAL
 - 2. PLEADINGS AND PRACTICE

General Consideration

Rule of section is same in equity. *Roberts v. Southern Ry.*, 73 Ga. App. 759, 38 S.E.2d 48 (1946).

Contract procured by fraud is not void, but voidable only. *Manning v. Wills*, 193 Ga. 82, 17 S.E.2d 261 (1941).

Voidable contract by party defrauded. — While it is true that fraud vitiates a contract, a contract is nevertheless voidable only at instance of person defrauded. *Jordy v. Dunlevie*, 139 Ga. 325, 77 S.E. 162 (1913).

When fraud is discovered, party defrauded is put to one’s election to disaffirm contract; one should not delay without cause. *Newton v. Burks*, 139 Ga. App. 617, 229 S.E.2d 94 (1976).

Misrepresentation designed to deceive other party renders sale voidable by injured party. — Fraud may exist from misrepresentation by either party, made with design to deceive, or which does actually deceive the other party, and in the latter case renders sale voidable at election of party injured.

General Consideration (Cont'd)

McBurney v. Woodward, 84 Ga. App. 807, 67 S.E.2d 398 (1951).

Must show due care and reliance on false representations. — In the absence of special circumstances, one must exercise ordinary diligence in making an independent verification of contractual terms and representations. Failure to do so will bar an action based on fraud. Hubert v. Beale Roofing, Inc., 158 Ga. App. 145, 279 S.E.2d 336 (1981).

In order to show fraud and misrepresentation in the procurement of the contract as a defense to an action on the contract, it must be shown that the defendant exercised due care to discover the fraud and that the defendant relied upon the false representations to the defendant's injury. Bimbo Bldrs., Inc. v. Stubbs Properties, Inc., 158 Ga. App. 280, 279 S.E.2d 730 (1981).

In order to show fraud and misrepresentation in the procurement of the contract as a defense to an action on the contract, it is not sufficient to show that false representations were made, which were known to be false and which were made with the intention to deceive. It must also be shown that the defendant exercised due care to discover the fraud. Charter Medical Mgt. Co. v. Ware Manor, Inc., 159 Ga. App. 378, 283 S.E.2d 330 (1981).

Reliance must be justified. — Misrepresentations are not actionable unless the hearer was justified in relying on the misrepresentation in the exercise of common prudence and diligence. Charter Medical Mgt. Co. v. Ware Manor, Inc., 159 Ga. App. 378, 283 S.E.2d 330 (1981).

In a consumer's suit against a car dealer for rescission, regarding the sale of a used car which the dealer's salesperson falsely represented had not been in a wreck, it was error for the trial court to grant a directed verdict to the dealer because whether the consumer reasonably relied on the salesperson's representation was a jury question. Mitchell v. Backus Cadillac-Pontiac, Inc., 274 Ga. App. 330, 618 S.E.2d 87 (2005).

When parties have equal opportunities for knowing the truth, a party grossly failing to inform oneself must take the consequence of one's own neglect. A party may not voluntarily accept the statements and representa-

tions of another and act thereon, instead of looking personally, and then obtain relief in equity from the obligation which the person assumes. Bimbo Bldrs., Inc. v. Stubbs Properties, Inc., 158 Ga. App. 280, 279 S.E.2d 730 (1981).

Fraud cannot be predicated upon misrepresentations of law. — A claim of fraud cannot be predicated upon misrepresentations of law or misrepresentations as to matters of law. Capitol Materials, Inc. v. Kellogg & Kimsey, Inc., 242 Ga. App. 584, 530 S.E.2d 488 (2000).

Party to a contract who can read must read or show legal excuse for not doing so and, ordinarily, if fraud is the excuse, it must be such fraud as to prevent the party from reading. Curtis v. First Nat'l Bank, 158 Ga. App. 379, 280 S.E.2d 404 (1981).

Such things as soil, timber, or springs on land are open to inspection, and the purchaser is willfully negligent if the purchaser fails to look and see personally, and neither law nor equity will relieve the purchaser from the purchaser's own want of diligence. Bimbo Bldrs., Inc. v. Stubbs Properties, Inc., 158 Ga. App. 280, 279 S.E.2d 730 (1981).

Victim of fraud may affirm contract and seek damages for fraud, or rescind. — One who has been fraudulently induced to purchase property may, after discovering fraud, affirm contract and sue for damages resulting from fraud, or he may rescind contract for fraud and, after offering to restore, recover purchase price which one has paid. Dunn v. Citizens' & S. Co., 47 Ga. App. 600, 171 S.E. 170 (1933); Butts v. Groover, 66 Ga. App. 20, 16 S.E.2d 894 (1941).

If purchaser of personal property has been injured by false and fraudulent representations of seller as to subject matter thereof, the purchaser ordinarily has election whether to rescind contract, return article and sue in tort for fraud and deceit, or whether to affirm contract, retain article and seek damages resulting from fraudulent misrepresentation. Bob Maddox Dodge, Inc. v. McKie, 155 Ga. App. 263, 270 S.E.2d 690 (1980).

Section inapplicable to defense of false representations in action on insurance policy. Columbian Nat'l Life Ins. Co. v. Mulkey, 146 Ga. 267, 91 S.E. 106 (1916).

Mere receipt is not a contract. Mackle Constr. Co. v. Wyatt, 29 Ga. App. 617, 116 S.E. 877 (1923).

Fraud cannot consist of mere broken promises, unfulfilled predictions, or erroneous conjectures as to future events. *Curtis v. First Nat'l Bank*, 158 Ga. App. 379, 280 S.E.2d 404 (1981).

Cited in *Strodger v. Southern Granite Co.*, 94 Ga. 626, 19 S.E. 1022 (1894); *Pearce & Williams v. Borg Chewing-Gum Co.*, 111 Ga. 847, 36 S.E. 457 (1900); *Fulghum v. Beck Duplicator Co.*, 121 Ga. 273, 48 S.E. 901 (1904); *Tuttle v. Stovall*, 134 Ga. 325, 67 S.E. 806, 20 Ann. Cas. 168 (1910); *Georgia Supply Co. v. Coffee*, 8 Ga. App. 502, 69 S.E. 1083 (1911); *Ruff v. Copeland*, 137 Ga. 56, 72 S.E. 506 (1911); *Story v. Williams*, 10 Ga. App. 392, 73 S.E. 549 (1912); *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S.E. 32 (1913); *Couch v. Crane*, 142 Ga. 22, 82 S.E. 459 (1914); *Garner v. Butler*, 144 Ga. 441, 87 S.E. 471 (1915); *Cabaniss v. Dallas Land Co.*, 144 Ga. 511, 87 S.E. 653 (1916); *Finch v. Hill*, 146 Ga. 687, 92 S.E. 63 (1917); *Knox v. Harrell*, 26 Ga. App. 772, 107 S.E. 594 (1921); *Avera Loan & Inv. Co. v. Jackson*, 30 Ga. App. 504, 118 S.E. 432 (1923); *Board of Drainage Comm'rs v. Arnold*, 156 Ga. 733, 120 S.E. 310 (1923); *Horne & Ponder v. Evans*, 31 Ga. App. 370, 120 S.E. 787 (1923); *DeLamar v. Fidelity Loan & Inv. Co.*, 158 Ga. 361, 123 S.E. 116 (1924); *Gibson v. Alford*, 161 Ga. 672, 132 S.E. 442 (1926); *Henderson v. Lott*, 163 Ga. 326, 136 S.E. 403 (1926); *Williams v. Fouché*, 164 Ga. 311, 138 S.E. 580 (1927); *Decatur County v. Praytor, Howton & Wood Contracting Co.*, 165 Ga. 742, 142 S.E. 73 (1928); *Barfield v. Farkas*, 40 Ga. App. 559, 150 S.E. 600 (1929); *Swint v. Adams*, 42 Ga. App. 705, 157 S.E. 249 (1931); *Griffin v. Haden*, 172 Ga. 478, 157 S.E. 686 (1931); *Fellows v. Sapp*, 45 Ga. App. 89, 163 S.E. 314 (1932); *Floyd v. Boss*, 174 Ga. 554, 163 S.E. 606 (1932); *Equitable Bldg. & Loan Ass'n v. Brady*, 175 Ga. 43, 164 S.E. 674 (1932); *Darnell v. Tate*, 177 Ga. 269, 170 S.E. 63 (1933); *Louisville & N.R.R. v. Gattis*, 180 Ga. 389, 178 S.E. 740 (1935); *Woodruff v. Cooper*, 180 Ga. 476, 179 S.E. 104 (1935); *Neely v. Oliver Farm Equip. Sales Co.*, 52 Ga. App. 166, 182 S.E. 630 (1935); *Beaudry v. United States*, 79 F.2d 650 (5th Cir. 1935); *Cooper v. Peevy*, 185 Ga. 805, 196 S.E. 705 (1938); *Cobb v. Daughtry*, 188 Ga. 70, 2 S.E.2d 638 (1939); *Karpas v. Candler*, 189 Ga. 711, 7 S.E.2d 243 (1940); *Thompson v. Thompson*, 190 Ga. 264, 9

S.E.2d 80 (1940); *Atlantic Mut. Fire Ins. Co. v. McKenzie*, 63 Ga. App. 384, 11 S.E.2d 72 (1940); *Crowell v. Brim*, 191 Ga. 288, 12 S.E.2d 585 (1940); *Cohen v. Cohen*, 200 Ga. 33, 35 S.E.2d 908 (1945); *Reardon v. Bland*, 206 Ga. 633, 58 S.E.2d 377 (1950); *Texeira v. Wagar*, 209 Ga. 820, 76 S.E.2d 385 (1953); *Cardin v. Riegel Textile Corp.*, 217 Ga. 797, 125 S.E.2d 62 (1962); *Daugert v. Holland Furnace Co.*, 107 Ga. App. 566, 130 S.E.2d 763 (1963); *Green Hotels, Inc. v. Citizen & S. Nat'l Bank*, 108 Ga. App. 286, 132 S.E.2d 800 (1963); *Smith v. Brown*, 220 Ga. 845, 142 S.E.2d 262 (1965); *Gay v. AMOCO*, 115 Ga. App. 18, 153 S.E.2d 612 (1967); *Griggs v. Dodson*, 223 Ga. 164, 154 S.E.2d 252 (1967); *Williams v. Bituminous Cas. Co.*, 121 Ga. App. 175, 173 S.E.2d 250 (1970); *Henry v. Allstate Ins. Co.*, 129 Ga. App. 223, 199 S.E.2d 338 (1973); *Preiser v. Jim Letts Oldsmobile, Inc.*, 160 Ga. App. 658, 288 S.E.2d 219 (1981); *Touche, Inc. v. Dearborn*, 161 Ga. App. 188, 291 S.E.2d 35 (1982); *Miller v. Economy Trading & Liquidating, Inc.*, 193 Ga. App. 344, 387 S.E.2d 620 (1989); *English Restaurant, Inc. v. A.R. II, Inc.*, 194 Ga. App. 639, 391 S.E.2d 462 (1990); *Carpenter v. Curtis*, 196 Ga. App. 234, 395 S.E.2d 653 (1990); *Reaugh v. Inner Harbour Hosp.*, 214 Ga. App. 259, 447 S.E.2d 617 (1994); *McNatt v. Colonial Pac. Leasing Corp.*, 221 Ga. App. 768, 472 S.E.2d 435 (1996).

Waiver

Contract obtained by fraud may be ratified by party defrauded, and when so ratified the contract becomes valid and binding upon all. *Manning v. Wills*, 193 Ga. 82, 17 S.E.2d 261 (1941).

Contract obtained by fraud may be ratified, and when so ratified, fraud is waived and contract cannot be rescinded. *Puckett v. Reese*, 203 Ga. 716, 48 S.E.2d 297 (1948).

Delay in seeking rescission and restoration of benefits may constitute waiver of fraud. — Delay in seeking rescission and restoring or offering to restore benefits received under contract may constitute waiver of fraud and bar to rescission. *Manning v. Wills*, 193 Ga. 82, 17 S.E.2d 261 (1941).

When, following discovery of a seller's deceptive practices, buyers of a business attempted to continue to operate the business and delayed seven months in sending a

Waiver (Cont'd)

letter of rescission, the buyer's released and waived the buyer's claims. *Orion Capital Partners, L.P. v. Westinghouse Elec. Corp.*, 223 Ga. App. 539, 478 S.E.2d 382 (1996).

Mere delay to sue for damages in tort will not operate as waiver unless barred by statute. *Tuttle v. Stovall*, 134 Ga. 325, 67 S.E. 806, 20 Ann. Cas. 168 (1910).

Any act, after discovery of fraud, inconsistent with repudiation, amounts to acquiescence. — When one who is entitled to rescind contract on ground of fraud or false representations, and has full knowledge of material circumstances of the case, freely and advisedly does anything which amounts to recognition of transaction, or acts in manner inconsistent with repudiation of contract, such conduct amounts to acquiescence, and, though originally impeachable, contract becomes unimpeachable in equity. *Gibson v. Alford*, 161 Ga. 672, 132 S.E. 442 (1926).

One accepting and retaining benefits after discovery of fraud cannot thereafter rescind. — Ordinarily one who knowingly accepts and retains any benefit under contract which one has been induced to make by fraud, after one has knowledge of such fraud, affirms validity of contract and will not be heard thereafter to repudiate the contract. *Legg v. Hood*, 154 Ga. 28, 113 S.E. 642 (1922).

Rescission

One must be diligent in discovering fraud and in announcing intent to rescind. — Duty is placed upon party who seeks to avoid contract on ground of fraud to make such efforts to discover fraud as would amount to ordinary diligence in law. *Massachusetts Benefit Life Ass'n v. Robinson*, 104 Ga. 256, 30 S.E. 918, 42 L.R.A. 261 (1898); *Reynolds & Hamby Estate Mtg. Co. v. Martin*, 116 Ga. 495, 42 S.E. 796 (1902).

To rescind contract obtained by fraud one must be diligent in discovering fraud and upon discovery of fraud one must act at once and announce one's purpose to rescind. *Manning v. Wills*, 193 Ga. 82, 17 S.E.2d 261 (1941).

While contract may be rescinded for fraud, party defrauded must exercise ordinary diligence in discovering fraud, and

must thereupon promptly announce decision to rescind, and restore or tender benefits received under contract. *Puckett v. Reese*, 203 Ga. 716, 48 S.E.2d 297 (1948).

What is reasonable or proper time for rescission is ordinarily a jury question. — Question as to what is reasonable or proper time within which to rescind contract depends upon facts of particular case and is ordinarily a question for the jury. *Newton v. Burks*, 139 Ga. App. 617, 229 S.E.2d 94 (1976).

Rescission is available remedy for inceptive fraud as well as for subsequent breach of contract. *Head v. Walker*, 243 Ga. 108, 252 S.E.2d 440 (1979).

The buyer's misrepresentations became a part of the contract for the sale of a motel and a consideration for the contract so that there was no merger or waiver for purposes of determining if the seller could maintain a claim for fraud in the inducement, where the buyer's misrepresentations as to the buyer's financial condition induced the seller to change the seller's position to the seller's detriment by refinancing a loan and incur substantial loan closing costs so that it could be assumed by the buyer, who subsequently refused to close. *Woodhull Corp. v. Saibaba Corp.*, 234 Ga. App. 707, 507 S.E.2d 493 (1998).

Rescission of contract by injured party must be in toto; the injured party cannot affirm contract in part and repudiate the contract in part. *Thompson v. Growers' Fin. Corp.*, 49 Ga. App. 119, 174 S.E. 192 (1934).

Rescission of contract must go to whole. There can be no rescission of contract in part. *Baker v. Corbin*, 148 Ga. 267, 96 S.E. 428 (1918).

Rescission abrogates contract, not partially but completely; it leaves rights of parties and amount of damages, if any, to be determined, not by rescinded contract, but by court of equity. *Eller v. McMillan*, 174 Ga. 729, 163 S.E. 910 (1932).

Rescission of release of claims denied. — Daughter's complaint against an heir seeking to rescind a release of claims against an estate was properly dismissed where the daughter admitted in the complaint that the daughter failed to tender the return of the funds paid as consideration for the release; it was disputed whether the daughter would have received anything for the claim against

the estate, and tender was not impossible as the daughter could have paid the heir individually, or could have paid the money into the registry fund of either the probate court or the trial court where the daughter filed the rescission complaint. *Daly v. Mueller*, 279 Ga. App. 168, 630 S.E.2d 799 (2006).

Ineffective conditional tender. — Trial court properly granted summary judgment to a used vehicle seller in an action by a purchaser seeking rescission of the sale due to alleged fraudulent inducement in representing the vehicle as new rather than used, because the purchaser did not make an unconditional tender of the vehicle to the seller pursuant to O.C.G.A. §§ 13-4-24 and 13-4-60; rather, the seller offered to give back the vehicle upon payment of damages that were more than twice the purchase price, and such a conditioned tender did not meet the condition precedent of unconditional tender required by the purchaser in order to bring the rescission action. *Scott v. Team Toyota*, 276 Ga. App. 257, 622 S.E.2d 925 (2005).

Elements necessary to sustain action are that representations of vendor were material and knowingly false; that the representations were made for purpose of inducing purchaser to enter into contract; that the purchaser relied upon false misrepresentations and was thereby induced to act, and that the purchaser did so to the purchaser's injury. *General Mach. Corp. v. Best Supply Co.*, 99 Ga. App. 250, 108 S.E.2d 158 (1959).

Essential elements of action for fraud and deceit are: (1) that defendant made representations; (2) that at time the defendant knew the representations were false (or had what law regards as equivalent of knowledge); (3) that the defendant made the representations with intention and purpose of deceiving plaintiff; (4) that plaintiff relied upon such representations; and (5) that plaintiff sustained alleged loss and damage as proximate result of the representations having been made. *McBurney v. Woodward*, 84 Ga. App. 807, 67 S.E.2d 398 (1951).

Nature of damage justifying rescission. — Insofar as the right to rescind a contract for fraud is concerned, injury or damage within the rule does not mean such actual pecuniary damage as might be estimated and recovered by a money judgment. *Thomson v. Walter*, 160 Ga. App. 542, 287 S.E.2d 562 (1981).

In a consumer's suit against a car dealer for rescission, regarding the sale of a used car which the dealer's salesperson falsely represented had not been in a wreck, it was error for the trial court to grant a directed verdict to the dealer because there was evidence that the consumer suffered loss due to the misrepresentation as, for instance, the consumer testified that the windshield, which had to be replaced after the wreck, leaked water and drained onto the control module. *Mitchell v. Backus Cadillac-Pontiac, Inc.*, 274 Ga. App. 330, 618 S.E.2d 87 (2005).

Fraudulent inducement to enter sales contract. — False and fraudulent representations as to an existing fact which induced the signing of a sales contract give the purchaser the right to rescind the contract. *Crews v. Cisco Bros. Ford-Mercury, Inc.*, 201 Ga. App. 589, 411 S.E.2d 518, cert. denied, *Cisco Bros. Ford-Mercury, Inc. v. Pettig*, No. S92C0221, 1991 Ga. LEXIS 1022 (Ga. Dec. 4, 1991).

"Merger clause" in a vehicle sales contract, which stated that any verbal promises by a salesperson were waived and were not a part of the contract, did not prohibit plaintiff from claiming fraudulent inducement to enter the contract. *Crews v. Cisco Bros. Ford-Mercury, Inc.*, 201 Ga. App. 589, 411 S.E.2d 518, cert. denied, *Cisco Bros. Ford-Mercury, Inc. v. Pettig*, No. S92C0221, 1991 Ga. LEXIS 1022 (Ga. Dec. 4, 1991).

In a consumer's suit against a car dealer for rescission, regarding the sale of a used car which the dealer's salesperson falsely represented had not been in a wreck, it was error for the trial court to grant a directed verdict to the dealer because it could be inferred from evidence that the salesperson's employment was terminated about the time the consumer informed the dealer the customer had learned the car was in a wreck that the salesperson's statements, which were attributable to the dealer, were fraudulent. *Mitchell v. Backus Cadillac-Pontiac, Inc.*, 274 Ga. App. 330, 618 S.E.2d 87 (2005).

Rescission for fraudulent misrepresentations unavailable when truth reasonably ascertainable. — Party cannot rescind on ground of fraudulent misrepresentations of vendor, if, in exercise of reasonable diligence, one could have ascertained personally that representations were untrue. *General Mach. Corp. v. Best Supply Co.*, 99 Ga. App. 250, 108 S.E.2d 158 (1959).

Rescission (Cont'd)

Negligence in failing to discover fraud may bar relief. *Commercial Union Assurance Co. v. Chattahoochee Lumber Co.*, 130 Ga. 191, 60 S.E. 554 (1908).

O.C.G.A. § 13-4-60 inapplicable to constructive fraud or breach of warranty. — Rescission, where right to rescind is not expressly reserved, cannot be had for mere constructive fraud or breach of warranty, but only for actual fraud. *General Mach. Corp. v. Best Supply Co.*, 99 Ga. App. 250, 108 S.E.2d 158 (1959).

Rescission for constructive fraud may be available in equity. — While only actual fraud will authorize ex parte rescission of sale of personalty so as to enable aggrieved party to sue at law, as in trover, for property that one may have delivered to other under contract, sale either of realty or of personalty may be rescinded by court of equity for mere constructive fraud, if other essentials of case are established. *Puckett v. Reese*, 203 Ga. 716, 48 S.E.2d 297 (1948).

Mere executory agreement to rescind not an accord and satisfaction of debt absent express agreement to that effect. *Redman v. Woods*, 42 Ga. App. 713, 157 S.E. 252 (1931).

One accused of fraud to be made party to action for rescission. — In action by insurer to rescind for fraud, other party or that party's legal representative should be made party to proceeding in order that one may be afforded opportunity to defend against accusation that one committed fraud. *Weems v. American Nat'l Ins. Co.*, 197 Ga. 493, 29 S.E.2d 500 (1944).

When contract is rescinded, parties are not to be left where rescission finds them; original status must be restored, or equivalent therefor must be provided in contract or furnished by law. *Eller v. McMillan*, 174 Ga. 729, 163 S.E. 910 (1932).

Measure of damages payable to the purchaser of a truck who elected to rescind a contract, rather than affirm the contract, was measured by the amount it would take to restore the purchaser to the status the purchaser held before the transaction, not the difference in the value of the truck with and without the "defect." *Evans Toyota, Inc. v. Cronin*, 233 Ga. App. 318, 503 S.E.2d 358 (1998).

When contract rescinded and action brought for fraud, disclaimer of warranty is

no longer binding. *Bob Maddox Dodge, Inc. v. McKie*, 155 Ga. App. 263, 270 S.E.2d 690 (1980).

Parol agreements. — The rule that parol agreements shall not be received to change or add to the terms of a written contract does not apply where the alleged contract was procured by fraud. *Potomac Leasing Co. v. Thrasher*, 181 Ga. App. 883, 354 S.E.2d 210 (1987).

Insistence of new car buyers that the buyers would not have defective door repaired but would accept only a new car in its stead did not amount in fact or effect to a tender back of the car purchased. By suing for damages, the buyers were deemed to have elected to affirm the contract, and thus could not rescind the contract. *DeLoach v. General Motors*, 187 Ga. App. 159, 369 S.E.2d 484 (1988).

Car dealer's failure to comply with Fair Business Practices Act. — Plaintiff's action based on a dealer's failure to comply with the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., and with O.C.G.A. § 40-1-5(a) was not barred on the basis that plaintiff failed to rescind the sales contract after learning of the purported misrepresentation because, after learning of the car's repair history, plaintiff promptly offered to return the vehicle to the manufacturer, also offered to return the car to the dealer, and then stopped making payments on the car. *Neal Pope, Inc. v. Garlington*, 245 Ga. App. 49, 537 S.E.2d 179 (2000).

Purchaser was entitled to rescission of a real estate sales contract, after the purchaser asked the vendor to "rescind the deal" and return the purchaser's money because the property was of no use to the purchaser unless the purchaser could rent the property. *Morris v. Cowart*, 201 Ga. App. 288, 411 S.E.2d 81, cert. denied, 201 Ga. App. 904, 411 S.E.2d 81 (1991).

Purchaser was entitled to rescission of a real estate sales contract, where the evidence was sufficient for the jury to conclude that the vendor had "passively concealed" the defective condition of prospective rental property. *Morris v. Cowart*, 201 Ga. App. 288, 411 S.E.2d 81 (1991).

Finance leases held not rescindable. — Since there was no evidence of a relationship pursuant to which purported fraud of an equipment supplier's employees could be

imputed to a finance lessor, finance leases were not rescindable by the business lessee, and "hell or high water" clauses in the leases were viable. *Colonial Pac. Leasing Corp. v. McNatt*, 268 Ga. 265, 486 S.E.2d 804 (1997).

Letters from counsel that expressly reserved the right to rescind did not constitute rescission under Georgia law. *Weed Wizard Acquisition Corp. v. A.A.B.B., Inc.*, 201 F. Supp. 2d 1252 (N.D. Ga. 2002).

Rescission and timing of lawsuit. — Although, pursuant to O.C.G.A. § 13-4-60, an attempt to seek rescission contemporaneously with the filing of a lawsuit is usually insufficiently prompt, a buyer did not waive its fraud claim under Georgia's tender rule where the buyer raised factual issues concerning whether requiring tender would be reasonable under the circumstances. Further, the buyer filed the buyer's action in state court only four days after the buyer received notification from the seller that the seller would not defend or indemnify buyer in a claim for patent infringement. *American Family Life Assur. Co. v. Intervoice, Inc.*, 659 F. Supp. 2d 1271 (M.D. Ga. 2009).

Unambiguous rescission of sales contract not made. — It was error to vacate an arbitrator's award to a seller under O.C.G.A. § 9-9-13(b)(5) on grounds that the arbitrator manifestly disregarded the law of rescission. The arbitrator found that as the buyer did not make an unambiguous rescission of the sales contract, the buyer's suit for fraud failed; in making this finding, the arbitrator cited O.C.G.A. § 13-4-60 and the applicable case law concerning rescission and applied that law to the circumstances of the case. *Hansen & Hansen Enters. v. SCSJ Enters.*, 299 Ga. App. 469, 682 S.E.2d 652 (2009).

Restoration of Benefits

1. In General

Rescission at law is effected by either restoring, or making bona fide offer to restore, to defendant the fruits of the contract. *Coleman v. Ellenberg* (In re Cohen), 6 Bankr. 708 (Bankr. N.D. Ga. 1980).

Party charged with fraud should be given opportunity to redress wrong before subject to suit for rescission. The party might be willing, without suit, to give back to complaining party what the party received under contract, and to take back from such party

that latter received from the party thereunder. This would end controversy and save litigation. *Williams v. Fouche*, 157 Ga. 227, 121 S.E. 217 (1924).

Reason for rule requiring restoration or offer to restore before attacking contract for fraud, is that attack amounts to admission that such contract was made, and involves also election to rescind contract; and rule of rescission always is that opposite party must be placed in status quo. *Roberts v. Southern Ry.*, 73 Ga. App. 759, 38 S.E.2d 48 (1946).

Equitable right to restitution upon rescission of contract, rests upon doctrine that party who has received from another anything of value by virtue of contract cannot rescind the contract without restoring whatever thing of value one has so gotten. *Kerlin v. Young*, 159 Ga. 95, 125 S.E. 204 (1924).

This principle is based on equitable doctrine that one who seeks equity must do equity. — Principle incorporated in law is predicated on broad equitable doctrine that one who asks equity must do equity. If a party intends to rescind a contract on ground of fraud, one must promptly disown the contract, return property, and restore status. *Jordy v. Dunlevie*, 139 Ga. 325, 77 S.E. 162 (1913).

Restoration must place parties in status the parties were in prior to contract. *Booth v. Atlanta Clearing-House Ass'n*, 132 Ga. 100, 63 S.E. 907 (1909).

Vendee rescinding under law entitled to restoration of payments made before discovering fraud. — If, because of false material representations by vendor, contract of conditional sale is promptly rescinded by vendee or by both parties, and vendee restores, or unsuccessfully offers to restore, vendor to the vendor's original status quo, vendee, being likewise entitled to restoration of vendee's own status, may recover any part of purchase price paid before discovery of fraud. *Walters v. Hagan*, 53 Ga. App. 547, 186 S.E. 563 (1936).

Upon restoration, purchaser entitled to return of payments made without equitable action for rescission. — Upon restoration, purchaser, without taking any independent proceeding in equity to rescind contract, is entitled to recover amount of purchase-price actually paid by the purchaser. *Cochran v. Meeks*, 25 Ga. App. 61, 102 S.E. 550 (1920).

Restoration unnecessary when party elects to sue in tort for fraud. — Party may elect to

Restoration of Benefits (Cont'd)**1. In General (Cont'd)**

bring action in tort for fraud, and in that event rule or restoration does not apply. *Tuttle v. Stovall*, 134 Ga. 325, 67 S.E. 806, 20 Ann. Cas. 168 (1910).

When subject matter of sale is worthless, restoration to status quo not required. *Harris v. Daly*, 121 Ga. 511, 49 S.E. 609 (1904).

No tender of the original consideration by the defrauded party is required when nothing of any value is received by the party seeking to rescind, or when the amount received under the contract sought to be rescinded may be less than the amount actually due the party seeking to rescind. *Metter Banking Co. v. Millen Lumber & Supply Co.*, 191 Ga. App. 634, 382 S.E.2d 624 (1989).

Party need not return that which the party is entitled to retain. *Bankers Health & Life Ins. Co. v. Griffeth*, 59 Ga. App. 740, 1 S.E.2d 771 (1939).

Used car buyers not obligated to return purchased vehicles. — Used car buyers who sought rescission of the buyers' sales contracts were not obligated to tender or offer to tender back the purchased vehicles, where the defrauding party would then have had both the money paid by a third party credit firm and the vehicles, and the buyers would have been put to trouble and expense to try to get the credit firm to absolve the buyers' debts, meanwhile having neither the vehicles nor the money. *Crews v. Cisco Bros. Ford-Mercury, Inc.*, 201 Ga. App. 589, 411 S.E.2d 518, cert. denied, *Cisco Bros. Ford-Mercury, Inc. v. Pettig*, No. S92C0221, 1991 Ga. LEXIS 1022 (Ga. Dec. 4, 1991).

In a consumer's suit against a car dealer for rescission, regarding the sale of a used car which the dealer's salesperson falsely represented had not been in a wreck, it was error for the trial court to grant a directed verdict to the dealer based on the fact that the consumer still had possession of the car because the consumer was not necessarily required to return the car, and there was evidence that the consumer's attempt to return the car was refused by the dealer. *Mitchell v. Backus Cadillac-Pontiac, Inc.*, 274 Ga. App. 330, 618 S.E.2d 87 (2005).

Leased vehicle. — Although lessees informed lessor-company that it "could come

pick up the vehicle", which arguably could be construed as an attempt at restoration of the benefit of the contract, the lessees' conduct following that notification was inconsistent with such a construction, since the lessees continued to drive the vehicle for months afterwards. *Hall v. World Omni Leasing, Inc.*, 209 Ga. App. 115, 433 S.E.2d 297 (1993).

Equity does not require restoration by plaintiff of receipts which would become part of recovery. — Equity does not require useless procedure on part of plaintiff to return part of plaintiff's just proportion only to have it included in larger sum due to plaintiff and which plaintiff seeks to recover. *Atlanta Life Ins. Co. v. Walker*, 53 Ga. App. 80, 184 S.E. 776 (1936).

When there is evidence tending to show that the amount received under the contract by those seeking to rescind may be less than the amount to which they are actually entitled, and that the opposing party may be still in possession of funds owing to the plaintiffs, the rule is that a party is not obliged to return that which the party is entitled to retain. *Corbitt v. Harris*, 182 Ga. App. 81, 354 S.E.2d 637 (1987).

One induced to accept much less alimony than amount due need not restore amounts received. *Ellis v. Ellis*, 161 Ga. 360, 130 S.E. 681 (1925).

Word "promptly" as used in the law means within reasonable time. *Equitable Bldg. & Loan Ass'n v. Brady*, 171 Ga. 576, 156 S.E. 222 (1930), later appeal, 175 Ga. 43, 164 S.E. 674 (1932); *Chapman v. Telex, Inc.*, 129 F. Supp. 567 (N.D. Ga. 1954).

Word "promptly" as used in the law, does not mean immediately, but means within reasonable time. *Kerr Glass Mfg. Co. v. Americus Grocery Co.*, 13 Ga. App. 512, 79 S.E. 381 (1913); *Stovall & Strickland v. McBrayer*, 20 Ga. App. 93, 92 S.E. 543 (1917).

Party must restore benefits with promptitude necessitated by circumstances. — Party must proceed with offer to restore what one has received with that promptitude which nature of case and environment of circumstances would require, as manifesting intention to treat from discovery of fraud, what one has received as property of other party. *Jordy v. Dunlevie*, 139 Ga. 325, 77 S.E. 162 (1913); *Manget v. Cunningham*, 166 Ga. 71, 142 S.E. 543 (1928).

Party aggrieved must act with promptitude which nature of case and circumstances require. *Chapman v. Telex, Inc.*, 129 F. Supp. 567 (N.D. Ga. 1954).

Party defrauded must proceed with the defrauded party's offer to restore what the party has received, with that promptitude which nature of case and environment of circumstances would require. *Newton v. Burks*, 139 Ga. App. 617, 229 S.E.2d 94 (1976); *Thomson v. Walter*, 160 Ga. App. 542, 287 S.E.2d 562 (1981).

Patent licensee's failure to rescind a license agreement by offering or tendering benefits the licensee received under the contract precluded the licensee's claim of fraud in the inducement against the licensor. *Meadow River Lumber Co. v. University of Ga. Research Found., Inc.*, 233 Ga. App. 169, 503 S.E.2d 655 (1998).

Shareholder was not entitled both to retain the shares and to recover the purchase price, because to rescind the contract and sue for restitution, the plaintiff must first restore or make a bona fide effort to restore to the other party whatever benefits one has received from the transaction. *Graham v. Cook*, 179 Ga. App. 603, 347 S.E.2d 623 (1986).

When no offer to restore benefits received has been made, contract must stand as written. *Ulmer v. Ulmer*, 86 Ga. App. 319, 71 S.E.2d 558 (1952).

Contract will not be set aside, on ground of fraud in the contract's procurement, at instance of one who has neither restored, nor offered to restore, fruits thereof. *Chattanooga Beauty Supply Co. v. Fanin*, 61 Ga. App. 736, 7 S.E.2d 302 (1940); *Roberts v. Southern Ry.*, 73 Ga. App. 759, 38 S.E.2d 48 (1946).

Notice of intention to disaffirm is insufficient, there must be offer to restore status. *Jordy v. Dunlevie*, 139 Ga. 325, 77 S.E. 162 (1913).

Offer to restore, made for first time in bill of complaint is insufficient. *Roberts v. Southern Ry.*, 73 Ga. App. 759, 38 S.E.2d 48 (1946).

Restoration or offer of restoration of receipts must be made prior to suit for rescission. — General rule is that one who seeks rescission of contract on ground of fraud must restore or offer to restore consideration received thereunder as condition pre-

cedent to bringing action. *Napier v. Adams*, 166 Ga. 403, 143 S.E. 566 (1928).

One who seeks rescission of contract on ground of fraud must restore, or offer to restore, consideration received thereunder, as condition precedent to bring action; and petition which fails to allege restoration or offer to restore before institution of suit is subject to demurrer (now motion to dismiss). *Chattanooga Beauty Supply Co. v. Fanin*, 61 Ga. App. 736, 7 S.E.2d 302 (1940); *Puckett v. Reese*, 203 Ga. 716, 48 S.E.2d 297 (1948); *Wheeler v. Pioneer Invs., Inc.*, 217 Ga. 367, 122 S.E.2d 518 (1961); *Scott v. Scott*, 107 Ga. App. 443, 130 S.E.2d 753 (1963).

Party seeking rescission for fraud must restore or offer to restore what the party has received before entering suit. Party charged with fraud should be given opportunity to redress wrong before being subjected to suit for rescission. *Georgia Baptist Orphans Home, Inc. v. Moon*, 192 Ga. 81, 14 S.E.2d 590 (1941).

Generally, restoration or offer to restore must be made promptly upon discovery of fraud, and before suit is filed, by one seeking rescission of contract on ground of fraud. *Roberts v. Southern Ry.*, 73 Ga. App. 759, 38 S.E.2d 48 (1946).

Restitution before absolution is general rule. *Bankers Health & Life Ins. Co. v. Griffith*, 59 Ga. App. 740, 1 S.E.2d 771 (1939).

Offer to restore whatever of value one has received under contract is condition precedent to bringing action for cancellation or rescission of contract, and such tender must be made before action is commenced. *Dimmick v. Pullen*, 224 Ga. 452, 162 S.E.2d 427 (1968).

2. Pleadings and Practice

Petition must allege restoration of or offer to restore benefits. — Restoration of or offer to restore status quo must be pled. *Garner v. Butler*, 144 Ga. 441, 87 S.E. 471 (1915); *Williams v. Fouché*, 157 Ga. 227, 121 S.E. 217 (1924).

In suit to rescind, petition must show that there has been restoration of or offer to restore benefits received. *Puckett v. Reese*, 203 Ga. 716, 48 S.E.2d 297 (1948).

Trial judge did not err in sustaining general demurrer (now motion to dismiss) to

Restoration of Benefits (Cont'd)**2. Pleadings and Practice (Cont'd)**

petition which sought rescission of deed to secure debt and note on ground of fraud since petition failed to allege restoration or offer to restore prior to institution of suit. *Wheeler v. Pioneer Invs., Inc.*, 217 Ga. 367, 122 S.E.2d 518 (1961).

Petition must allege restoration of benefits or excuse for failure to do so. — One seeking to avoid effects of release and plea of accord and satisfaction based thereon on ground of fraud must show either rescission and tender back to other party of fruits of that contract before commencing suit, or excuse for failure to do so. *Drew v. Lyle*, 88

Ga. App. 121, 76 S.E.2d 142 (1953).

One who seeks rescission of a contract on the ground of fraud must restore, or offer to restore, the consideration received thereunder, as a condition precedent to bringing the action; and a petition which fails to allege restoration or offer to restore before institution of the suit is demurrable. This principle applies to answer or crossbill where defendant seeks rescission of contract for fraud. *Hardware Mut. Cas. Co. v. Dooley*, 68 Ga. App. 230, 22 S.E.2d 625 (1942).

Party must allege offer to return party's premiums before bringing action to declare policy void. *Belt v. Allstate Ins. Co.*, 140 Ga. App. 740, 231 S.E.2d 831 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Cancellation of Instruments, § 16 et seq. 17 Am. Jur. 2d, Contracts, §§ 476, 488, 496, 499, 506. 37 Am. Jur. 2d, Fraud and Deceit, §§ 15, 16, 52, 136, 375, 376.

Am. Jur. Proof of Facts. — Proof of Fraudulent Inducement of a Contract and Entitlement to Remedies, 48 POF3d 329.

C.J.S. — 17 C.J.S., Contracts, § 167. 17A C.J.S., Contracts, §§ 415, 418, 438, 439, 441, 445.

ALR. — Presence of noxious weeds as ground for rescission of contract for purchase of land, 2 ALR 1511.

Validity and effect of stipulation to the effect that vendee or purchaser does not rely upon representations of vendor or seller, or the latter's agent, 10 ALR 1472.

Validity of agreement to pay an officer or employee of a bank or trust company to disclose the existence of, or to assist one to establish, a deposit, 18 ALR 979.

Seller's concealment of ownership of other property inducing exclusion of same from contract as actionable fraud, 26 ALR 990.

Fraudulent misrepresentation or concealment by a contracting party concerning title to property or other subjects which are matters of public record, 33 ALR 853; 56 ALR 1217.

Recovery in action of deceit for fraudulently inducing contract of expense of other litigation incident to contract, 41 ALR 1156.

False statement by vendor, or his agent, as

to price for which property in question, or property in vicinity, had been sold as ground for relief of purchaser, 66 ALR 188.

Examination of real property by purchaser before entering into contract as precluding rescission on ground of falsity of representations, 70 ALR 942.

Time for rescission by purchaser of chattel for fraud or breach of warranty, 72 ALR 726.

Principle which denies relief to party who has conveyed or transferred property in fraud of his creditors, as affected by execution, as part of, or as contemplated at time of, the fraudulent transaction, of reconveyance or retransfer of the property to him, 89 ALR 1166.

Misrepresentations by one party's agent, who was not authorized in that regard, as ground of rescission by the other party, 95 ALR 763.

Fraud inducing deposits or subscription to stock in building and loan association as ground of rescission or preference where association is insolvent, 100 ALR 573.

Stamp or transfer tax as payable in respect of tender or return of securities or documents incident to rescission of contract, 100 ALR 1420.

Pecuniary damage as essential to rescission of contract for purchase of real or personal property, 106 ALR 125.

Rescission as essential to cancellation of instrument or lien voidable for fraud or failure of consideration, 109 ALR 1032.

Remedy of rescission for grantee's breach

of agreement to support grantor, 112 ALR 670.

Sufficiency of buyer's attempt to rescind as affected by his apparent recognition of or insistence upon continuance of seller's obligation under the contract, 118 ALR 530.

Rights of parties to conditional sale as affected by breach of warranty, 130 ALR 753.

Return or tender of consideration for release or compromise as condition of action for rescission or cancellation, action upon original claim, or action for damages sustained by the fraud inducing the release or compromise, 134 ALR 6.

Breach of obligation to pay tax or assessment on land sold as ground for rescission of contract, 139 ALR 971.

Partial rescission of contract, 148 ALR 417.

Seller's advertisements as affecting rights of parties to sale of personal property, 158 ALR 1413.

Assignability of right to rescind or of right to return of money or other property as incident of rescission, 162 ALR 743.

What amounts to fraud on contractor, sustaining rescission or action for damages under building or construction contract, 166 ALR 938.

Commitment of grantor to institution for insane as ground for setting aside convey-

ance in consideration of support, 18 ALR2d 906.

Timeliness of tender or offer of return of consideration for release or compromise, required as a condition of setting it aside, 53 ALR2d 757.

What constitutes abandonment of land contract by vendee, 68 ALR2d 581.

Venue of action for rescission or cancellation of contract relating to interests in land, 77 ALR2d 1014.

Necessity of showing damage to establish fraud as defense to action on contract, 91 ALR2d 346.

Seller's liability for fraud in connection with contract for the sale of long-term dancing lessons, 28 ALR3d 1412.

Purchaser's misrepresentations as to intended use of real property as ground for vendor's equitable relief from contract and deed, 35 ALR3d 1369.

Automobile or motorcycle as necessary for infant, 56 ALR3d 1335.

Public contracts: duty of public authority to disclose to contractor information, allegedly in its possession, affecting cost or feasibility of project, 86 ALR3d 182.

Construction and effect of provision in contract for sale of realty by which purchaser agrees to take property "as is" or in its existing condition, 8 ALR5th 312.

13-4-61. Rights of vendor as to reclamation of goods where contract rescinded for fraud.

Except as otherwise provided in Title 11, the "Uniform Commercial Code," where a contract of sale is rescinded for fraud, the rights of the vendor reclaiming the goods are superior to those of one who has acquired the goods or a lien thereon in consideration of an antecedent debt. (Civil Code 1895, § 3713; Civil Code 1910, § 4307; Code 1933, § 20-908.)

History of Code section. — This Code section is derived from the decision in *Dinkler v. Potts & Potts*, 90 Ga. 103, 15 S.E. 690 (1892).

Cross references. — Provisions of Uniform Commercial Code relating to sales, § 11-2-101 et seq.

JUDICIAL DECISIONS

Defrauded vendor of land had rights superior to vendee's grantee taking as security for preexisting debt. *Mize v. Bank of Whigham*, 138 Ga. 499, 75 S.E. 629 (1912).

Vendor's right under O.C.G.A. § 13-4-61 superior to mortgagee's under mortgage to secure antecedent debt. — Right of seller to rescind sale for fraud is superior to right of

mortgagee whose mortgage was taken to secure antecedent debt. *Harris v. Evans*, 134 Ga. 161, 67 S.E. 880 (1910).

On facts, seller's right of reclamation superior to those of buyer's trustee in bankruptcy. — When seller was induced to sell goods shortly before buyer's bankruptcy, at time when buyer was insolvent, and when buyer did not intend to pay, and concealed the buyer's insolvency by affirmative misrep-

resentations, giving the seller the right to rescind, the seller could reclaim goods as against buyer's trustee. In *re Spinks Drug Co.*, 298 F. 307 (N.D. Ga. 1924).

Cited in *Sutton v. Ford*, 144 Ga. 587, 87 S.E. 799, 1918D L.R.A. 561, 1918A Ann. Cas. 106 (1916); *Singletary v. GMAC*, 73 F.2d 453 (5th Cir. 1934); *Puckett v. Reese*, 203 Ga. 716, 48 S.E.2d 297 (1948).

RESEARCH REFERENCES

Am. Jur. 2d. — 77 Am. Jur. 2d, Vendor and Purchaser, §§ 349, 463, 502.

C.J.S. — 92 C.J.S., Vendor and Purchaser, § 440 et seq.

ALR. — Validity and effect of stipulation to the effect that vendee or purchaser does not rely upon representations of vendor or seller, or the latter's agent, 10 ALR 1472.

Recovery in action of deceit for fraudulently inducing contract of expense of other litigation incident to contract, 41 ALR 1156.

Dealings between seller and buyer after latter's knowledge of former's fraud as waiver of claim for damages on account of fraud, 106 ALR 172.

Assignability of right to rescind or of right to return of money or other property as incident of rescission, 110 ALR 849; 162 ALR 743.

Compensation as alternative relief upon denial of rescission to purchaser of land, 175 ALR 686.

Rescission of corporate stock sale or transaction as authorizing court to award recovery of requisite number of shares to party entitled to relief, 14 ALR2d 855.

What constitutes abandonment of land contract by vendee, 68 ALR2d 581.

13-4-62. Rescission for nonperformance.

A party may rescind a contract without the consent of the opposite party on the ground of nonperformance by that party but only when both parties can be restored to the condition in which they were before the contract was made. (Orig. Code 1863, § 2801; Code 1868, § 2809; Code 1873, § 2860; Code 1882, § 2860; Civil Code 1895, § 3712; Civil Code 1910, § 4306; Code 1933, § 20-907.)

JUDICIAL DECISIONS

Basis for right to restoration upon rescission. — The equitable right to restoration upon the rescission of a contract rests upon the doctrine that a party who has received from another anything of value by virtue of a contract cannot rescind the contract without restoring whatever thing of value one has so gotten. *Jones v. Gaskins*, 248 Ga. 510, 284 S.E.2d 398 (1981).

Letter referring to rescission, but plainly indicating that the subject of rescission was under negotiation, was not a rescission of the contract. *Southern Prestige Homes, Inc.*

v. Moscoso, 243 Ga. App. 412, 532 S.E.2d 122 (2000).

Rescission and restitution are available remedies for material nonperformance or breach in certain situations, but various rules govern situations in which these remedies will be granted. *Cutcliffe v. Chesnut*, 122 Ga. App. 195, 176 S.E.2d 607 (1970).

Rescission not mandatory even if parties can be restored to original positions. — Even if parties can be restored to their respective conditions at time of alleged breach, plaintiff is not required to rescind. *Western Con-*

tracting Corp. v. State Hwy. Dep't, 125 Ga. App. 376, 187 S.E.2d 690 (1972).

Generally, one injured by breach may rescind or continue under contract and recover damages for breach. Western Contracting Corp. v. State Hwy. Dep't, 125 Ga. App. 376, 187 S.E.2d 690 (1972).

Option for damages or rescission. — When money is paid on contract which is executory on part of one who receives money, and party so receiving fails to fulfill one's part of the contract, the injured party may elect either to bring action on contract and recover damages for nonperformance, or to consider contract as rescinded and recover money paid. Marietta Publishing Co. v. Times Publishing Co., 26 Ga. App. 752, 107 S.E. 270 (1921); Cutcliffe v. Chesnut, 122 Ga. App. 195, 176 S.E.2d 607 (1970).

Rescission abrogates contract, not partially but completely; it leaves rights of parties and amount of damages, if any, to be determined, not by rescinded contract, but by court of equity. Eller v. McMillan, 174 Ga. 729, 163 S.E. 910 (1932).

Breach which defeats object of contract may authorize rescission. — Breach of contract as to matter so substantial and fundamental as to defeat object of contract may authorize rescission by opposite party. Martin v. Rollins, Inc., 138 Ga. App. 649, 226 S.E.2d 771 (1976), aff'd, 238 Ga. 119, 231 S.E.2d 751 (1977); Mayor of Douglasville v. Hilderbrand, 175 Ga. App. 434, 333 S.E.2d 674 (1985).

Breach must be material. — County's refusal to pay all of the requested amount of a contractor's change order did not constitute a material breach of contract allowing the contractor to terminate the contract, given that the amount of the change order was about two percent of the total contract price. Forsyth County v. Waterscape Servs., LLC, No. A09A1964, 2010 Ga. App. LEXIS 250 (Mar. 16, 2010).

Party who has substantially broken contract cannot rescind on ground of other's nonperformance. — Right to rescind or terminate contract on ground of failure of performance by opposite party belongs only to party who is free from substantial default personally, and a party who has substantially broken contract cannot rescind the contract on ground that other party subsequently refused or failed to perform. Martin v.

Rollins, Inc., 138 Ga. App. 649, 226 S.E.2d 771 (1976), aff'd, 238 Ga. 119, 231 S.E.2d 751 (1977).

Rescission may be had for ineptive fraud, as well as for subsequent breach of contract. Head v. Walker, 243 Ga. 108, 252 S.E.2d 440 (1979).

When equitable action for rescission appropriate. Head v. Walker, 243 Ga. 108, 252 S.E.2d 440 (1979).

Doctrine of rescission is based upon restitution, and it is only applicable generally where restitution can or ought to be made. This doctrine can have no application to case if one party has acquired nothing which other party is entitled to have restored. Henderson Whse. Co. v. Brand, 105 Ga. 217, 31 S.E. 551 (1898).

When contract is rescinded, parties are not to be left where rescission finds the parties; original status must be restored, or equivalent therefor must be provided in contract or furnished by law. Eller v. McMillan, 174 Ga. 729, 163 S.E. 910 (1932).

Party electing to rescind must restore or tender benefits received under contract. Milam v. Gray, 80 Ga. App. 356, 56 S.E.2d 168 (1949).

Restoration to substantially original position is sufficient. — Restoration does not require that the opposite party shall be placed in the exact situation in which the party was before the exchange, but only that the party be placed substantially in the party's original position, and that the party rescinding shall derive no unconscionable advantage from the rescission. Jones v. Gaskins, 248 Ga. 510, 284 S.E.2d 398 (1981); International Software Solutions, Inc. v. Atlanta Pressure Treated Lumber Co., 194 Ga. App. 441, 390 S.E.2d 659 (1990).

Recovery of consideration is available remedy. — The restitutionary remedy of recovery of the consideration advanced on the theory of rescission of the contract because of the material nonperformance or breach is an available remedy in this state. Jones v. Gaskins, 248 Ga. 510, 284 S.E.2d 398 (1981).

Return of down payment required when contract for sale of land is rescinded. — Defense judgment was reversed as the seller of a vacant lot continued to hold possession and title to the land and offered the land for sale to another after the buyer defaulted on

a contract similar to a bond for title or an installment sale contract; as the seller rescinded the contract, the original status had to be restored and the buyer was entitled to the return of the down payment. *Crowell v. Williams*, 273 Ga. App. 676, 615 S.E.2d 797 (2005).

Defendant may assert right to restoration to original position defensively only. — When vendor is entitled to rescind without consent of opposite party, vendee cannot take advantage of vendee's own wrong so as to give oneself standing as plaintiff in action to recover for improvements or purchase-money paid in part performance of contract of sale. Such claim can only be asserted defensively, when vendor by exercising right of rescission has clothed vendee with correlative right to be restored to vendee's status. *Clark v. Powell*, 30 Ga. App. 198, 117 S.E. 250 (1923).

Equitable right to restitution upon rescission not dependent upon full performance of party seeking restitution. — Equitable right to restitution upon rescission of contract does not depend upon full performance of contract by party seeking restitution. This right rests upon doctrine that party who has received from another anything of value by virtue of contract cannot rescind the contract without restoring whatever thing of value one has so gotten. *Kerlin v. Young*, 159 Ga. 95, 125 S.E. 204 (1924).

One seeking rescission for other's default must show own compliance. — Party seeking rescission due to other's default must show that party has done all that party is required to do in order to be entitled to performance by other party. Moreover, party seeking to rescind must show that the party was free from default in relation to obligation which the party claims the other party failed to perform. *Martin v. Rollins, Inc.*, 138 Ga. App. 649, 226 S.E.2d 771 (1976), *aff'd*, 238 Ga. 119, 231 S.E.2d 751 (1977).

Rescission allowed for breach of warranty in conditional sale. — When notes were given for certain apparatus for manufacture under conditional sale, if, upon trial of apparatus by vendee, it did not come up to representations and covenants of vendor, as to their quality and condition, and proved worthless, vendee had right to rescind contract without consent of vendor, vendee being able to restore vendor to condition in

which vendor was before contract was made. *Tufts v. Cheatham*, 75 Ga. 865 (1885).

Rescission of contract for sale of land for breach by return of installment paid. — Vendor may rescind contract for sale of land upon installments, when vendee failed to pay second installment when due by offer to return first installment. *Dukes v. Baugh*, 91 Ga. 33, 16 S.E. 219 (1892).

Rescission of contract to sell realty allowed for breach of parol covenant. — Vendee may rescind contract of sale of realty after vendor failed to improve premises, although this covenant was parol. *Epps v. Waring*, 93 Ga. 765, 20 S.E. 645 (1894).

Rescission is improper remedy where commodity sold has been consumed. — When in contract for sale of corn, a portion was delivered, paid for, and used by purchaser, rescission upon ground that corn was of inferior quality is not proper remedy. *Henderson Elevator Co. v. North Ga. Milling Co.*, 126 Ga. 279, 55 S.E. 50 (1906).

Section inapplicable to breach of contract to teach. — Rule of this statute has no application to case when one agrees to teach another a certain thing, and, after beginning the course of instruction, refuses to proceed further, whereupon the other party treats the contract as rescinded and brings suit to recover amount which one has paid under agreement. *Timmerman v. Stanley*, 123 Ga. 850, 51 S.E. 760, 1 L.R.A. (n.s.) 379 (1905) (see O.C.G.A. § 13-4-62).

Ordinary rule of rescission does not apply to accord and satisfaction because in order for there to be accord and satisfaction, the accord must be executed. As long as accord is executory, although it is partially performed, original cause of action is not extinguished, and action may be brought upon it. *Brunswick & W. Ry. v. Clem*, 80 Ga. 534, 7 S.E. 84 (1888).

Evidence insufficient to justify rescission. — See *City of McCaysville v. Cardinal Robotics, LLC*, 263 Ga. App. 847, 589 S.E.2d 614 (2003).

Cited in *White v. Hand*, 76 Ga. 3 (1885); *McCardle v. Kennedy*, 92 Ga. 198, 17 S.E. 1001, 44 Am. St. R. 85 (1893); *Collier v. Weyman & Connors*, 114 Ga. 944, 41 S.E. 50 (1902); *Williams v. Walden*, 124 Ga. 913, 53 S.E. 564 (1906); *Booth v. Atlanta Clearing-House Ass'n*, 132 Ga. 100, 63 S.E. 907 (1909); *Georgia Supply Co. v. Coffee*, 8

Ga. App. 502, 69 S.E. 1083 (1911); *Bishop v. Brantley*, 23 Ga. App. 663, 99 S.E. 224 (1919); *Fletcher v. Fletcher*, 158 Ga. 899, 124 S.E. 722 (1924); *Home Ins. Co. v. Swann*, 34 Ga. App. 19, 128 S.E. 70 (1924); *Riverside Academy v. Urigh*, 33 Ga. App. 455, 126 S.E. 900 (1925); *Swint v. Adams*, 42 Ga. App. 705, 157 S.E. 249 (1931); *Smith v. McWhorter*, 173 Ga. 255, 160 S.E. 250 (1931); *Gibbs v. H.T. Henning Co.*, 189 Ga. 675, 7 S.E.2d 238 (1940); *C.V. Hill & Co. v. Weinberg*, 67 Ga. App. 44, 19 S.E.2d 430 (1942); *Carroll v. Witter*, 75 Ga. App. 632, 44 S.E.2d 165

(1947); *Rumph v. Rister*, 92 Ga. App. 29, 87 S.E.2d 447 (1955); *Hubert v. Luden's, Inc.*, 92 Ga. App. 427, 88 S.E.2d 481 (1955); *Tipton v. Harden*, 128 Ga. App. 517, 197 S.E.2d 746 (1973); *Sachs v. Swartz*, 233 Ga. 99, 209 S.E.2d 642 (1974); *Dozier v. Matthews*, 136 Ga. App. 375, 221 S.E.2d 236 (1975); *Uptegraft v. Scott*, 169 Ga. App. 12, 311 S.E.2d 187 (1983); *English Restaurant, Inc. v. A.R. II, Inc.*, 194 Ga. App. 639, 391 S.E.2d 462 (1990); *Williams v. Dienes Apparatus, Inc.*, 200 Ga. App. 205, 407 S.E.2d 408 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 458, 482, 490 et seq., 517, 518.

C.J.S. — 17A C.J.S., Contracts, §§ 389, 418, 432, 444 et seq.

ALR. — Presence of noxious weeds as ground for rescission of contract for purchase of land, 2 ALR 1511.

Time for rescission by purchaser of chattel for fraud or breach of warranty, 72 ALR 726.

Action involving rescission or right to rescind contract and to recover amount paid thereunder as one at law or in equity, 95 ALR 1000.

Action based on rescission of contract as one arising on contract, express or implied, within the meaning of attachment statute, 95 ALR 1028.

Stamp or transfer tax as payable in respect of tender or return of securities or documents incident to rescission of contract, 100 ALR 1420.

Pecuniary damage as essential to rescission of contract for purchase of real or personal property, 106 ALR 125.

Owner's right to rescind building and construction contract for default of contractor, 107 ALR 1035.

Remedy of rescission for grantee's breach of agreement to support grantor, 112 ALR 670.

Breach of obligation to pay tax or assessment on land sold as ground for rescission of contract, 139 ALR 971.

Partial rescission of contract, 148 ALR 417.

Assignability of right to rescind or of right to return of money or other property as incident of rescission, 162 ALR 743.

Compensation as alternative relief upon

denial of rescission to purchaser of land, 175 ALR 686.

Notice of rescission as irrevocable election when other party refuses to assent thereto, 1 ALR2d 1084.

Rescission of corporate stock sale or transaction as authorizing court to award recovery of requisite number of shares to party entitled to relief, 14 ALR2d 855.

Commitment of grantor to institution for insane as ground for setting aside conveyance in consideration of support, 18 ALR2d 906.

Measure of infant's recovery for value of chattel traded for another upon his rescission of the transaction, 52 ALR2d 1114.

Timeliness of tender or offer of return of consideration for release or compromise, required as a condition of setting it aside, 53 ALR2d 757.

What constitutes abandonment of land contract by vendee, 68 ALR2d 581.

Venue of action for rescission or cancellation of contract relating to interests in land, 77 ALR2d 1014.

Right of lessor to cancel oil or gas lease for breach of implied obligation to explore and develop further after initial discovery of oil or gas, in absence of showing reasonable expectation of profit to lessee from further drilling, 79 ALR2d 792.

Effect of attempt to terminate employment or agency contract upon shorter notice than that stipulated in contract, 96 ALR2d 272.

Enforceability of contract to make will in return for services, by one who continues performance after death of person originally undertaking to serve, 84 ALR3d 930.

ARTICLE 5

RELEASE

13-4-80. Release of another bound jointly or primarily or acceptance of higher security for same debt.

A release may result by operation of law. When a creditor releases another who is bound jointly with or primarily to a debtor or accepts from a debtor a higher security for the same debt, not intended to be collateral thereto, a release results by operation of law. (Orig. Code 1863, § 2803; Code 1868, § 2811; Code 1873, § 2862; Code 1882, § 2862; Civil Code 1895, § 3715; Civil Code 1910, § 4309; Code 1933, § 20-910.)

Law reviews. — For note, “Lackey v. Non-Parties Under Georgia Law,” see 44 McDowell: The Effect of Releases on Mercer L. Rev. 975 (1993).

JUDICIAL DECISIONS

Under this statute, as at common law, release of one joint debtor releases the other. *Atlantic C.L.R.R. v. Ouzts*, 82 Ga. App. 36, 60 S.E.2d 770 (1950) (see O.C.G.A. § 13-4-80).

Technical release and agreement not to sue distinguished. — Technical release executed by one of several persons jointly liable as original debtors, destroys obligation as to all parties; but if effect of transaction is mere agreement or covenant not to sue, there is no discharge of others; but payment so made must be credited as against other coobligators. In *re Kimbrough-Veasey Co.*, 292 F. 757 (N.D. Ga. 1923).

Contract of release not prevented by provision in original contract regarding method for effecting changes. *Redpath Chautauguas, Inc. v. Parks*, 33 Ga. App. 415, 126 S.E. 551 (1925).

Release of one jointly liable operates, prima facie, as release of others, and obligation is apparently no longer enforceable against them. *Middlebrooks v. Phillips*, 39 Ga. App. 263, 146 S.E. 653 (1929).

Where payee of promissory note releases one joint maker, other maker is discharged. *Ward v. Fleming*, 18 Ga. App. 128, 88 S.E. 899 (1916).

Release of one defendant jointly liable on judgment operates as release of other joint debtor. *Powell v. Davis*, 60 Ga. 70 (1878).

Covenant to indemnify one partner may be consistent with continuance of obligation

of all parties. *Kendrick v. J.B. O’Neil, Foster & Co.*, 48 Ga. 631 (1873).

Third parties cannot dispose of chose in action belonging exclusively to another without one’s consent prior to disposition or one’s ratification of the act thereafter. *Rowland v. Lewis*, 109 Ga. App. 755, 137 S.E.2d 387 (1964).

Employer’s release and settlement of claims will not bar employee’s right of action. — Mere fact that employer chose to make settlement and obtained release of all claims purporting to release both employer and employee, following a motor vehicle collision, will not bar employee from the employee’s own right of action. *Rowland v. Lewis*, 109 Ga. App. 755, 137 S.E.2d 387 (1964).

Retention of right to proceed. — A consent agreement was not intended as a release for an assignee of a lessee where the lessee did not obtain full satisfaction from O.C.G.A. § 13-4-80 and expressly retained the right to proceed against the defendant assignee, and where the agreement expressly entitled the lessee to proceed against the assignee for the amount of the judgment unsatisfied by the lessor’s contribution. *Crim v. Jones*, 204 Ga. App. 289, 419 S.E.2d 130 (1992).

Where a settlement agreement between a creditor and one of two guarantors of a note clearly provided that the guarantor’s payments were not a full satisfaction of amounts

due on the note and that the creditor retained the right to proceed against the second guarantor, the agreement could not be construed as a general release of the second guarantor O.C.G.A. § 9-13-74 or O.C.G.A. § 13-4-80. *Groover v. Commercial Bancorp.*, 220 Ga. App. 13, 467 S.E.2d 355 (1996).

Release normally does not relate to a future or contingent claim. — If a “release” speaks in terms of future or contingent claim, it is more accurately denominated “a covenant not to sue.” Thus, a covenant not to sue is appropriately described as an agreement not to sue, given in exchange for lawful consideration. At the time such an agreement is given, there is no claim in existence to be released. It speaks of future, not of present or past. Since no liability exists, none can be released. *Wade v. Watson*, 527 F. Supp. 1049 (N.D. Ga. 1981), *aff’d*, 731 F.2d 890 (11th Cir. 1984).

Cited in *Coleman v. Davies*, 45 Ga. 489 (1872); *Wilkinson v. Conley*, 133 Ga. 518, 66 S.E. 372 (1909); *Register v. Southern States Phosphate & Fertilizer Co.*, 157 Ga. 561, 122 S.E. 323 (1924); *Kent v. Hair*, 60 Ga. App. 652, 4 S.E.2d 703 (1939); *Jordan v. Wiggins*, 66 Ga. App. 534, 18 S.E.2d 512 (1942); *Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Hill*, 113 Ga. App. 283, 148 S.E.2d 83 (1966); *Duncan v. Georgia Money Corp.*, 222 Ga. 643, 151 S.E.2d 769 (1966); *Paris v. Coggin, Haddon, Stuckey & Thompson*, 143 Ga. App. 829, 240 S.E.2d 201 (1977); *Lester v. Groves*, 162 Ga. App. 590, 291 S.E.2d 785 (1982); *Graves v. Graves*, 252 Ga. 27, 310 S.E.2d 901 (1984); *J & S Properties, Inc. v. Sterling*, 192 Ga. App. 181, 384 S.E.2d 194 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Release, § 1 et seq.

ALR. — Return or tender of consideration for release or compromise as condition of action for rescission or cancelation, action upon original claim, or action for damages sustained by the fraud inducing the release or compromise, 134 ALR 6.

Release of (or covenant not to sue) one tort-feasor as affecting liability of others, 148 ALR 1270.

Failure to revive judgment against a number jointly, as to some of them, as making applicable the rule that a release of one is a release of all, 160 ALR 678.

Compensation as alternative relief upon denial of rescission to purchaser of land, 175 ALR 686.

Collision insurance: insured's release of tort-feasor before settlement by insurer as

releasing insurer from liability, 38 ALR2d 1095.

What constitutes reservation of right to terminate, rescind, or modify contract, as against third party beneficiary, 44 ALR2d 1270.

Interest on consideration returned or tendered as condition of setting aside release or compromise, 53 ALR2d 749.

Prospective buyer's release of prospective seller from liability for injuries resulting from trial use or inspection of product for sale, 93 ALR3d 1296.

Refusal to pay debt as economic duress or business compulsion avoiding compromise or release, 9 ALR4th 942.

Release of, or covenant not to sue, one primarily liable for tort, but expressly reserving rights against one secondarily liable, as bar to recovery against latter, 24 ALR4th 547.

13-4-81. Covenant not to sue; bond to indemnify debtor against debt.

A covenant never to sue is equivalent to a release as is a bond to indemnify a debtor against his own debt. (Orig. Code 1863, § 2802; Code 1868, § 2810; Code 1873, § 2861; Code 1882, § 2861; Civil Code 1895, § 3714; Civil Code 1910, § 4308; Code 1933, § 20-909.)

Law reviews. — For survey article on torts, see 34 Mercer L. Rev. 271 (1982).

For comment on *Atlantic C.L.R.R. v. Ouzts*, 82 Ga. App. 36, 60 S.E.2d 770 (1950),

see 14 Ga. B.J. 246 (1951). For comment on *Doster v. C.V. Nalley, Inc.*, 95 Ga. App. 862, 99 S.E.2d 432 (1957), concerning the dis-

inction between a release and a covenant not to sue, see 21 Ga. B.J. 102 (1958).

JUDICIAL DECISIONS

Discussion of scope of section. — See *Kendrick v. J.B. O'Neil, Foster & Co.*, 48 Ga. 631 (1873).

Distinction between covenant not to sue and release. — Covenant not to sue is different in legal effect from a release, in that where executed to one of two joint tortfeasors it does not release the other, though as to first it leaves the first tortfeasor in as good a position as to ultimate freedom from liability as if that tortfeasor had been expressly released. *Atlantic C.L.R.R. v. Ouzts*, 82 Ga. App. 36, 60 S.E.2d 770 (1950).

Even though O.C.G.A. § 13-4-81 provides that a covenant not to sue is "equivalent" to a release, the legal effect of a covenant not to sue is distinguished from the legal effect of a release. *World Bazaar Franchise Corp. v. CCC Assocs. Co.*, 167 Bankr. 985 (Bankr. N.D. Ga. 1994).

Loan receipt agreement between plaintiff and joint tortfeasor in exchange for a forbearance to sue is an absolute payment and not a loan. As such, the agreement constitutes a covenant not to sue and not a release. *American Chain & Cable Co. v. Brunson*, 157 Ga. App. 833, 278 S.E.2d 719 (1981).

There is difference between accord and satisfaction or release and covenant not to sue. — There is a decided difference between consequence of accord and satisfaction, or release of one defendant, and that of mere covenant not to sue one defendant. *Moore v. Smith*, 78 Ga. App. 49, 50 S.E.2d 219 (1948).

Covenant not to sue releases only one with whom it is entered. *Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Hill*, 113 Ga. App. 283, 148 S.E.2d 83 (1966).

While O.C.G.A. § 13-4-81 provides that a covenant never to sue is equivalent to a release, it applies to the parties with whom the covenant is made and not to another tortfeasor. A covenant not to sue one tortfeasor will not bar actions against another tortfeasor. *American Chain & Cable Co. v. Brunson*, 157 Ga. App. 833, 278 S.E.2d 719 (1981).

Law applies to parties with whom covenant is made and not to another tortfeasor. *Ford Motor Co. v. Lee*, 137 Ga. App. 486, 224 S.E.2d 168, aff'd in part, rev'd in part on other grounds, 237 Ga. 554, 229 S.E.2d 379 (1976).

General release bars any cause of action. — When a release is general, i.e., one that releases the alleged tortfeasor from all claims arising out of an occurrence, in the absence of fraud such release will bar any cause of action by the person executing the release. *Kaiser Aluminum & Chem. Corp. v. Ingersoll-Rand Co.*, 519 F. Supp. 60 (S.D. Ga. 1981).

Covenant not to sue one tortfeasor will not bar actions against another tortfeasor. *Ford Motor Co. v. Lee*, 137 Ga. App. 486, 224 S.E.2d 168, aff'd in part, rev'd in part on other grounds, 237 Ga. 554, 229 S.E.2d 379 (1976).

Covenant not to sue when multiple tortfeasors. — Written covenant not to sue one of two joint tortfeasors is not, stating that it is equivalent to a release, a release of other joint tortfeasor, and does not bar proceeding against the other tortfeasor. *Atlantic C.L.R.R. v. Ouzts*, 82 Ga. App. 36, 60 S.E.2d 770 (1950).

Covenant not to sue between victim and joint tortfeasor does not bar action against remaining joint tortfeasor. *City Express Serv., Inc. v. Rich's, Inc.*, 148 Ga. App. 123, 250 S.E.2d 867 (1978).

Effect of covenant not to sue on wrongful death action. See *Wade v. Watson*, 527 F. Supp. 1049 (N.D. Ga. 1981), aff'd, 731 F.2d 890 (11th Cir. 1984).

Amount paid under covenant not to sue may be pled by joint obligor for credit. *Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Hill*, 113 Ga. App. 283, 148 S.E.2d 83 (1966).

Reducing damages based on joint obligor's payment. — Any sum received pursuant to covenant not to sue may be pleaded and proved by remaining joint obligor in reduction of damages to be awarded by jury. *Atlantic C.L.R.R. v. Ouzts*, 82 Ga. App. 36, 60 S.E.2d 770 (1950).

Any amount which jury might award against joint tortfeasor may be reduced by amount of any sums previously received by other joint tortfeasor in consideration of covenant not to sue issued to that tortfeasor. *City Express Serv., Inc. v. Rich's, Inc.*, 148 Ga. App. 123, 250 S.E.2d 867 (1978).

Agreement never to sue upon written obligation must be written to be equivalent to release. *Jennings v. Powell*, 58 Ga. App. 416, 198 S.E. 809 (1938).

Agreement that payee of note obligated oneself not to bring suit thereon should be in writing in order to furnish valid defense as covenant equivalent to release within meaning of this section. *Crooker v. Hamilton*, 3 Ga. App. 190, 59 S.E. 722 (1907); *Turner v. Strauss-Epstein Co.*, 20 Ga. App. 735, 93 S.E. 234 (1917) (see O.C.G.A. § 13-4-81).

Consideration generally required for covenant not to sue to operate as release of preexisting obligation. — If covenant never to sue is relied upon as release of preexisting obligation to pay, such covenant would not be binding unless founded upon sufficient consideration; but this is not true when covenant never to sue comes into existence contemporaneously with obligation to pay. *Martin v. Monroe*, 107 Ga. 330, 33 S.E. 62 (1899).

Cited in *Mansfield v. Barber*, 59 Ga. 851 (1877); *Marietta Sav. Bank v. Janes*, 66 Ga. 286 (1881); *Manley v. Ayers*, 68 Ga. 507 (1882); *Haymans v. Bennett*, 29 Ga. App. 265, 114 S.E. 923 (1922); *Jordan v. Wiggins*, 66 Ga. App. 534, 18 S.E.2d 512 (1942); *Maryland Cas. Co. v. Stephens*, 76 Ga. App. 723, 47 S.E.2d 108 (1948).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Release, § 28.

Am. Jur. Pleading and Practice Forms. — 21B Am. Jur. Pleading and Practice Forms, Release, § 7.

C.J.S. — 17 C.J.S., Contracts, § 116. 76 C.J.S., Release, § 2.

ALR. — Promise to marry as consideration for note or other executory obligation made some time thereafter, 63 ALR 1184.

Return or tender of consideration for release or compromise as condition of action for rescission or cancellation, action upon original claim, or action for damages sustained by the fraud inducing the release or compromise, 134 ALR 6.

Release of (or covenant not to sue) one tortfeasor as affecting liability of others, 148 ALR 1270.

Interest on consideration returned or tendered as condition of setting aside release or compromise, 53 ALR2d 749.

Manner of crediting one tortfeasor with

amount paid by another for release or covenant not to sue, 94 ALR2d 352.

Recovery of litigation expenses allegedly incurred as result of breach of covenant not to sue, 30 ALR3d 1433.

Validity and effect of "loan receipt" agreement between injured party and one tortfeasor, for loan repayable to extent of injured party's recovery from a cotortfeasor, 62 ALR3d 1111.

Prospective buyer's release of prospective seller from liability for injuries resulting from trial use or inspection of product for sale, 93 ALR3d 1296.

Refusal to pay debt as economic duress or business compulsion avoiding compromise or release, 9 ALR4th 942.

Release of, or covenant not to sue, one primarily liable for tort, but expressly reserving rights against one secondarily liable, as bar to recovery against latter, 24 ALR4th 547.

Recovery of attorneys' fees and costs of litigation incurred as result of breach of agreement not to sue, 9 ALR5th 933.

13-4-82. Intermarriage of parties.

Intermarriage of the parties generally releases a debt created prior to marriage. However, intermarriage of the parties does not release a debt arising from an antenuptial contract. (Orig. Code 1863, § 2804; Code 1868, § 2812; Code 1873, § 2863; Code 1882, § 2863; Civil Code 1895, § 3716; Civil Code 1910, § 4310; Code 1933, § 20-911.)

Cross references. — Antenuptial agreements generally, § 19-3-62 et seq.

JUDICIAL DECISIONS

Subsequent marriage of plaintiff to defendant extinguishes right to sue for breach of

promise because it is a personal right. *Harris v. Tisom*, 63 Ga. 629, 36 Am. R. 126 (1879).

ARTICLE 6

ACCORD AND SATISFACTION

JUDICIAL DECISIONS

Accord and satisfaction should usually be governed by same law as main contract. *A-T-O, Inc. v. Stratton & Co.*, 486 F. Supp. 1323 (N.D. Ga. 1980).

Permitting foreclosure not deemed accord and satisfaction. — Assuming as true defendant's assertion that the defendant entered into an agreement with plaintiff to permit foreclosure and sale of the collateral real property to extinguish the defendant's debt, this agreement fell short of an accord and satisfaction, since it was unenforceable for lack of consideration, since an agreement on the part of one to do what one is already legally bound to do is not a sufficient consideration for the promise of another. Consequently, since defendant failed in pre-

senting evidence to establish a prima facie case of novation or accord and satisfaction, and since the amount of the deficiency under the promissory note was undisputed, the trial court properly granted summary judgment in favor of the plaintiff. *Hall v. Bank S.*, 186 Ga. App. 860, 368 S.E.2d 810 (1988).

Cited in *Northside Bldg. & Inv. Co. v. Finance Co. of Am.*, 119 Ga. App. 131, 166 S.E.2d 608 (1969); *Clark Equip. Credit Corp. v. Refrigerated Transp. Co.*, 148 Ga. App. 405, 251 S.E.2d 321 (1978); *Codner v. Siegel*, 246 Ga. 368, 271 S.E.2d 465 (1980); *FDIC v. Hoover-Morris Enters.*, 642 F.2d 785 (5th Cir. 1981).

RESEARCH REFERENCES

ALR. — Failure to perform act required by new agreement as affecting character thereof as accord and satisfaction, 14 ALR 230.

Payment before maturity of part of a liquidated and undisputed indebtedness as a consideration for its acceptance in satisfaction of the entire debt, 24 ALR 1474.

Acceptance of remittance by check purporting to be "in full" or accompanied by indications of debtor's intention that it be so regarded, 34 ALR 1035; 75 ALR 905.

Accord and satisfaction by authorized endorsement and transfer of commercial paper by agent having no authority to compromise, 46 ALR 1522.

Counterclaim or setoff as affecting rule as to part payment of a liquidated and undisputed debt, 53 ALR 768.

Return or tender of consideration for release or compromise as condition of ac-

tion for rescission or cancellation, action upon original claim, or action for damages sustained by the fraud inducing the release or compromise, 134 ALR 6.

Validity and effect of agreement to pay original creditor part of debt refinanced under Federal Farm Loan Act, 147 ALR 743.

Acceptance by building or construction contractor of payments under his contract as a waiver of right of action upon implied warrant as to conditions affecting cost, 173 ALR 308.

Admissibility of evidence of unperformed compromise agreement, 26 ALR2d 858.

Interest of spouse in estate by entireties as subject to satisfaction of his or her individual debt, 75 ALR2d 1172.

Refusal to pay debt as economic duress or business compulsion avoiding compromise or release, 9 ALR4th 942.

Modern status of rule that acceptance of

check purporting to be final settlement of disputed amount constitutes accord and satisfaction, 42 ALR4th 12.

Conveyance or surrender of property as an accord and satisfaction of contract obligation, 59 ALR5th 665.

13-4-100. Effect of executory accord.

An accord may not amount to an extinguishment of the original debt but may extend only to suspend the execution or collection thereof for a limited time; in the meantime, an action on the original debt cannot be sustained. (Orig. Code 1863, § 2820; Code 1868, § 2828; Code 1873, § 2879; Code 1882, § 2879; Civil Code 1895, § 3733; Civil Code 1910, § 4327; Code 1933, § 20-1202.)

JUDICIAL DECISIONS

Effect of executed agreement to settle dispute generally. — When there is a bona fide dispute between parties either as to the amount of a claim or as to ultimate liability thereon, and this dispute is settled by an agreement which has been executed, the matter is and should be at an end. DeKalb

County v. Commercial Union Ins. Co., 159 Ga. App. 782, 285 S.E.2d 240 (1981).

Cited in Tarver v. Tarver, 53 Ga. 43 (1874); Wilder Bros. v. Montgomery, 51 Ga. App. 231, 179 S.E. 861 (1935); Carpet Transp., Inc. v. TMS Ins. Agency, Inc., 165 Ga. App. 734, 302 S.E.2d 421 (1983).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Accord and Satisfaction, §§ 48, 49.

ALR. — Failure to perform act required by new agreement as affecting character thereof as accord and satisfaction, 10 ALR 222; 14 ALR 230.

Part payment of liquidated indebtedness by, or with aid of, third person as consideration for its acceptance in discharge of entire debt, 41 ALR 1490.

Trade acceptance or unsecured note or bill of debtor as accord and satisfaction, 62 ALR 751.

Acceptance of amount appropriated on account of claim against state or other public

body as bar to balance of claim, 70 ALR 1208.

Income tax in respect of amount collected on a debt which had been deducted as a bad debt in the return for a previous year, 143 ALR 338.

Validity and effect of agreement to pay original creditor part of debt refinanced under Federal Farm Loan Act, 147 ALR 743.

Interest of spouse in estate by entireties as subject to satisfaction of his or her individual debt, 75 ALR2d 1172.

Conveyance or surrender of property as an accord and satisfaction of contract obligation, 59 ALR5th 665.

13-4-101. Elements and requirements of accord and satisfaction generally.

Accord and satisfaction occurs where the parties to an agreement, by a subsequent agreement, have satisfied the former agreement, and the latter agreement has been executed. The execution of a new agreement may itself amount to a satisfaction of the former agreement, where it is so expressly agreed by the parties; and, without such agreement, if the new promise is founded on a new consideration, the taking of it is a satisfaction of the former agreement. (Orig. Code 1863, § 2819; Code 1868, § 2827; Code

1873, § 2878; Code 1882, § 2878; Civil Code 1895, § 3732; Civil Code 1910, § 4326; Code 1933, § 20-1201.)

Law reviews. — For comment on *Chocran v. Bell*, 102 Ga. App. 617, 117 S.E.2d 645 (1960), see 24 Ga. B.J. 422 (1962).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SUBJECT MATTER OF ACCORD AND SATISFACTION

AGREEMENT

EXECUTION

APPLICATION

General Consideration

Accord and satisfaction defined. — Accord and satisfaction is agreement between two parties to give and accept something in satisfaction of right of action which one has against the other, which when performed is a bar to all actions on this account. *Woodstock Rd. Inv. Properties v. Lacy*, 149 Ga. App. 593, 254 S.E.2d 910 (1979); *M.W. Buttrill, Inc. v. Air Conditioning Contractors*, 158 Ga. App. 122, 279 S.E.2d 296 (1981).

Contract of accord and satisfaction is a separate contract. *Eldon Indus., Inc. v. Paradies & Co.*, 397 F. Supp. 535 (N.D. Ga. 1975).

Accord and satisfaction is itself a contract and requires meeting of minds to render it valid and binding. *Woodstock Rd. Inv. Properties v. Lacy*, 149 Ga. App. 593, 254 S.E.2d 910 (1979).

There must be a meeting of the minds if the novation or accord and satisfaction is to be valid and binding. *M.W. Buttrill, Inc. v. Air Conditioning Contractors*, 158 Ga. App. 122, 279 S.E.2d 296 (1981); *Derosa v. Shiah*, 205 Ga. App. 106, 421 S.E.2d 718 (1992), cert. denied, 205 Ga. App. 899, 421 S.E.2d 718 (1992).

Accord and satisfaction requires express agreement or new consideration or execution. — Agreement in accord and satisfaction of note is not satisfaction of debt unless it is so expressly agreed between parties, or new promise is founded on new consideration, or unless agreement in accord and satisfaction has been executed. *Kent v. First Nat'l Bank*, 57 Ga. App. 751, 196 S.E. 103

(1938); *North Ala. Enters., Inc. v. Cap'n Sam's Cruises, Inc.*, 181 Ga. App. 718, 353 S.E.2d 578 (1987).

Must have all elements of de novo contract. — A novation or accord and satisfaction is in itself a contract and must have all the elements of a de novo contract. *Slapppy Bldrs., Inc. v. FDIC*, 157 Ga. App. 343, 277 S.E.2d 328 (1981); *M.W. Buttrill, Inc. v. Air Conditioning Contractors*, 158 Ga. App. 122, 279 S.E.2d 296 (1981).

New consideration, although slight, will be sufficient to support new agreement. — Execution of new agreement may itself amount to satisfaction if new promise is founded on new consideration. A new consideration, although slight, will be sufficient to support new agreement. *Codner v. Siegel*, 246 Ga. 368, 271 S.E.2d 465 (1980).

Accord and satisfaction may result from oral transaction. *Wood v. Yancey Bros. Co.*, 135 Ga. App. 720, 218 S.E.2d 698 (1975).

Intent of parties governs. — Whether a debt is extinguished or forgiven by certain acts is dependent upon the intention of the parties to be arrived at from an examination of all the circumstances. *Willingham v. Willingham*, 160 Ga. App. 175, 286 S.E.2d 754 (1981).

Magic words not necessary if other evidence of intent is present. — It is not necessary under O.C.G.A. § 13-4-101 that a check or the accompanying correspondence contain magic words such as "payment in full," "in full consideration" or "in final payment" if there is some other documentary evidence to show what the check is intended to cover. *Commercial Union Assur-*

ance Co. v. Southeastern Ventilating, Inc., 159 Ga. App. 443, 283 S.E.2d 660 (1981); Hadson Gas Sys. v. Atlanta Airlines Term. Corp., 200 Ga. App. 363, 408 S.E.2d 454, cert. denied, 200 Ga. App. 896, 408 S.E.2d 454 (1991).

Parties need not intend particular solution. — Although the parties must intend to reach an accord and satisfaction, the parties need not agree or intend to agree that a judicial resolution of the underlying dispute would result in a particular solution. Hall v. Time Ins. Co., 854 F.2d 440 (11th Cir. 1988).

Accord and satisfaction may be effective, although unwillingly assented to. — Accord and satisfaction, though unwillingly assented to, if acted on by other party to that party's injury will terminate the dispute. Glaze v. Western & A.R.R., 67 Ga. 761 (1881).

Parties may reach accord and satisfaction as to some, but not all, distinct contract demands. — Accord and satisfaction may be made between contracting parties pro tanto. If contract is of such nature as to give rise to separate and distinct demands, or to create a number of separate obligations and cross-obligations, and a number of distinct breaches as to these separate obligations occur, parties may make accord and satisfaction, or what in law amounts to accord and satisfaction, as to one or more of these demands, without affecting others. State Farm Fire & Cas. Co. v. Fordham, 148 Ga. App. 48, 250 S.E.2d 843 (1978).

Compromise or mutual accord and satisfaction is binding on both parties. Collier v. Casey, 59 Ga. App. 627, 1 S.E.2d 776 (1939).

Completed contract of accord and satisfaction may be rescinded by agreement, or waived by acts or conduct of party thereto, in which case debt is restored to its original status. Eldon Indus., Inc. v. Paradies & Co., 397 F. Supp. 535 (N.D. Ga. 1975).

Avoidance of accord and satisfaction on ground of fraud generally requires restitution. Interstate Life & Accident Co. v. Shedrick, 57 Ga. App. 382, 195 S.E. 456 (1938).

Former Civil Code 1895, § 3711 (see O.C.G.A. § 13-4-60) governed rescission of fraudulent accord and satisfaction. Pattison v. Albany Bldg. & Loan Ass'n, 63 Ga. 373 (1879).

Breach of contract accepted in satisfaction of claim will not restore original status. Byrd

Printing Co. v. Whitaker Paper Co., 135 Ga. 865, 70 S.E. 798, 1912A Ann. Cas. 182 (1911).

Effect of executed accord and satisfaction not dependent upon complete and literal performance. — Compromise and mutual accord and satisfaction is immediately binding upon parties and terminates prior obligations and prior controversy between the parties insofar as subject matter therein compromised. Its effect is not dependent upon complete and literal performance; rather, after execution, parties are relegated to their remedies thereunder. J.A. Jones Constr. Co. v. Greenbriar Shopping Ctr., 332 F. Supp. 1336 (N.D. Ga. 1971), aff'd, 461 F.2d 1269 (5th Cir. 1972).

Accord and satisfaction is an affirmative defense and burden of proof is upon defendant. McClure Ten Cent Co. v. Stone, 30 Ga. App. 584, 118 S.E. 498 (1923).

Burden of proof is on party relying on accord and satisfaction. — Pleas of accord and satisfaction are pleas in confession and avoidance. Burden of pleading and proving existence, terms, and effect of accord and satisfaction is on party relying upon the accord and satisfaction. City of Atlanta v. Gore, 47 Ga. App. 70, 169 S.E. 776 (1933).

When accord and satisfaction is raised as a defense, burden of proof lies with party relying on the doctrine. McCullough v. Mobiland, Inc., 139 Ga. App. 260, 228 S.E.2d 146 (1976).

The burden is on the proponent to prove accord and satisfaction. M. Walter & Co. v. North Highland Assembly of God, Inc., 188 Ga. App. 852, 374 S.E.2d 792 (1988).

Generally, whether there is accord and satisfaction is question for jury. Woodstock Rd. Inv. Properties v. Lacy, 149 Ga. App. 593, 254 S.E.2d 910 (1979); All-Georgia Dev., Inc. v. Kadis, 178 Ga. App. 37, 341 S.E.2d 885 (1986); North Ala. Enters., Inc. v. Cap'n Sam's Cruises, Inc., 181 Ga. App. 718, 353 S.E.2d 578 (1987).

Whether there is an accord and satisfaction is a jury question. Commercial Union Assurance Co. v. Southeastern Ventilating, Inc., 159 Ga. App. 443, 283 S.E.2d 660 (1981); Greenway v. Cheatwood, 160 Ga. App. 143, 286 S.E.2d 471 (1981).

Cited in Beazley v. Gignilliat, 61 Ga. 187 (1878); Thompson v. Mallory Bros. & Co., 104 Ga. 684, 30 S.E. 887 (1898); Dillard v.

General Consideration (Cont'd)

Dillard, 118 Ga. 97, 44 S.E. 885 (1903); Phinizy v. Bush, 129 Ga. 479, 59 S.E. 259 (1907); Thompson v. Carrollton Bank, 29 Ga. App. 520, 116 S.E. 39 (1923); Joseph Liebling, Inc. v. C.L. Tabb & Co., 30 Ga. App. 38, 116 S.E. 666 (1923); Heller v. Samuel Silver, Inc., 30 Ga. App. 488, 118 S.E. 449 (1923); Georgia Nat'l Bank v. Fry, 32 Ga. App. 695, 124 S.E. 542 (1924); Spence v. Carter, 33 Ga. App. 279, 125 S.E. 883 (1924); Messenger Publishing Co. v. Overstreet, 36 Ga. App. 458, 137 S.E. 125 (1927); Whitehead v. Dillard, 178 Ga. 714, 174 S.E. 244 (1934); Stewart v. Finance Co., 49 Ga. App. 462, 176 S.E. 73 (1934); Wilder Bros. v. Montgomery, 51 Ga. App. 231, 179 S.E. 861 (1935); Keramidas v. Rusch, 58 Ga. App. 615, 199 S.E. 590 (1938); Whatley v. Troutman, 60 Ga. App. 23, 2 S.E.2d 731 (1939); David C. Doniger & Co. v. Briggs, 61 Ga. App. 699, 7 S.E.2d 321 (1940); J. Kuniansky, Inc. v. Ware, 192 Ga. 488, 15 S.E.2d 783 (1941); Millers Nat'l Ins. Co. v. Hatcher, 194 Ga. 449, 22 S.E.2d 99 (1942); City of Eastman v. Georgia Power Co., 69 Ga. App. 182, 25 S.E.2d 47 (1943); McLendon v. Johnson, 69 Ga. App. 214, 25 S.E.2d 53 (1943); Rural Elec. Appliance Co. v. Joiner, 69 Ga. App. 353, 25 S.E.2d 428 (1943); Gilpin v. Swainsboro Ice & Fuel Co., 74 Ga. App. 813, 41 S.E.2d 540 (1947); Manning v. Carroll, 204 Ga. 100, 48 S.E.2d 737 (1948); Cloud v. Bagwell, 83 Ga. App. 769, 64 S.E.2d 921 (1951); Owens v. Service Fire Ins. Co., 90 Ga. App. 553, 83 S.E.2d 249 (1954); Banister v. National Fire Ins. Co., 108 Ga. App. 202, 132 S.E.2d 518 (1963); Duncan v. Georgia Money Corp., 222 Ga. 643, 151 S.E.2d 769 (1966); Waters v. Lanier, 116 Ga. App. 471, 157 S.E.2d 796 (1967); Thurmond v. Peoples Auto. Loan & Fin. Corp., 118 Ga. App. 844, 165 S.E.2d 885 (1968); Coldway Carriers, Inc. v. Hartman, 120 Ga. App. 787, 172 S.E.2d 205 (1969); Young v. Forester, 122 Ga. App. 679, 178 S.E.2d 340 (1970); Gilchrist v. Skidmore, 227 Ga. 134, 179 S.E.2d 341 (1971); Epps Air Serv., Inc. v. Lampkin, 125 Ga. App. 779, 189 S.E.2d 127 (1972); National Personnel Serv. of Atlanta, Inc. v. Henson, 128 Ga. App. 189, 196 S.E.2d 179 (1973); Allstate Ins. Co. v. Moody, 128 Ga. App. 300, 196 S.E.2d 482 (1973); Cristal v. Harmon, 137 Ga. App. 153, 223 S.E.2d 210

(1976); Citizens & S. Nat'l Bank v. Morgan, 142 Ga. App. 337, 235 S.E.2d 767 (1977); Mutual Benefit Health & Accident Ass'n v. Reed, 144 Ga. App. 853, 242 S.E.2d 731 (1978); Dolanson Co. v. Citizens & S. Nat'l Bank, 242 Ga. 681, 251 S.E.2d 274 (1978); Landon v. Lavietes, 156 Ga. App. 123, 274 S.E.2d 120 (1980); Southeastern Waste Treatment, Inc. v. Chem-Nuclear Sys., 506 F. Supp. 944 (N.D. Ga. 1980); Rigdon v. Walker Sales & Serv., Inc., 161 Ga. App. 459, 288 S.E.2d 711 (1982); Leasing Sys. v. Easy St., Inc., 161 Ga. App. 756, 288 S.E.2d 879 (1982); Nationwide-Penncraft, Inc. v. Royal Globe Ins. Co., 162 Ga. App. 555, 291 S.E.2d 760 (1982); O'Kon & Co. v. Tishman Speyer Atlanta Assocs., 167 Ga. App. 741, 307 S.E.2d 282 (1983); Olympic Dev. Group, Inc. v. American Druggists' Ins. Co., 175 Ga. App. 425, 333 S.E.2d 622 (1985); Sunbelt Life Ins. Co. v. Bank of Alapaha, 176 Ga. App. 628, 337 S.E.2d 410 (1985); Charles Rossignol, Inc. v. Prophecy Corp., 177 Ga. App. 245, 339 S.E.2d 288 (1985); Bruce Tile Co. v. Copelan, 185 Ga. App. 469, 364 S.E.2d 603 (1988); Cheeks v. Novatel Carcom, Inc., 200 Ga. App. 664, 409 S.E.2d 229 (1991); Mitchell v. W.S. Badcock Corp., 230 Ga. App. 352, 496 S.E.2d 502 (1998); Kendrick v. Kalmanson, 244 Ga. App. 363, 534 S.E.2d 884 (2000).

Subject Matter of Accord and Satisfaction

All claims and demands, whether liquidated or unliquidated, disputed or undisputed, may furnish subject matter of agreement in accord and satisfaction, provided such agreement, like all other express or implied contracts, is supported by consideration. *Matthews v. Sprayberry*, 216 Ga. 40, 114 S.E.2d 516 (1960).

Acceptance of less than full amount owed in satisfaction of entire debt. — An accord and satisfaction occurs if a creditor tenders to the debtor a sum of money, though it be less than the amount actually owed, and the tender is made upon the condition, express or implied, that it satisfies the entire debt, and if the creditor accepts the tender. *Commercial Union Assurance Co. v. Southeastern Ventilating, Inc.*, 159 Ga. App. 443, 283 S.E.2d 660 (1981).

Satisfaction of debt by less than amount claimed, with nothing else, requires bona fide dispute. — It is essential to sustaining of

agreement in accord and satisfaction, whereby entire debt or disputed claim is to be satisfied by giving of less sum than that claimed and nothing more, that bona fide dispute or controversy exist between parties; this rule does not have application where damages are unliquidated, or where there is agreement in accord and satisfaction of liquidated claim by giving and acceptance of smaller sum and some additional consideration. *Gledhill v. Brown*, 44 Ga. App. 670, 162 S.E. 824 (1932).

Nature of disputed claim which will suffice as basis for accord and satisfaction. — In accord and satisfaction of disputed claim it is not merit of contentions of either party which determines its validity to support such accord and satisfaction, its controlling factor being bona fides of debtor's contention, which as a general rule is a question of fact for jury. *Nauman v. McCoy*, 84 Ga. App. 131, 65 S.E.2d 853 (1951).

Where debt in dispute, payment and acceptance of agreed sum constitutes accord and satisfaction. — Agreement by creditor to receive less than amount of the debt may be pleaded as accord and satisfaction where bona fide dispute arises between parties as to certain material terms of original contract and where such subsequent agreement is actually executed by payment of sum agreed upon. *Nauman v. McCoy*, 84 Ga. App. 131, 65 S.E.2d 853 (1951).

Dispute or controversy is not essential element of some forms of accord and satisfaction, as an accord and satisfaction of a liquidated claim by giving and acceptance of a smaller sum and some additional consideration. *Burgamy v. Holton*, 165 Ga. 384, 141 S.E. 42 (1927).

Agreement

Accord and satisfaction involves, among other things, express agreement or some new consideration. *Wood v. Wood*, 239 Ga. 120, 236 S.E.2d 68 (1977).

Unilateral mistake of creditor cannot serve as basis for accord and satisfaction. — When plaintiff in suit to collect alleged indebtedness never agreed to write off any portion of loan balance to settle accounts, nor did defendant ask plaintiff to do so, and since intention of both parties was clearly that loans would be paid in full, and the only reason the loans were not was due to unilat-

eral mistake of plaintiff, there was no accord and satisfaction. *Sun Fed. Sav. & Loan Ass'n v. Manny*, 156 Ga. App. 807, 275 S.E.2d 661 (1980).

When overpayment is made due to the unilateral mistake of one party, the doctrine of accord and satisfaction does not apply. *Gulf Life Ins. Co. v. Folsom*, 907 F.2d 1115 (11th Cir. 1990).

Party pleading accord and satisfaction must show express agreement or new consideration. — Burden of proof of existence of accord and satisfaction lies with party relying on doctrine, which involves, among other things, express agreement or some new consideration. *Fowler v. Gorrell*, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

Agreement will not operate as accord and satisfaction unless so agreed. *Treich v. Doster*, 65 Ga. App. 41, 14 S.E.2d 612 (1941).

Execution of new agreement will itself amount to satisfaction only where expressly agreed by parties. *First Nat'l Bank v. Appalachian Indus., Inc.*, 146 Ga. App. 630, 247 S.E.2d 422 (1978); *Fowler v. Gorrell*, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

When there is no agreement to settle all disputes under contract, satisfaction does not result although money is demanded and received. *Pierson v. Herrington*, 138 Ga. App. 463, 226 S.E.2d 299 (1976); *First Nat'l Bank v. Appalachian Indus., Inc.*, 146 Ga. App. 630, 247 S.E.2d 422 (1978); *Fowler v. Gorrell*, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

Agreement to reach accord and satisfaction of disputed debt may be either express or implied. *Eldon Indus., Inc. v. Paradies & Co.*, 397 F. Supp. 535 (N.D. Ga. 1975).

There must be meeting of minds as to subject matter embraced in accord and satisfaction. *Myers v. American Fin. Sys.*, 615 F.2d 368 (5th Cir. 1980).

Meeting of minds required. — To render accord and satisfaction binding, there must be meeting of minds as to subject matter embraced. *Pierson v. Herrington*, 138 Ga. App. 463, 226 S.E.2d 299 (1976).

To render agreement binding as accord and satisfaction, there must be meeting of minds as to subject matter embraced. *First Nat'l Bank v. Appalachian Indus., Inc.*, 146 Ga. App. 630, 247 S.E.2d 422 (1978); *Fowler v. Gorrell*, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

Agreement (Cont'd)

To render execution of new agreement binding, there must be meeting of minds as to subject matter embraced. *Clark Equip. Credit Corp. v. Refrigerated Transp. Co.*, 148 Ga. App. 405, 251 S.E.2d 321 (1978).

An accord and satisfaction is a contract and thus requires a meeting of the minds of the two parties before it is valid and binding. *Hinely v. Barrow*, 169 Ga. App. 529, 313 S.E.2d 739 (1984).

Since accord and satisfaction is itself a contract, it requires a meeting of the minds as to the subject matter embraced in the accord and satisfaction. *M. Walter & Co. v. North Highland Assembly of God, Inc.*, 188 Ga. App. 852, 374 S.E.2d 792 (1988).

Party need not intend to enter contract of accord and satisfaction to be bound. *Eldon Indus., Inc. v. Paradies & Co.*, 397 F. Supp. 535 (N.D. Ga. 1975).

Subsequent agreement can only be implied from evidence of new consideration. *McCullough v. Mobiland, Inc.*, 139 Ga. App. 260, 228 S.E.2d 146 (1976).

Accord and satisfaction requires intent of debtor to tender check in full settlement. — Contract of accord and satisfaction requires, in first instance, intent on part of debtor to tender check in full settlement of disputed claims. *Eldon Indus., Inc. v. Paradies & Co.*, 397 F. Supp. 535 (N.D. Ga. 1975).

To constitute accord and satisfaction, payment must be made and accepted as satisfying entire debt. — For tender by debtor of lesser amount than owed to constitute accord and satisfaction, it must be made and accepted upon condition, express or implied, that it satisfies entire debt. *Georgia Marble Co. v. Judd*, 118 Ga. App. 733, 165 S.E.2d 453 (1968).

If debtor tenders sum of money less than amount claimed upon condition, express or implied, that it satisfy entire debt, and creditor accepts tender, accord and satisfaction results. *State Farm Fire & Cas. Co. v. Fordham*, 148 Ga. App. 48, 250 S.E.2d 843 (1978); *Chrietzberg v. Kristopher Woods, Ltd.*, 162 Ga. App. 517, 292 S.E.2d 100 (1982).

Parol evidence admissible to show scope of agreement forming basis of accord and satisfaction. *Myers v. American Fin. Sys.*, 615 F.2d 368 (5th Cir. 1980).

Execution

Accord without satisfaction is no bar; it is only complete when all is done that was to be done in satisfaction. *Campbell Coal Co. v. Pano*, 51 Ga. App. 232, 180 S.E. 139 (1935).

Mere accord requires complete performance before the accord operates in satisfaction of original agreements. *J.A. Jones Constr. Co. v. Greenbriar Shopping Ctr.*, 332 F. Supp. 1336 (N.D. Ga. 1971), *aff'd*, 461 F.2d 1269 (5th Cir. 1972).

Debt not discharged by executory agreement unless promise rather than performance was agreed upon satisfaction. *Fouche & Fouche v. Morris*, 112 Ga. 143, 37 S.E. 182 (1900); *Hewlett v. Almand*, 29 Ga. App. 392, 115 S.E. 501 (1923).

When agreement contains express understanding of new consideration, satisfaction need not be fully executed. — When agreement itself shows either express understanding by parties thereto that it shall itself operate as discharge of prior contract, or when new promise of creditor is supported by new consideration amounting to benefit to creditor or detriment to debtor, satisfaction need not be fully executed. *Powers v. American Nat'l Bank*, 113 Ga. App. 302, 147 S.E.2d 791 (1966).

Acceptance of tender may be necessary even when agreement supported by new consideration. — Even though new agreement be supported by sufficient new consideration, tender by debtor of amount agreed by creditor to be accepted in satisfaction of prior claim might be necessary in order for debtor to avail oneself of defense of accord and satisfaction. *Powers v. American Nat'l Bank*, 113 Ga. App. 302, 147 S.E.2d 791 (1966).

If accord is not supported by new consideration, satisfaction agreed to must be fully executed; and if any part thereof be executory, it is not sufficient as defense to action on prior claim. *Powers v. American Nat'l Bank*, 113 Ga. App. 302, 147 S.E.2d 791 (1966).

Agreement to accept less than full, admitted, liquidated indebtedness not a satisfaction until fully executed, and part payment of lesser amount is not satisfaction of entire debt but only a defense pro tanto. *Taylor v. Central of Ga. Ry.*, 99 Ga. App. 224, 108 S.E.2d 103 (1959).

Defense based upon alleged accord can be sustained only when accord has been completely executed. *Dixon v. Ernest L. Rhodes & Co.*, 44 Ga. App. 678, 162 S.E. 716 (1932).

Nothing short of actual performance accepted will sustain defense of accord and satisfaction. — Defense based on alleged accord and satisfaction cannot be sustained by offer to perform or actual tender of performance; nothing short of actual performance — meaning thereby, performance accepted — will sustain such defense. *Redman v. Woods*, 42 Ga. App. 713, 157 S.E. 252 (1931).

Willingness or readiness to pay or perform is not equivalent of performance or payment, and is therefore not satisfaction; nothing short of actual performance or payment, meaning performance or payment accepted, will suffice. *Campbell Coal Co. v. Pano*, 51 Ga. App. 232, 180 S.E. 139 (1935).

Defendant must show full performance and acceptance of alleged accord and satisfaction. — When plea of accord and satisfaction is filed by defendant, defendant must show full performance of the terms by the defendant and full acceptance by plaintiff; unless the defendant shows this, accord is no bar to suit upon original contract or claim. *Atlanta Life Ins. Co. v. Walker*, 53 Ga. App. 80, 184 S.E. 776 (1936).

Accord sufficiently executed only when all is done which party agrees to accept as satisfaction of preexisting obligation. *Atlanta Life Ins. Co. v. Walker*, 53 Ga. App. 80, 184 S.E. 776 (1936).

Accord and satisfaction is only complete when all is done that was to be done in satisfaction. *Rebel Mobile Homes v. Smith*, 137 Ga. App. 496, 224 S.E.2d 483 (1976).

As long as accord is executory, although partially performed, original cause of action not extinguished, and action may be brought upon it, and remedy for defendant is to plead his part performance as satisfaction pro tanto. *Atlanta Life Ins. Co. v. Walker*, 53 Ga. App. 80, 184 S.E. 776 (1936).

One may in fact agree to take less than the full amount in satisfaction of a debt, but the accord, until full execution, is no bar to an action on the original debt. *Peters v. Thomason*, 157 Ga. App. 513, 277 S.E.2d 798 (1981).

Execution of part and tender of performance of residue of accord, insufficient to

extinguish cause. — To be good, an accord must be fully executed; execution of part and tender of performance of residue is not sufficient. As long as accord is executory, although it is partially performed, original cause of action is not extinguished. *Taylor v. Central of Ga. Ry.*, 99 Ga. App. 224, 108 S.E.2d 103 (1959).

Executory agreement to rescind is not an accord and satisfaction absent agreement to that effect. *Redman v. Woods*, 42 Ga. App. 713, 157 S.E. 252 (1931).

Application

Promise to accept stated amount in satisfaction of debt not binding until paid and accepted. *Borden, Inc. v. Barker*, 124 Ga. App. 291, 183 S.E.2d 597 (1971).

Balancing and liquidation of mutual accounts by agreement amounts to accord and satisfaction when executed. *Loftis v. Allen Plumbing Co.*, 57 Ga. App. 847, 197 S.E. 45 (1938).

Executory agreement to accept less than full amount of debt not obligatory without fresh consideration to support the agreement, and mere payment of part of sum agreed on will not serve as consideration. *Taylor v. Central of Ga. Ry.*, 99 Ga. App. 224, 108 S.E.2d 103 (1959).

Generally, execution of promissory note is prima facie evidence of full settlement of all accounts up to date of note. *Collier v. Casey*, 59 Ga. App. 627, 1 S.E.2d 776 (1939).

Relationship with Fair Labor Standards Act. — When employers entered into a contract with a former employee regarding unpaid salary, this agreement did not constitute an accord and satisfaction as to the employee's salary claim because there could not be private settlement of claims under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. *Stout v. Smolar*, No. 1:05-CV-1202-JOF, 2007 U.S. Dist. LEXIS 69615 (N.D. Ga. Sept. 18, 2007).

Unless specifically agreed to, renewal of promissory note alone is not an accord and satisfaction. *Douglas v. Dixie Fin. Corp.*, 139 Ga. App. 251, 228 S.E.2d 144 (1976). But see *Collier v. Casey*, 59 Ga. App. 627, 1 S.E.2d 776 (1939).

Renewal note for less than original note, presumed to settle differences between parties. — New note for sum less than old note, given in renewal thereof, is presumptive

Application (Cont'd)

evidence that all differences between parties were adjusted and settled when such new note was given. *Collier v. Casey*, 59 Ga. App. 627, 1 S.E.2d 776 (1939). But see *Douglas v. Dixie Fin. Corp.*, 139 Ga. App. 251, 228 S.E.2d 144 (1976).

Evidence sufficient to support new consideration. — When the money being paid by defendant-purchaser had to be paid in a different manner and on shorter terms than the original promissory notes, it was evidence sufficient to support a new consideration. *North Ala. Enters., Inc. v. Cap'n Sam's Cruises, Inc.*, 181 Ga. App. 718, 353 S.E.2d 578 (1987).

Delivery and acceptance of check in full and complete settlement of claim. — An accord and satisfaction occurs with the delivery and acceptance of a check as a stated amount in full and complete settlement of a claim, whether the amount of the claim is established or uncertain. *Commercial Union Assurance Co. v. Southeastern Ventilating, Inc.*, 159 Ga. App. 443, 283 S.E.2d 660 (1981).

Acceptance of less than full amount of debt. — When the plaintiff conducted a liquidation sale of property not pledged as collateral for the loan, and the plaintiff applied the proceeds of the sale to payment of the indebtedness, by doing this, the plaintiff gave the creditor additional security which the creditor had no right to demand, and this would constitute consideration for the creditor's alleged agreement to accept less than the full amount of the liquidated debt. *South Atl. Prod. Credit Ass'n v. Gibbs*, 257 Ga. 521, 361 S.E.2d 167 (1987).

If the debtor tenders a sum of money less than the amount claimed upon the condition, express or implied, that it satisfied the entire debt, and the creditor accepts the tender, an accord and satisfaction results. *M. Walter & Co. v. North Highland Assembly of God, Inc.*, 188 Ga. App. 852, 374 S.E.2d 792 (1988).

Accord and satisfaction may result from acceptance of cash or check. — It matters not whether tender be of cash or check; if check is accepted in full settlement, accord and satisfaction will result. *Studstill v. AMOCO*, 126 Ga. App. 722, 191 S.E.2d 538 (1972), *aff'd*, 230 Ga. 305, 196 S.E.2d 847

(1973), later appeal, 132 Ga. App. 56, 207 S.E.2d 553 (1974).

Binding accord and satisfaction barred all claims between parties. — Because a valid general release entered into by home buyer and home builder effectuated a binding accord and satisfaction, barring any future claims between the parties, and absent evidence to void the release based on fraud, buyer's filed claims in subsequent suit filed against home builder were properly summarily dismissed; thus, assessment of attorney fees was not an abuse of discretion and a penalty for filing a frivolous appeal was ordered. *Pacheco v. Charles Crews Custom Homes, Inc.*, 289 Ga. App. 773, 658 S.E.2d 396 (2008).

Retention of check for excessive period of time may work accord and satisfaction. — If party intends to accept check as payment of demand, that check should be promptly presented for payment, usually within a 30-day period. When in absence of circumstances suggesting contrary state of facts, check, although not cashed, is kept for period greatly in excess of this time, such retention may of itself cause debtor to rely on theory that the debtor's offer (accord) has been accepted (satisfaction) in which case creditor no longer has right of action for any excess payment due. *Studstill v. AMOCO*, 126 Ga. App. 722, 191 S.E.2d 538 (1972), *aff'd*, 230 Ga. 305, 196 S.E.2d 847 (1973), later appeal, 132 Ga. App. 56, 207 S.E.2d 553 (1974).

Retaining check for unreasonable time without cashing or refusing acceptance as accord and satisfaction. — Retention of check for unreasonable time without cashing and without indicating refusal to accept as accord and satisfaction will constitute acceptance. *Studstill v. AMOCO*, 126 Ga. App. 722, 191 S.E.2d 538 (1972), *aff'd*, 230 Ga. 305, 196 S.E.2d 847 (1973), later appeal, 132 Ga. App. 56, 207 S.E.2d 553 (1974).

When check contains language of accord and satisfaction, creditor's knowledge of its purpose conclusively presumed. — When tendered check is accompanied by statement or letter explaining certain claimed deductions, or when check contains express language of accord and satisfaction, creditor's knowledge of the check's purpose is in effect conclusively presumed. *Eldon Indus., Inc. v. Paradies & Co.*, 397 F. Supp. 535 (N.D. Ga. 1975).

Acceptance and cashing of check accompanied by itemized listing of deductions constitutes accord and satisfaction as a matter of law, at least when evidence is not in dispute that creditor realized, or should have realized, that checks were tendered in full payment of obligation. *Eldon Indus., Inc. v. Paradies & Co.*, 397 F. Supp. 535 (N.D. Ga. 1975).

Satisfaction accomplished by deposit with knowledge that tender was intended as fully settling disputed claim. — When creditor receives and retains a sum of money from the debtor less than amount actually due the creditor with understanding, either express or implied, that it is received by the creditor in satisfaction of the creditor's claim or demand, the creditor cannot thereafter treat it as a nullity and recover balance, and this is so whether the creditor's claim or demand be disputed or undisputed, liquidated or unliquidated. *Borden, Inc. v. Barker*, 124 Ga. App. 291, 183 S.E.2d 597 (1971).

Act of depositing check, containing statement of certain claimed deductions coupled with knowledge that it was tendered in full settlement of disputed claim, completes contract of accord and satisfaction. *Eldon Indus., Inc. v. Paradies & Co.*, 397 F. Supp. 535 (N.D. Ga. 1975).

When debtor indicated in a new correspondence that it intended the previously tendered check to be full and final payment of the amount the debtor owed to the creditor and the creditor subsequently deposited the check, the debtor was entitled to the defense of accord and satisfaction under O.C.G.A. § 13-4-101. *Neal H. Howard & Assocs., P.C. v. Carey & Danis, LLC*, 244 F. Supp. 2d 1344 (M.D. Ga. 2003).

Permitting repossession under security agreement, on condition that it extinguish debt, not accord and satisfaction. — If defendant permits repossession only on condition that it extinguish the debt, this falls short of establishing an enforceable accord and satisfaction for it shows nothing more than attempted unilateral imposition without consideration of condition contrary to terms of original contract recognizing immediate right of repossession upon default. *Barnes v. Reliable Tractor Co.*, 117 Ga. 777, 161 S.E.2d 918 (1968).

New contract for purchase and sale of same article, when fully executed, may be

satisfaction of former agreement. *Poland Paper Co. v. Foote & Davies Co.*, 118 Ga. 458, 45 S.E. 374 (1903).

Agreement on repair of defective construction work constituting compromise and mutual accord and satisfaction. See *J.A. Jones Constr. Co. v. Greenbriar Shopping Ctr.*, 332 F. Supp. 1336 (N.D. Ga. 1971), *aff'd*, 461 F.2d 1269 (5th Cir. 1972).

On facts, retention of stale check did not effect accord and satisfaction. — Mere retention of stale check, where there was knowledge on part of debtor at time that creditor refused to accept it in full satisfaction of unliquidated liability, and which was never cashed and was, at time of summary judgment order, in hands of maker, will not support judgment of accord and satisfaction. *Studstill v. AMOCO*, 126 Ga. App. 722, 191 S.E.2d 538 (1972), *aff'd*, 230 Ga. 305, 196 S.E.2d 847 (1973), later appeal, 132 Ga. App. 56, 207 S.E.2d 553 (1974).

Receipt of stock sooner than contemplated in the original agreement was consideration sufficient to support a new agreement and to constitute an accord and satisfaction with regard to the original agreement. *Computer Maintenance Corp. v. Tilley*, 172 Ga. App. 220, 322 S.E.2d 533 (1984).

No valid accord and satisfaction. — It was error to find the existence of a partnership between a business owner and the alleged partner as the business was not included in any partnership agreement, described in any recorded statement, or acquired in a partnership name; furthermore, without any record evidence of a settlement agreement between the two, the court also erred in finding a valid accord and satisfaction. *Yun v. Um*, 277 Ga. App. 477, 627 S.E.2d 49 (2006).

Failure to give charge on part B of pattern jury instruction was error. — In a breach of contract action pertaining to the sale of unshelled peanuts, the trial court committed reversible error in giving part A of the pattern charge on accord and satisfaction but failing to give part B of such charge, as the failure to give part B deprived the defendant of a defense fairly raised by the evidence. *Golden Peanut Co. v. Bass*, 249 Ga. App. 224, 547 S.E.2d 637 (2001), *aff'd*, 275 Ga. 145, 563 S.E.2d 116 (2002), cert. denied, 537 U.S. 886, 123 S. Ct. 32, 154 L. Ed. 2d 146 (2002).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Accord and Satisfaction, § 1, 2. 60 Am. Jur. 2d, Payment, § 2. 66 Am. Jur. 2d, Release, § 1.

C.J.S. — 1 C.J.S., Accord and Satisfaction, § 1. 17A C.J.S., Contracts, §§ 549, 578.

ALR. — Failure to perform act required by new agreement as affecting character thereof as accord and satisfaction, 10 ALR 222; 14 ALR 230.

Trade acceptance or unsecured note or bill of debtor as accord and satisfaction, 62 ALR 751.

Principal's acceptance of remittance from agent as an accord and satisfaction, 80 ALR 1056.

Accepted offer to give or take less than full amount of liquidated claim as a novation or an accord executory, 96 ALR 1133.

Payment of undisputed amount or liability as consideration for discharge of disputed amount or liability, 112 ALR 1219.

Return or tender of consideration for release or compromise as condition of ac-

tion for rescission or cancellation, action upon original claim, or action for damages sustained by the fraud inducing the release or compromise, 134 ALR 6.

Validity and effect of agreement to pay original creditor part of debt refinanced under Federal Farm Loan Act, 147 ALR 743.

Interest of spouse in estate by entireties as subject to satisfaction of his or her individual debt, 75 ALR2d 1172.

Modern status of rule that acceptance of check purporting to be final settlement of disputed amount constitutes accord and satisfaction, 42 ALR4th 12.

Creditor's certification of check purporting to be final settlement of disputed amount as constituting accord and satisfaction, 42 ALR4th 95.

Creditor's retention without negotiation of check purporting to be final settlement of disputed amount as constituting accord and satisfaction, 42 ALR4th 117.

13-4-102. Benefit to creditor.

An accord and satisfaction must be of some advantage, legal or equitable, to the creditor or it shall not have the effect of barring him from his legal rights under the original agreement. (Orig. Code 1863, § 2821; Code 1868, § 2829; Code 1873, § 2880; Code 1882, § 2880; Civil Code 1895, § 3734; Civil Code 1910, § 4328; Code 1933, § 20-1203.)

JUDICIAL DECISIONS

Accord and satisfaction involves, among other things, express agreement or some new consideration. Wood v. Wood, 239 Ga. 120, 236 S.E.2d 68 (1977).

To render agreement binding as accord and satisfaction requires meeting of minds as to subject matter. Fowler v. Gorrell, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

Execution of new agreement will itself amount to satisfaction only where expressly agreed by parties. Fowler v. Gorrell, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

When no agreement to settle all disputes arising from contract, satisfaction does not result; although money is demanded and received. Fowler v. Gorrell, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

It was error to find the existence of a

partnership between a business owner and the alleged partner, as the business was not included in any partnership agreement, described in any recorded statement, or acquired in a partnership name; furthermore, without any record evidence of a settlement agreement between the two, the court also erred in finding a valid accord and satisfaction. Yun v. Um, 277 Ga. App. 477, 627 S.E.2d 49 (2006).

Even slight additional advantage or other new consideration to creditor may suffice.

— Even slight additional advantage, or other new consideration to creditor, such as a waiver of defense by debtor, or debtor's agreement to surrender possession of realty covered by security deed before the debtor is legally obliged to do so, in exchange for

promise by creditor that indebtedness shall thereby be discharged, when undertaking of debtor is fully performed and accepted, is good accord and satisfaction. *Mortgage Purchase & Sales Co. v. Williamson*, 55 Ga. App. 92, 189 S.E. 293 (1936).

Payment of less than amount claimed may operate as accord and satisfaction when debt unliquidated. — Generally, an essential element to sustain accord and satisfaction of entire debt or disputed claim by giving of less sum of money than that claimed, and nothing more, is a bona fide dispute or controversy; but this rule does not apply when damages are unliquidated. *Burgamy v. Holton*, 165 Ga. 384, 141 S.E. 42 (1927).

Permitting repossession under security agreement on condition that it extinguish debt, not accord and satisfaction. — If defendant permits repossession only on condition that it extinguish debt, this falls short of establishing an enforceable accord and satisfaction for it shows nothing more than attempted unilateral imposition, without consideration, of condition contrary to terms of original contract recognizing immediate right of repossession upon default. *Barnes v. Reliable Tractor Co.*, 117 Ga. App. 777, 161 S.E.2d 918 (1968).

Avoidance of accord and satisfaction on ground of fraud generally requires restitution. *Interstate Life & Accident Co. v. Shedrick*, 57 Ga. App. 382, 195 S.E. 456 (1938).

Burden is on defendant to affirmatively establish existence of accord and satisfaction. *Prater v. American Protection Ins. Co.*, 145 Ga. App. 853, 244 S.E.2d 925 (1978).

Party pleading accord and satisfaction must show express agreement or new consideration. — Burden of proof of existence of accord and satisfaction lies with party

relying on doctrine which involves, among other things, express agreement or some new consideration. *Fowler v. Gorrell*, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

Parol evidence admissible as to understanding of parties concerning meaning of "every claim". — Check in final settlement of every claim subject to oral testimony as to understanding of parties concerning meaning of "every claim," so as to make defense of accord and satisfaction a jury question. *Fowler v. Gorrell*, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

Delivery of loan collateral. — Borrower's delivery to bank of vehicle servicing as collateral for loan did not constitute accord and satisfaction, even assuming that delivery was on express condition that delivery extinguished debt. *Brewer v. Trust Co. Bank*, 205 Ga. App. 891, 424 S.E.2d 74 (1992).

Cited in *Decatur Bank & Trust Co. v. American Sav. Bank*, 166 Ga. 789, 144 S.E. 285 (1928); *Wilder Bros. v. Montgomery*, 51 Ga. App. 231, 179 S.E. 861 (1935); *City of Eastman v. Georgia Power Co.*, 69 Ga. App. 182, 25 S.E.2d 47 (1943); *McLendon v. Johnson*, 69 Ga. App. 214, 25 S.E.2d 53 (1943); *Rural Elec. Appliance Co. v. Joiner*, 69 Ga. App. 353, 25 S.E.2d 428 (1943); *Stein Steel & Supply Co. v. Briggs Mfg. Co.*, 110 Ga. App. 489, 138 S.E.2d 910 (1964); *Epps Air Serv., Inc. v. Lampkin*, 125 Ga. App. 779, 189 S.E.2d 127 (1972); *McCullough v. Mobiland, Inc.*, 139 Ga. App. 260, 228 S.E.2d 146 (1976); *Clark Equip. Credit Corp. v. Refrigerated Transp. Co.*, 148 Ga. App. 405, 251 S.E.2d 321 (1978); *Sun Fed. Sav. & Loan Ass'n v. Manny*, 156 Ga. App. 807, 275 S.E.2d 661 (1980); *Rigdon v. Walker Sales & Serv., Inc.*, 161 Ga. App. 559, 288 S.E.2d 711 (1982); *Carpet Transp., Inc. v. TMS Ins. Agency, Inc.*, 165 Ga. App. 734, 302 S.E.2d 421 (1983).

RESEARCH REFERENCES

ALR. — Debtor's waiver of, or refraining from exercising, right to resort to bankruptcy, or his insolvency, as consideration for release of all or part of liability, 108 ALR 656.

Payment of undisputed amount or liability as consideration for discharge of disputed amount or liability, 112 ALR 1219.

13-4-103. Acceptance of less than amount of debt.

(a) Except as otherwise provided in this Code section, an agreement by a creditor to receive less than the amount of his debt cannot be pleaded as

an accord and satisfaction unless it is actually executed by the payment of the money, the giving of additional security, the substitution of another debtor, or some other new consideration.

(b) Acceptance by a creditor of a check, draft, or money order marked "payment in full" or with language of equivalent condition, in an amount less than the total indebtedness, shall not constitute an accord and satisfaction unless:

(1) A bona fide dispute or controversy exists as to the amount due; or

(2) Such payment is made pursuant to an independent agreement between the creditor and debtor that such payment shall satisfy the debt. (Orig. Code 1863, § 2822; Code 1868, § 2830; Code 1873, § 2881; Code 1882, § 2881; Civil Code 1895, § 3735; Civil Code 1910, § 4329; Code 1933, § 20-1204; Ga. L. 1979, p. 1051, § 1.)

History of Code section. — This Code section is derived in part from the decision in *Evans v. Pollock*, 1 Ga. Dec. 33 (1842).

Law reviews. — For article discussing the anachronistic nature of the Georgia Contracts Code as dramatized by comparing the doctrine of consideration as it is formulated in the Restatements of Contracts and in Code 1933, Title 20 (now this title), and the interpretative approach Georgia courts have taken in dealing with such Code, see 13 Ga. L. Rev. 499 (1979). For article surveying

recent legislative and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979). (But see amendments by Ga. L. 1981, p. 876.) For article, "Construction Law," see 53 Mercer L. Rev. 173 (2001).

For comment on *Doniger and Co. v. Briggs*, 61 Ga. App. 699, 7 S.E.2d 321 (1940), see 4 Ga. B.J. 50 (1942). For comment on *Rivers v. Cole Corp.*, 209 Ga. 406, 73 S.E.2d 573 (1952), see 15 Ga. B.J. 339 (1953).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

AGREEMENTS TO ACCEPT LESS

CONSIDERATION FOR ACCORD AND SATISFACTION

EFFECT OF RETENTION OF PAYMENT

General Consideration

Section applies to case of claim by one person against another for usury paid by former to latter. *Hanes v. First Fed. Sav. & Loan Ass'n*, 101 Ga. App. 609, 114 S.E.2d 804 (1960).

Section inapplicable to composition agreement of creditors. *Stewart Bros. v. Langston & Woodson*, 103 Ga. 290, 30 S.E. 35 (1898).

Accord and satisfaction requires offer and acceptance on condition that it is in full settlement of outstanding debt. *Vintage Enters., Inc. v. Guerdon Indus., Inc.*, 365 F. Supp. 465 (N.D. Ga. 1973).

Accord and satisfaction may result from

acceptance of cash or check. — It matters not whether tender be of cash or check; if check is accepted in full settlement, accord and satisfaction will result. *Studstill v. AMOCO*, 126 Ga. App. 722, 191 S.E.2d 538 (1972), *aff'd*, 230 Ga. 305, 196 S.E.2d 847 (1973), later appeal, 132 Ga. App. 56, 207 S.E.2d 553 (1974).

Deposit of a check constituted an accord and satisfaction under O.C.G.A. § 11-3-311 of a settlement agreement in a debt dispute as a dispute under O.C.G.A. § 13-4-103(b)(1) existed as to the fee portion of the settlement and the letter sent with the check contained a conspicuous statement under O.C.G.A. § 11-1-201(10)

that the tender of the check was full payment and satisfaction of the settlement. *Blitch v. Walker Pharm., Inc.*, 295 Ga. App. 347, 671 S.E.2d 842 (2008).

Until paid, check tendered must be accepted as full payment to work accord and satisfaction. *Bass Dry Goods Co. v. Roberts Coal Co.*, 4 Ga. App. 520, 61 S.E. 1134 (1908).

Creditor's acceptance of payment with understanding that it fully satisfies debt works accord and satisfaction. — Actual payment and acceptance of lesser sum than due is binding if done with understanding that claim will thereby be satisfied. *King v. Liberty Nat'l Life Ins. Co.*, 59 Ga. App. 450, 1 S.E.2d 223 (1939).

If debtor remits to creditor a sum of money, less than amount actually due, upon condition, either express or implied, that it is in satisfaction of creditor's claim, and latter accepts and retains the money, accord and satisfaction results, and this is true whether demand be liquidated or unliquidated, disputed or undisputed. *Young v. Proctor*, 119 Ga. App. 165, 166 S.E.2d 428 (1969).

When creditor receives and retains sum of money from debtor less than amount actually due with understanding, either express or implied, that it is received in satisfaction of creditor's claim or demand, the creditor cannot thereafter treat it as a nullity and recover balance, and this is so whether the creditor's claim or demand be disputed or undisputed, liquidated or unliquidated. *Gulf States Constr., Inc. v. Superior Rigging & Erecting Co.*, 125 Ga. App. 187, 186 S.E.2d 588 (1971); *McGlaun v. Southwest Ga. Prod. Credit Ass'n*, 256 Ga. 648, 352 S.E.2d 558 (1987).

If debtor remits a sum of money to the debtor's creditor, though less than amount actually due, with understanding, either express or implied, that it is in satisfaction of creditor's claim, and latter accepts and retains it, accord and satisfaction of demand results therefrom, and balance, insofar as the law is concerned, may not thereafter be recovered by debtor in action instituted for that purpose; this is true under the law whether debtor's claim or demand be liquidated or unliquidated, disputed or undisputed. *Vintage Enters., Inc. v. Guerdon Indus., Inc.*, 365 F. Supp. 465 (N.D. Ga. 1973).

Georgia law provides an accord and satisfaction when a debtor remits to a creditor a sum of money, less than the amount claimed due, and the creditor accepts and retains the money in spite of the existence of a bona fide dispute. *Rhone v. State Auto Mut. Ins. Co.*, 858 F.2d 1507 (11th Cir. 1988).

When there is dispute as to the amount due, and one party tenders and other accepts check reciting that the check is in payment in full of demand, and check is subsequently paid, reception and retention of the check can be set up as accord and satisfaction. *Edwards Bottling Works v. Jarnagin & Weight*, 11 Ga. App. 162, 74 S.E. 1004 (1912).

Part of payment-in-full language on check stricken. — Chiropactor's negotiation of a check bearing the language "Settlement in Full" constituted an accord and satisfaction, even though the chiropactor struck out part of the payment-in-full language and wrote in a restrictive endorsement of the chiropactor's own which said "accepted as partial payment only." *Rhone v. State Auto Mut. Ins. Co.*, 664 F. Supp. 1431 (S.D. Ga. 1987), *aff'd*, 858 F.2d 1507 (11th Cir. 1988).

Deposit by agent without knowledge of controversy or authority to adjust debt, not accord and satisfaction. — Mere authority given agent to endorse check for deposit does not effect accord and satisfaction based upon receipt of check for amount less than that due when agent does not have knowledge of any controversy as to amount of indebtedness or authority to adjust any such controversy. *Clark Equip. Credit Corp. v. Refrigerated Transp. Co.*, 148 Ga. App. 405, 251 S.E.2d 321 (1978).

Accepting checks labeled as representing balance for year did not create such understanding. *Vintage Enters., Inc. v. Guerdon Indus., Inc.*, 365 F. Supp. 465 (N.D. Ga. 1973).

Delivery of loan collateral. — Borrower's delivery to bank of vehicle serving as collateral for loan did not constitute accord and satisfaction, even assuming that delivery was on express condition that delivery extinguished debt. *Brewer v. Trust Co. Bank*, 205 Ga. App. 891, 424 S.E.2d 74 (1992).

Payment conditioned on fully discharging unliquidated claim works accord and satisfaction when accepted and retained. — When claims of contractor under road con-

General Consideration (Cont'd)

tracts were unliquidated, acceptance and retention of amounts tendered by state on condition that the amounts be accepted in discharge of all contractor's claims or demands under contracts had effect of accord and satisfaction of those claims or demands. *Chandler v. State Hwy. Bd.*, 61 F.2d 601 (5th Cir. 1932).

Promise of future performance generally not satisfaction unless expressly accepted as such. For such promise to be available in bar, it must be pleaded, and its acceptance averred. *Brunswick & W. Ry. v. Clem*, 80 Ga. 534, 7 S.E. 84 (1888).

Accord without satisfaction is no bar; it is only complete when all is done that was to be done in satisfaction. *Campbell Coal Co. v. Pano*, 51 Ga. App. 232, 180 S.E. 139 (1935).

Burden is on defendant to affirmatively establish existence of accord and satisfaction. *Prater v. American Protection Ins. Co.*, 145 Ga. App. 853, 244 S.E.2d 925 (1978).

Debtor must show express or implied understanding that acceptance and retention of payment satisfies accord. — In order to show accord and satisfaction, debtor must show understanding, either express or implied that acceptance and retention of payment by payee is in satisfaction of accord. *Richardson v. Richardson*, 237 Ga. 830, 229 S.E.2d 641 (1976).

Limited to mind of debtor. — Although the parties agreed that a promissory note signed by the defendant would satisfy the defendant's obligation to pay past due rent under a lease agreement, nothing in the record showed, that, by executing the promissory note, defendants agreed to settle any claims the defendants might have had for the plaintiff's alleged breach of the lease agreement and, in fact, there was no evidence whatsoever that a dispute existed regarding the plaintiff's alleged breach prior to the filing of the defendants' counterclaim; to the extent that the defendant's affidavit revealed that the defendant was aware of possible claims against the plaintiff under the lease agreement, such dispute was clearly "limited to the mind of the debtor," and, thus, the promissory note did not operate as an accord and satisfaction of any and all claims defendants may have had under the lease. *Gouldstone v. Life Investors Ins. Co.*, 236 Ga. App. 813, 514 S.E.2d 54 (1999).

Cited in *Lowry v. Sloan*, 51 Ga. 633 (1874); *Rogers v. Ball*, 54 Ga. 15 (1875); *Patterson v. Ramspeck & Green*, 81 Ga. 808, 10 S.E. 390 (1888); *Davis & Co. v. Morgan*, 117 Ga. 504, 43 S.E. 732, 97 Am. St. R. 171, 61 L.R.A. 148 (1903); *Bowen v. E.A. Waxelbaum & Bro.*, 2 Ga. App. 521, 58 S.E. 784 (1907); *T.B. Redmond & Co. v. Atlanta & B. Air-Line Ry.*, 129 Ga. 133, 58 S.E. 874 (1907); *Pennsylvania Cas. Co. v. Thompson*, 130 Ga. 766, 61 S.E. 829 (1908); *Heller v. Samuel Silver, Inc.*, 30 Ga. App. 488, 118 S.E. 449 (1923); *Phillips v. Lindsey*, 31 Ga. App. 479, 120 S.E. 923 (1923); *Wilder Bros. v. Montgomery*, 51 Ga. App. 231, 179 S.E. 861 (1935); *Kooker-Bassett Furn. Co. v. Georgia Hardwood Lumber Co.*, 53 Ga. App. 175, 184 S.E. 910 (1936); *Mortgage Purchase & Sales Co. v. Williamson*, 55 Ga. App. 92, 189 S.E. 293 (1936); *Mason v. Foster*, 62 Ga. App. 104, 8 S.E.2d 180 (1940); *Dunn v. Meyer*, 193 Ga. 91, 17 S.E.2d 275 (1941); *Farmer v. Bankers Health & Life Ins. Co.*, 69 Ga. App. 105, 24 S.E.2d 831 (1943); *McLendon v. Johnson*, 69 Ga. App. 214, 25 S.E.2d 53 (1943); *Collier v. Mayflower Apts., Inc.*, 196 Ga. 419, 26 S.E.2d 731 (1943); *Crow v. Bowers*, 204 Ga. 786, 51 S.E.2d 855 (1949); *King v. Prince*, 89 Ga. App. 588, 80 S.E.2d 222 (1954); *Owens v. Service Fire Ins. Co.*, 90 Ga. App. 553, 83 S.E.2d 249 (1954); *Hatfield v. Colonial Life & Accident Ins. Co.*, 102 Ga. App. 630, 116 S.E.2d 900 (1960); *McCullough v. Mobiland, Inc.*, 139 Ga. App. 260, 228 S.E.2d 146 (1976); *Dolanson Co. v. Citizens & S. Nat'l Bank*, 242 Ga. 681, 251 S.E.2d 274 (1978); *Siegel v. Codner*, 153 Ga. App. 438, 265 S.E.2d 287 (1980); *Hartline-Thomas, Inc. v. H.W. Ivey Constr. Co.*, 161 Ga. App. 91, 289 S.E.2d 296 (1982); *Municipal & Indus. Pipe Serv., Ltd. v. Walter E. Heller & Co.*, 163 Ga. App. 677, 296 S.E.2d 68 (1982); *Carpet Transp., Inc. v. TMS Ins. Agency, Inc.*, 165 Ga. App. 734, 302 S.E.2d 421 (1983); *Sepulvado v. Daniels Lincoln-Mercury, Inc.*, 170 Ga. App. 109, 316 S.E.2d 554 (1984); *Charles Rossignol, Inc. v. Prophecy Corp.*, 177 Ga. App. 245, 339 S.E.2d 288 (1985); *Lewis v. Alfred L. Simpson & Co.*, 183 Ga. App. 166, 358 S.E.2d 262 (1987); *Hall v. Time Ins. Co.*, 854 F.2d 440 (11th Cir. 1988); *Atlas Casing Co. v. Joyner*, 192 Ga. App. 738, 386 S.E.2d 397 (1989); *Wood Bros. Constr. Co. v. Simons-Eastern Co.*, 193 Ga. App. 874, 389 S.E.2d 382 (1989); *Habachy v. Georgia*

Health Group, 207 Ga. App. 288, 427 S.E.2d 808 (1993); *King Indus. Realty, Inc. v. Rich*, 224 Ga. App. 629, 481 S.E.2d 861 (1997); *Quintanilla v. Rathur*, 227 Ga. App. 788, 490 S.E.2d 471 (1997); *Mitchell v. W.S. Badcock Corp.*, 230 Ga. App. 352, 496 S.E.2d 502 (1998); *Regions Bank v. Wachovia Bank (In re Goldberg)*, 248 Bankr. 209 (Bankr. S.D. Ga. 2000); *Frantz v. Piccadilly Place Condo. Ass'n*, 278 Ga. 103, 597 S.E.2d 354 (2004).

Agreements to Accept Less

Agreement to accept less than full admitted, liquidated indebtedness not satisfaction until fully executed. *Taylor v. Central of Ga. Ry.*, 99 Ga. App. 224, 108 S.E.2d 103 (1959).

Agreement to accept less than full amount of liquidated debt in future, unenforceable unless executed. — Agreement by creditor whose claim is liquidated, to take in futuro less than full amount of debt, is an executory agreement and is without consideration and unenforceable, unless, by definite execution at future date, either by payment of money or its equivalent or discharge by new consideration, the agreement becomes executed, in which event such execution thereafter may be pleaded as accord and satisfaction for original debt. *Walbridge v. Jacobs Pharmacy Co.*, 60 Ga. App. 404, 3 S.E.2d 876 (1939).

Accord and satisfaction as to liquidated, undisputed debt. — Even if there is no bona fide dispute, actual payment and acceptance of lesser sum than due will be binding if done with understanding that claim will thereby be satisfied. *Matthews v. Gulf Life Ins. Co.*, 64 Ga. App. 112, 12 S.E.2d 202 (1940).

Where liquidated debt, upon which there is no dispute as to amount due, is agreed to be settled for less than its face value and settlement is consummated by payment of amount agreed upon and execution and delivery of writing stating that it is a release from all further claims, this is an accord and satisfaction and extinguishes all liability therefor by debtor. *Hanes v. First Fed. Sav. & Loan Ass'n*, 101 Ga. App. 609, 114 S.E.2d 804 (1960).

Execution of agreement to accept less than amount due estops creditor from claiming balance. — Executed agreement to receive less than amount of debt due, by actual payment of money agreed upon, can be

pleaded as accord and satisfaction, and will estop party so receiving money from asserting the part claim to balance. *Tyler Cotton Press Co. v. Chevalier*, 56 Ga. 494 (1876).

Debtor's subsequent correspondence sufficient for accord and satisfaction. — Debtor was entitled to the defense of accord and satisfaction when debtor's correspondence to the creditor amounted to a re-tender of the sum as full and final payment and the creditor subsequently deposited the check. *Neal H. Howard & Assocs., P.C. v. Carey & Danis, LLC*, 244 F. Supp. 2d 1344 (M.D. Ga. 2003).

Nothing short of actual performance or payment, meaning performance or payment accepted, will suffice. *Capital Auto. Co. v. Rick*, 134 Ga. App. 830, 216 S.E.2d 601 (1975).

When agreement to take less than sum claimed is executed. — Agreement by creditor whose claim is liquidated to take in praesenti less than full amount of creditor's debt, where money is paid or its definitely agreed equivalent accepted, becomes executed agreement, and is an accord and satisfaction of original debt. *Walbridge v. Jacobs Pharmacy Co.*, 60 Ga. App. 404, 3 S.E.2d 876 (1939).

When sum less than amount of claim is tendered by debtor in full settlement of claim and the sum is accepted by creditor, agreement is executed and results in valid and binding accord and satisfaction. *David D. Doniger & Co. v. Briggs*, 61 Ga. App. 699, 7 S.E.2d 321 (1940).

Retention of sum smaller than amount of undisputed debt, not accord and satisfaction absent agreement. — In absence of independent agreement, retention by creditor of smaller sum offered in settlement of claim, as to amount of which there is no bona fide dispute, does not amount to accord and satisfaction. *Sylvania Elec. Prods., Inc. v. Electrical Wholesalers, Inc.*, 198 Ga. 870, 33 S.E.2d 5 (1945); *Treadwell v. Treadwell*, 218 Ga. App. 823, 463 S.E.2d 497 (1995).

Acceptance in discharge, pursuant to agreement, of less than amount claimed, works accord and satisfaction. — If creditor agrees to accept amount less than the creditor's claim in property, and does accept the property in discharge of such claim, defendant may plead it by way of accord and satisfaction. *Burgamy v. Holton*, 165 Ga. 384, 141 S.E. 42 (1927).

Agreements to Accept Less (Cont'd)

Acceptance of a sum as full settlement giving receipt and closing transaction executes contract. — After \$50.00 was paid and accepted as full settlement of claim, receipt was given, and transaction was closed, it was an executed contract, and was binding on parties. *Whatley v. Troutman*, 60 Ga. App. 23, 2 S.E.2d 731 (1939).

Mere payment of part of lesser sum agreed upon not accord and satisfaction. *Troutman v. Lucas*, 63 Ga. 466 (1879); *Blalock v. Jackson*, 94 Ga. 469, 20 S.E. 346 (1894).

Part payment of lesser amount not satisfaction of entire debt, but only defense pro tanto. — *Taylor v. Central of Ga. Ry.*, 99 Ga. App. 224, 108 S.E.2d 103 (1959).

Part execution of accord may be pleaded as satisfaction pro tanto. *Brunswick & W. Ry. v. Clem*, 80 Ga. 534, 7 S.E. 84 (1888).

Willingness or readiness to pay or perform is not equivalent of performance or payment, and is therefore not satisfaction; nothing short of actual performance or payment, meaning performance or payment accepted, will suffice. *Campbell Coal Co. v. Pano*, 51 Ga. App. 232, 180 S.E. 139 (1935).

In a landlord-tenant dispute where a tenant who could vacate the premises on 120 days' notice gave notice of the tenant's intent to vacate and said the tenant would vacate on a later date and then subsequently said the tenant was only liable for rent for 120 days from the date of the tenant's notice rather than the date included with the notice, when the tenant actually vacated the premises within the 120 days, the tenant was liable for rent until the tenant's original vacation date (the date included in the notice), and the tenant's tender of rent until the date the tenant actually vacated was not an accord and satisfaction because the landlord did not agree to accept that amount in satisfaction of the rent due, nor was there evidence that the tenant's check for the lesser amount or the letter accompanying that check contained any conditional language, such as "payment in full." *Logistics Int'l, Inc. v. RACO/Melaver, LLC*, 257 Ga. App. 879, 572 S.E.2d 388 (2002).

Trial court did not err in finding that a commercial tenant failed to prove the affirmative defense of accord and satisfaction

pursuant to O.C.G.A. § 13-4-103 in an action by the landlord for recovery of rent and other charges due as the tenant failed to show that there was a bona fide dispute as to the amount due prior to paying the reduced amount, and the restrictive wording on the check did not remedy the insufficiency of the proof. *Rafizadeh v. KR Snellville, LLC*, 280 Ga. App. 613, 634 S.E.2d 406 (2006).

Consideration for Accord and Satisfaction

Accord and satisfaction requires some benefit or new consideration to creditor. — To be an accord and satisfaction, the state of facts relied on must contain some benefit or new consideration to creditor. *Thurmond v. Peoples Auto. Loan & Fin. Cor.*, 118 Ga. App. 844, 165 S.E.2d 885 (1968).

Executory agreement to accept less than whole amount of debt not obligatory without fresh consideration to support the agreement. *Taylor v. Central of Ga. Ry.*, 99 Ga. App. 224, 108 S.E.2d 103 (1959).

Executory agreement to accept less than amount claimed requires dispute or consideration to be enforceable. — When agreement has not been fully executed, mere agreement to accept lesser sum than that claimed to be due would require that there exist a dispute or some other consideration. *King v. Liberty Nat'l Life Ins. Co.*, 59 Ga. App. 450, 1 S.E.2d 223 (1939).

Agreement to accept less than total liquidated debt requires new consideration or complete performance. — Executory agreement to accept payment of less than total amount of liquidated debt is not obligatory without new consideration or complete performance of agreement, and partial performance will not serve as consideration. *Codner v. Siegel*, 246 Ga. 368, 271 S.E.2d 465 (1980).

Even slight additional advantage or other new consideration to creditor may support accord and satisfaction. — Even slight additional advantage, or other new consideration to creditor, such as waiver of defense by debtor, or debtor's agreement to surrender possession of realty covered by security deed before the debtor is legally obliged to do so, in exchange for promise by creditor that indebtedness shall thereby be discharged, where undertaking of debtor is fully performed and accepted, is a good accord and satisfaction. *Mortgage Purchase & Sales Co.*

v. Williamson, 55 Ga. App. 92, 189 S.E. 293 (1936).

Settlement of disputed claim is sufficient consideration for accord and satisfaction. King v. Liberty Nat'l Life Ins. Co., 59 Ga. App. 450, 1 S.E.2d 223 (1939); Matthews v. Gulf Life Ins. Co., 64 Ga. App. 112, 12 S.E.2d 202 (1940).

When entire claim of party suing for damages is in dispute, and therefore doubtful, receipt of part, on condition that balance of claim be abandoned, is of advantage to plaintiff, and will be good as accord and satisfaction of whole claim. Tyler Cotton Press Co. v. Chevalier, 56 Ga. 494 (1876).

Bona fide dispute, even without merit, as to amount due, supports accord and satisfaction. — When there is bona fide dispute, even without merit, over amount due, and amount less than amount of debt is accepted in settlement thereof, it amounts to accord and satisfaction of entire debt. Rivers v. Cole Corp., 86 Ga. App. 469, 71 S.E.2d 712, rev'd on other grounds, 209 Ga. 406, 73 S.E.2d 196 (1952).

Creditor's acceptance, pursuant to agreement, of less than amount claimed, is sufficient consideration. — It would seem that agreement of creditor to receive less than amount of creditor's demand, and payment of money thereunder, is sufficient consideration for such agreement, and stands upon same footing as giving of additional security, or substitution of new debtor, or some other new consideration. King v. Liberty Nat'l Life Ins. Co., 59 Ga. App. 450, 1 S.E.2d 223 (1939).

Promise to relieve creditor from liability under first mortgage is adequate new consideration. Codner v. Siegel, 246 Ga. 368, 271 S.E.2d 465 (1980).

Promise to pay debt before it is due in smaller sum than owed suffices as necessary additional consideration. Codner v. Siegel, 246 Ga. 368, 271 S.E.2d 465 (1980).

Agreement to refrain from bankruptcy proceedings as consideration. — Agreement by debtor not to go into bankruptcy and thereby be discharged from certain debt, or at least imperil the debt's collection, furnishes sufficient consideration. Dawson v. Beall, 68 Ga. 328 (1882).

Part payment of lesser sum agreed upon will not serve as consideration for agreement. Taylor v. Central of Ga. Ry., 99 Ga. App. 224, 108 S.E.2d 103 (1959).

Partial performance, absent other consideration, is not sufficient to support an accord and satisfaction by payment of a lesser sum than the amount owed on a liquidated debt. Codner v. Siegel, 246 Ga. 368, 271 S.E.2d 465 (1980).

Extent of accord and satisfaction based on payment. — Jury issue existed as to the extent of the accord and satisfaction of a hospital's claims for treatment provided to a company's employees, and the company's liability for any remaining claims for the employees; as to one set of employees, there was conflicting evidence as to whether a \$21,000 check was a settlement for hospital services provided in early 1997 only, or as to all amounts owed for their care from 1997 to 1999. Hosp. Auth. v. Pyrotechnic Specialties, Inc., 263 Ga. App. 886, 589 S.E.2d 644 (2003).

Insurance payout was binding accord and satisfaction. — Summary judgment should have been granted for the insurer and the insurance adjusting company because the undisputed facts showed that the insurer and the insured entered into a binding accord and satisfaction, pursuant to O.C.G.A. § 13-4-103(b); there was no evidence of bad faith with regard to the insurer's settlement discussion with the insured and the attorney as it fully revealed the calculation of the final settlement amount in a letter, and it clearly indicated that no tag, title, or other fees were included. Progressive Cas. Ins. Co. v. Evans, 276 Ga. App. 594, 623 S.E.2d 767 (2005).

Effect of Retention of Payment

Mere retention of check is immaterial. Colfax Gin Co. v. Buckeye Cotton Oil Co., 24 Ga. App. 610, 101 S.E. 697 (1919).

Retention of check for excessive period of time may work accord and satisfaction. — If party intends to accept check as payment of demand, that check should be promptly presented for payment, usually within 30-day period. When, in absence of circumstances suggesting contrary state of facts, check, although not cashed, is kept for period greatly in excess of this time, such retention may of itself cause debtor to rely on theory that the debtor's offer (accord) has been accepted (satisfaction), in which case creditor no longer has right of action for any excess payment due. Studstill v. AMOCO,

Effect of Retention of Payment (Cont'd)

126 Ga. App. 722, 191 S.E.2d 538 (1972), *aff'd*, 230 Ga. 305, 196 S.E.2d 847 (1973), later appeal, 132 Ga. App. 56, 207 S.E.2d 553 (1974).

Retaining check for unreasonable time without cashing or refusing acceptance as accord and satisfaction. — Retention of check for unreasonable time without cashing and without indicating refusal to accept as accord and satisfaction will constitute acceptance. *Studstill v. AMOCO*, 126 Ga. App. 722, 191 S.E.2d 538 (1972), *aff'd*, 230 Ga. 305, 196 S.E.2d 847 (1973), later appeal, 132 Ga. App. 56, 207 S.E.2d 553 (1974).

Existence of dispute between parties prior to tender of instrument. — Acceptance of a check containing mere words of conditional payment will not constitute an accord and satisfaction unless a dispute as to the correctness of the amount of the debt existed previously to the tender. *Sunbelt Life Ins. Co. v. Bank of Alapaha*, 176 Ga. App. 628, 337 S.E.2d 410 (1985).

Absence of bona fide dispute between parties. — In an action to remove a lien on property, the trial court did not err in granting summary judgment against the defendant on the basis of accord and satisfaction since it was uncontroverted that the plaintiff and defendant disagreed about the amount plaintiff owed for renovation work before plaintiff tendered a check marked "Payment in Full" to defendant. *Kendrick v. Kalmanson*, 244 Ga. App. 363, 534 S.E.2d 884 (2000).

Evidence supported a determination that the preexisting dispute between the parties was not a bona fide dispute and that the defendant acted in bad faith both in generating the underlying controversy and in its offer to settle that controversy through the tender of a check. *Withington v. Valuation Group, Inc.*, 249 Ga. App. 8, 547 S.E.2d 594 (2001).

Acceptance of check with conditional language on it not accord and satisfaction. — When there was no evidence of a preexisting bona fide controversy or of an independent agreement, plaintiff's acceptance of checks, even with notice of the conditional language on them, "Pd. in full ... No Bal. on Paint," and "Pd. in full ... No Bal. due," did not as a matter of law constitute an accord and

satisfaction. *Franklin v. Cummings*, 181 Ga. App. 755, 353 S.E.2d 626 (1987).

Acceptance of check and endorsement with conditional language was accord and satisfaction — Contractor's acceptance and deposit of a check tendered in partial payment of the contractor's bill for clearing rights of way in a housing development, along with a letter from the developer which stated the developer disputed the amount of work actually performed and that the tendered payment was in full constituted an accord and satisfaction under O.C.G.A. § 13-4-103(b) despite the fact that the contractor endorsed the check "with reservations"; thus, the contractor's action for additional payments allegedly owed was barred. *Hawthorne Grading & Hauling v. Rampley*, 252 Ga. App. 771, 556 S.E.2d 912 (2001).

When receipt and retention of check amounts to accord and satisfaction. — Absent agreement, it is only when there is a dispute as to amount due, and one party tenders and other accepts check reciting that it is in payment in full of demand, and check is subsequently paid, that receipt and retention of check can be set up as accord and satisfaction. *Studstill v. AMOCO*, 126 Ga. App. 722, 191 S.E.2d 538 (1972), *aff'd*, 230 Ga. 305, 196 S.E.2d 847 (1973), later appeal, 132 Ga. App. 56, 207 S.E.2d 553 (1974).

Plaintiff's acceptance of a check from the defendants constituted an accord and satisfaction since the defendants mailed letters to the plaintiff detailing the dispute between the parties, indicating that the defendants were tendering an amount less than the total indebtedness set forth under the contract, and stating that an enclosed check, marked "final payment," constituted remuneration for "the balance of the contract," and the plaintiff accepted the payment without condition. *Bridges v. Mann*, 247 Ga. App. 730, 544 S.E.2d 755 (2001).

On facts, retention of stale check did not effect accord and satisfaction. — Mere retention of stale check, since there was knowledge on part of debtor at time that creditor refused to accept the check in full satisfaction of unliquidated liability, and which was never cashed and was, at time of summary judgment order, in hands of maker, will not support judgment of accord and satisfaction.

Studstill v. AMOCO, 126 Ga. App. 722, 191 S.E.2d 538 (1972), aff'd, 230 Ga. 305, 196

S.E.2d 847 (1973), later appeal, 132 Ga. App. 56, 207 S.E.2d 553 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Accord and Satisfaction, §§ 19, 20, 22, 24, 31, 35, 36, 37, 46, 53.

C.J.S. — 1 C.J.S., Accord and Satisfaction, §§ 33, 36.

ALR. — Payment before maturity of part of a liquidated and undisputed indebtedness as a consideration for its acceptance in satisfaction of the entire debt, 24 ALR 1474.

Acceptance of amount appropriated on account of claim against state or other public body as bar to balance of claim, 70 ALR 1208.

Payment of undisputed amount or liability as consideration for discharge of disputed amount or liability, 112 ALR 1219.

Validity and effect of agreement to pay original creditor part of debt refinanced under Federal Farm Loan Act, 147 ALR 743.

Interest of spouse in estate by entirety as subject to satisfaction of his or her individual debt, 75 ALR2d 1172.

Necessity and nature of consideration supporting landlord's reduction of rent, 30 ALR3d 1259.

13-4-104. Parties bound by accord and satisfaction.

An accord and satisfaction is binding upon both parties. (Orig. Code 1863, § 2823; Code 1868, § 2831; Code 1873, § 2882; Code 1882, § 2882; Civil Code 1895, § 3736; Civil Code 1910, § 4330; Code 1933, § 20-1205.)

Law reviews. — For comment on Chocran v. Bell, 102 Ga. App. 617, 117 S.E.2d 645 (1960), see 24 Ga. B.J. 422 (1962).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

COMPROMISE OF DOUBTFUL CLAIM

General Consideration

Accord and satisfaction, to bind both parties requires meeting of minds as to subject matter embraced in agreement. State Farm Fire & Cas. Co. v. Fordham, 148 Ga. App. 48, 250 S.E.2d 843 (1978); Wallace v. Harrison, 166 Ga. App. 461, 304 S.E.2d 487 (1983).

An accord and satisfaction is itself a contract which requires a meeting of the minds in order to render it valid and binding. Commercial Union Assurance Co. v. Southeastern Ventilating, Inc., 159 Ga. App. 443, 283 S.E.2d 660 (1981).

All matters must be settled for accord. — If there is no agreement to settle all matters in dispute, no accord and satisfaction results. Wallace v. Harrison, 166 Ga. App. 461, 304 S.E.2d 487 (1983).

There may be a pro tanto settlement of one or more of several claims, or of a portion of a claim consisting of one or more distinct elements, without prejudice to the remaining claims or portions of claims. Wallace v. Harrison, 166 Ga. App. 461, 304 S.E.2d 487 (1983).

Compromise or mutual accord and satisfaction binds both parties. Collier v. Casey, 59 Ga. App. 627, 1 S.E.2d 776 (1939).

Compromise and mutual accord and satisfaction immediately binds parties and terminates prior obligations and prior controversy between the parties insofar as subject matter therein compromised. J.A. Jones Constr. Co. v. Greenbriar Shopping Ctr., 332 F. Supp. 1336 (N.D. Ga. 1971), aff'd, 461 F.2d 1269 (5th Cir. 1972).

Effect of executed compromise and mu-

General Consideration (Cont'd)

tual accord and satisfaction not dependent upon complete and literal performance; rather, parties are relegated to their remedies thereunder. *J.A. Jones Constr. Co. v. Greenbriar Shopping Ctr.*, 332 F. Supp. 1336 (N.D. Ga. 1971), *aff'd*, 461 F.2d 1269 (5th Cir. 1972).

Material mistake of fact, not resulting from negligence, may invalidate settlement agreement. — It is generally agreed that settlement agreement based on mistake of material fact, where mistake was not due to negligence of party claiming mistake and where it did not pertain to fact in dispute, may be invalidated on that ground like other agreements. *D.H. Overmyer Co. v. Joe Summers Roofing Co.*, 120 Ga. App. 188, 169 S.E.2d 821 (1969), later appeal, 121 Ga. App. 804, 175 S.E.2d 880 (1970).

Party cannot attack agreement on grounds of unilateral mistake. — When final commission check to employee by employer was intended as a compromise and settlement of all claims between the parties, and when employer claimed that the employer subsequently discovered an overpayment in the amount of the check due to the employer's own mathematical error, the employee denying any such overpayment, employer could not attack the agreement on grounds of unilateral mistake. *Mobley v. Fulton Roofing Co.*, 173 Ga. App. 563, 327 S.E.2d 540 (1985).

Mistake resulting from negligence of party to settlement contract will not render contract invalid. *D.H. Overmyer Co. v. Joe Summers Roofing Co.*, 120 Ga. App. 188, 169 S.E.2d 821 (1969), later appeal, 121 Ga. App. 804, 175 S.E.2d 880 (1970).

Law of this state favors settlements and cessation of litigation. *Coleman v. Ellenberg* (In re Cohen), 6 Bankr. 708 (Bankr. N.D. Ga. 1980).

In equity, termination of family controversies affords consideration sufficient to support contract for such purpose. *Fulford v. Fulford*, 225 Ga. 9, 165 S.E.2d 848 (1969).

Law and equity not only allow but strongly encourage private settlements of family affairs. *Trammell v. West*, 224 Ga. 365, 162 S.E.2d 353 (1968).

Compromise of family claims is favored both in law and equity. *Dickerson v.*

Dickerson, 19 Ga. App. 269, 91 S.E. 346 (1917).

Relinquishment of claims against each other effects accord and satisfaction regardless of respective amounts. — When each of two persons relinquishes claim against the other, or each discontinues action against the other, mutual accord and satisfaction is effected, regardless of respective amounts involved; and this bars any further recourse on part of either as to such claims. Any rights of parties must now be based upon new agreement. *Collier v. Casey*, 59 Ga. App. 627, 1 S.E.2d 776 (1939).

Person who by renouncing one claim induces settlement of others is bound by settlement. *Neal v. Field*, 68 Ga. 534 (1882).

Settlement by guardian with third party concerning trust will accrue to benefit of ward. *Smith v. Smith*, 36 Ga. 184, 91 Am. Dec. 761 (1867).

Renewal note for less than old note, presumed to settle differences between parties. — New note for sum less than old note, given in renewal thereof, is presumptive evidence that all differences between parties were adjusted and settled when such new note was given. *Collier v. Casey*, 59 Ga. App. 627, 1 S.E.2d 776 (1939).

Agreement on repair of defective construction work constituting compromise and mutual accord and satisfaction. See *J.A. Jones Constr. Co. v. Greenbriar Shopping Ctr.*, 332 F. Supp. 1336 (N.D. Ga. 1971), *aff'd*, 461 F.2d 1269 (5th Cir. 1972).

Party relying on doctrine must show matter included. — When settlement is pleaded as an estoppel, burden is upon party relying thereon to sustain plea by showing that particular matter was included in compromise. *Glisson v. Burkhalter*, 31 Ga. App. 365, 120 S.E. 664 (1923).

Burden of proof is on party relying on accord and satisfaction. — Pleas of accord and satisfaction are pleas in confession and avoidance. Burden of pleading and proving existence, terms, and effect of accord and satisfaction is on party relying upon the accord and satisfaction. *City of Atlanta v. Gore*, 47 Ga. App. 70, 169 S.E. 776 (1933).

When in defendant's answer and in defendant's motion for summary judgment, accord and satisfaction is defendant's sole legal theory, the burden of proof, as with any other affirmative defense, is on defendant,

the party asserting this doctrine. *Wallace v. Harrison*, 166 Ga. App. 461, 304 S.E.2d 487 (1983).

When defendant moves for summary judgment and relies upon a line of cases which holds that the cashing of a check and retention of the proceeds constitutes an accord and satisfaction, regardless of any protest, oral or written, and regardless of whether the other party is given notice of protest or any purported reservation of rights, defendant thus undertakes to discharge a treble burden: not only that ordinarily imposed upon the proponent of an affirmative defense, but a second burden that requires the movant for summary judgment to establish that there exist no material issues of fact in the case, and yet a third that requires the movant who is also the defendant affirmatively to negate one or more essential elements of the case made out by the plaintiff. *Wallace v. Harrison*, 166 Ga. App. 461, 304 S.E.2d 487 (1983).

Jury to determine exact terms of compromise when evidence is conflicting. *Murphy Mach. Co. v. Burke*, 19 Ga. App. 351, 91 S.E. 490 (1917).

Cited in *Rogers v. Ball*, 54 Ga. 15 (1875); *Southern Ry. v. Dalton Tel. Co.*, 145 Ga. 189, 88 S.E. 940 (1916); *Phillips v. Lindsey*, 31 Ga. App. 479, 120 S.E. 923 (1923); *Vann v. Kimbrel*, 32 Ga. App. 275, 123 S.E. 168 (1924); *Pere Marquette Ry. v. Tifton Produce Co.*, 48 Ga. App. 286, 172 S.E. 727 (1934); *Stewart v. Finance Co.*, 49 Ga. App. 462, 176 S.E. 73 (1934); *Eatonton Oil & Auto Co. v. Greene County*, 181 Ga. 47, 181 S.E. 758 (1935); *Mason v. Foster*, 62 Ga. App. 104, 8 S.E.2d 180 (1940); *Hall v. Beavers*, 75 Ga. App. 722, 51 S.E.2d 879 (1949); *Coggins v. Edmonds*, 209 Ga. 381, 73 S.E.2d 199 (1952); *Collins v. Louisville & W.R.R.*, 92 Ga. App. 814, 89 S.E.2d 908 (1955); *McVay v. Anderson*, 221 Ga. 381, 144 S.E.2d 741 (1965); *Coldway Carriers, Inc. v. Hartman*, 120 Ga. App. 787, 172 S.E.2d 205 (1969); *Epps Air Serv., Inc. v. Lampkin*, 125 Ga. App. 779, 189 S.E.2d 127 (1972); *Sollek v. Laseter*, 126 Ga. App. 137, 190 S.E.2d 148 (1972); *Olivetti Leasing Corp. v. Metro-Plastics, Inc.*, 128 Ga. App. 401, 196 S.E.2d 686 (1973); *Capital Auto. Co. v. Rick*, 134 Ga. App. 830, 216 S.E.2d 601 (1975).

Compromise of Doubtful Claim

Compromise of doubtful question of law or fact provides sufficient consideration. — When compromise contract is based upon bona fide dispute on doubtful question of either law or fact, there is sufficient consideration to support validity of contract. *David v. Atlantic Co.*, 69 Ga. App. 643, 26 S.E.2d 650 (1943).

Settlement of doubtful issues provides sufficient consideration to support agreement of settlement and compromise. *Fulford v. Fulford*, 225 Ga. 9, 165 S.E.2d 848 (1969).

Compromise of doubtful claim is sufficient consideration to support promissory note fairly given in settlement of controversy. *Cotterill v. Hopkins*, 180 Ga. 179, 178 S.E. 444 (1935).

Compromise of doubtful rights are upheld by general policy, as tending to prevent litigation, in all enlightened systems of jurisprudence. *Smith v. Smith*, 36 Ga. 184, 91 Am. Dec. 761 (1867); *David v. Atlantic Co.*, 69 Ga. App. 643, 26 S.E.2d 650 (1943).

When fairly made, courts always favor compromise of doubtful rights, and the compromises are binding notwithstanding it may eventually turn out that point of law was in favor of party complaining. *David v. Atlantic Co.*, 69 Ga. App. 643, 26 S.E.2d 650 (1943).

To furnish consideration for compromise agreement, contention must be made in good faith and be honestly believed in. *David v. Atlantic Co.*, 69 Ga. App. 643, 26 S.E.2d 650 (1943).

To render compromise of claim valid, the matter need not be really in doubt; it is sufficient if parties consider it so far doubtful as to make it subject of compromise. *David v. Atlantic Co.*, 69 Ga. App. 643, 26 S.E.2d 650 (1943); *Hall v. Beavers*, 78 Ga. App. 722, 51 S.E.2d 879 (1949); *Fulford v. Fulford*, 225 Ga. 9, 165 S.E.2d 848 (1969).

Nature of disputed claim which will suffice as basis for accord and satisfaction. — In accord and satisfaction of disputed claim it is not the merit of contentions of either party which determines its validity to support such accord and satisfaction, its controlling factor being bona fides of debtor's conten-

Compromise of Doubtful Claim (Cont'd)

tion, which as a general rule is a question of fact for jury. *Nauman v. McCoy*, 84 Ga. App. 131, 65 S.E.2d 853 (1951).

Compromise of contention as to property rights, final outcome of which, if settled by litigation, parties consider to be doubtful, furnishes consideration sufficient to support compromise contract. *David v. Atlantic Co.*, 69 Ga. App. 643, 26 S.E.2d 650 (1943); *Fulford v. Fulford*, 225 Ga. 9, 165 S.E.2d 848 (1969).

Promise made in extinguishment of doubtful claim is sufficient to support valid claim. — The law favors compromises, and a

promise made in extinguishment of doubtful claim is sufficient to support valid contract. *Skinner v. Smith*, 120 Ga. App. 35, 169 S.E.2d 365 (1969).

When debt in dispute, payment and acceptance of agreed sum constitutes accord and satisfaction. — Agreement by creditor to receive less than amount of creditor's debt may be pleaded as accord and satisfaction when bona fide dispute arises between parties as to certain material terms of original contract and when such subsequent agreement is actually executed by payment of sum agreed upon. *Nauman v. McCoy*, 84 Ga. App. 131, 65 S.E.2d 853 (1951).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Compromise and Settlement, §§ 18, 37, 38.

C.J.S. — 17 C.J.S., Contracts, §§ 104, 118, 119, 208. 17A C.J.S., Contracts, §§ 231, 232, 411.

ALR. — Failure to perform act required by new agreement as affecting character thereof as accord and satisfaction, 10 ALR 222; 14 ALR 230.

Surrender of, or forbearance to prosecute, a claim for damages for personal injuries or death as a consideration, 57 ALR 279.

Agreement with one tortfeasor that any judgment that may be recovered will not be enforced against him, as affecting liability of cotortfeasor, 160 ALR 870.

Admissibility of evidence of unperformed compromise agreement, 26 ALR2d 858.

Family settlement of testator's estate, 29 ALR3d 8.

Contempt for violation of compromise and settlement the terms of which were approved by court not incorporated in court order, decree, or judgment, 84 ALR3d 1047.

CHAPTER 5

DEFENSES

Article 1		Sec.	
General Provisions			
Sec.			failure of consideration, or other act as defense.
13-5-1.	Pleading of facts indicating contract not obligatory generally.	13-5-9.	Total or partial failure of consideration generally.
13-5-2.	Incapacity generally.	13-5-10.	Failure to perform dependent covenant.
13-5-3.	Exemption from contractual liability of minor.	13-5-11.	Part performance.
13-5-4.	Mistake of fact or law.		
13-5-5.	Fraud.		
13-5-6.	Duress.	13-5-30.	Agreements required to be in writing.
13-5-7.	Rescission or release.	13-5-31.	Agreements enforceable without writing.
13-5-8.	Noncompliance with condition,		

Cross references. — Excuse for nonperformance of contract for sale of goods, § 11-2-601 et seq.

JUDICIAL DECISIONS

Interference with contractual relationship when based on absolute right. — There is no liability for interference with a contractual relationship when the alleged interference is caused by the exercise of an absolute right. *J.C. Penney Co. v. Davis & Davis, Inc.*, 158 Ga. App. 169, 279 S.E.2d 461 (1981).

Distinction exists between interference with contractual rights and procuring or inducing another to breach the other's contract. *First Mtg. Corp. v. Felker*, 158 Ga. App. 14, 279 S.E.2d 451 (1981).

Failure of third person to perform independent prior contract made with one of the parties does not give rise to a cause of action for inducing the breach of the contract. *First Mtg. Corp. v. Felker*, 158 Ga. App. 14, 279 S.E.2d 451 (1981).

Caveat emptor is not a defense to action on warranty breach. *Ben Trovato Properties, Inc. v. Strauss*, 159 Ga. App. 510, 284 S.E.2d 632 (1981).

RESEARCH REFERENCES

ALR. — Rights and remedies of one whose contract for a free or reduced service rate with public utility in consideration of a grant of property or privileges is nullified by public authority, 14 ALR 252.

Validity of contract by agent for compensation from third person for negotiating loan or sale with principal, 14 ALR 464.

Right of infant to recover back insurance premiums, 94 ALR 965.

Agency: Anti-assignment clause in contract as precluding enforcement by undisclosed principal, 75 ALR3d 1184.

Failure of building and construction artisan or contractor to procure business or occupational license as affecting enforceabil-

ity of contract or right of recovery for work done—modern cases, 44 ALR4th 271.

Credit card issuer's liability, under state

laws, for wrongful billing, cancellation, dishonor, or disclosure, 53 ALR4th 231.

ARTICLE 1

GENERAL PROVISIONS

13-5-1. Pleading of facts indicating contract not obligatory generally.

Any fact going to show that a contract was not obligatory, though executed, may be pleaded as a defense. (Orig. Code 1863, § 2797; Code 1868, § 2805; Code 1873, § 2856; Code 1882, § 2856; Civil Code 1895, § 3706; Civil Code 1910, § 4300; Code 1933, § 20-901.)

JUDICIAL DECISIONS

Cited in *Hartman Stock Farm v. Henley*, 8 Ga. App. 255, 68 S.E. 957 (1910).

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Contracts, § 17.

ALR. — Failure to procure occupational or business license or permit as affecting validity or enforceability of contract, 30 ALR 834; 42 ALR 1226; 118 ALR 646.

Validity and enforceability of contract, the making or performance of which involves breach of a contract made by one of the parties with a third person, or impairs his ability to perform such contract, 83 ALR 32.

Estoppel of grantee or mortgagee as to amount of prior mortgage recited, 141 ALR 1184.

Insurer's statements as to amount of dividends, accumulations, surplus, or the like as binding on insurer or merely illustrative, 17 ALR3d 777.

13-5-2. Incapacity generally.

A person may plead his own incapacity to contract. (Orig. Code 1863, § 2698; Code 1868, § 2694; Code 1873, § 2736; Code 1882, § 2736; Civil Code 1895, § 3653; Civil Code 1910, § 4238; Code 1933, § 20-208.)

JUDICIAL DECISIONS

Cited in *DOT v. Arapaho Constr., Inc.*, 180 Ga. App. 341, 349 S.E.2d 196 (1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Incompetent Persons, §§ 28, 68, 95, 99, 127.

C.J.S. — 17A C.J.S., Contracts, § 674 et seq. 44 C.J.S., Insane Persons, § 148.

13-5-3. Exemption from contractual liability of minor.

The exemption of a minor from contractual liability is a personal privilege. The party contracting with a minor may not plead it unless he was ignorant of the fact at the time of the contract nor may third persons avail themselves of it as a defense. (Orig. Code 1863, § 2694; Code 1868, § 2690; Code 1873, § 2732; Code 1882, § 2732; Civil Code 1895, § 3649; Civil Code 1910, § 4234; Code 1933, § 20-202.)

Cross references. — Borrowers deemed capable regardless of age, § 20-3-287.

JUDICIAL DECISIONS

Contracts made with infants generally obligatory on adults, but not on infants. *Hughes v. Murphy*, 5 Ga. App. 328, 63 S.E. 231 (1908).

Minor's privilege is personal. — Minor's exemption under O.C.G.A. § 13-5-3 from contractual liability is a personal privilege which others may not assert as a defense; binding settlement agreement was reached between an insurer and a minor injured party even though: (1) a contract of a minor is voidable under O.C.G.A. § 13-3-20(a); (2) judicial approval pursuant to O.C.G.A. § 29-2-16(e) postdated the settlement agreement; and (3) no guardian had been appointed for the minor at the time the agreement was reached. *Grange Mut. Cas. Co. v. Kay*, 264 Ga. App. 139, 589 S.E.2d 711 (2003).

False and fraudulent representations as to age may estop infant from asserting infancy defense. — False and fraudulent representations by infant touching the infant's apparent majority will estop the infant from setting up the infant's disability, where other party to contract has acted in good faith to the infant's injury and without fault or negligence on the infant's part; and further appears that contract is fair and reasonable, and infant has received, enjoyed, and consumed its irrestorable benefits. *Hood v. Duren*, 33 Ga. App. 203, 125 S.E. 787 (1924).

Bona fide holder of instrument before due and without notice not protected from infancy defense. — Plea of infancy goes to capacity to contract, and bona fide holder before due and without notice is not protected therefrom. *Howard v. Simpkins*, 70 Ga. 322 (1883).

Repossession of collateral does not void contract of minor. — Repossession of collateral does not void contract as to surety, and result is not changed when maker is a minor. *Murphy v. Bank of Dahlonge*, 151 Ga. App. 264, 259 S.E.2d 670 (1979).

Section does not affect proper method of suing and serving infants. — Exemption of infant generally from liability on the infant's contract is a personal privilege, but this does not affect proper method of suing and serving an infant. *Maryland Cas. Co. v. Lanham*, 124 Ga. 859, 53 S.E. 395 (1906); *Miller v. Luckey*, 132 Ga. 581, 64 S.E. 658 (1909).

Cited in *Elder v. Woodruff Hdwe. & Mfg. Co.*, 9 Ga. App. 484, 71 S.E. 806 (1911); *Levy v. McPhail*, 33 Ga. App. 784, 127 S.E. 793 (1925); *McIntyre v. Ragan*, 179 Ga. 360, 175 S.E. 795 (1934); *Holland v. Peerless Furn. Co.*, 60 Ga. App. 149, 3 S.E.2d 138 (1939); *Tharpe v. Cudahy Packing Co.*, 60 Ga. App. 449, 4 S.E.2d 49 (1939); *Holliday v. Pope*, 205 Ga. 301, 53 S.E.2d 350 (1949); *Rozenberg v. Sund*, 81 Ga. App. 856, 60 S.E.2d 390 (1950); *Beckworth v. Beckworth*, 255 Ga. 241, 336 S.E.2d 782 (1985).

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Contracts, § 98.

ALR. — Right of infant to enjoin other

party to contract from asserting its validity, 15 ALR 1215.

Stipulations in pass as binding on infant, 41 ALR 1099.

Return of property purchased by infant as condition of recovery of purchase price, 124 ALR 1368.

Failure to disaffirm as ratification of infant's executory contract, 5 ALR2d 7.

Right of infant to disaffirm his sale of personalty and recover it from third person purchasing without notice of infancy, 16 ALR2d 1420.

Right of infant who repudiates contract for services to recover thereon or in quantum meruit, 35 ALR2d 1302.

Agreement to arbitrate future controversies as binding on infant, 78 ALR2d 1292.

Contract, provision thereof, or stipulation waiving wife's right to counsel fees in event of divorce or separation action, 3 ALR3d 716.

Enforceability of covenant not to compete in infant's employment contract, 17 ALR3d 863.

Infant's misrepresentation as to his age as estopping him from disaffirming his voidable transaction, 29 ALR3d 1270.

Automobile or motorcycle as necessary for infant, 56 ALR3d 1335.

13-5-4. Mistake of fact or law.

If the consideration upon which a contract is based was given as a result of a mutual mistake of fact or of law, the contract cannot be enforced. (Orig. Code 1863, § 2707; Code 1868, § 2701; Code 1873, § 2743; Code 1882, § 2743; Civil Code 1895, § 3660; Civil Code 1910, § 4245; Code 1933, § 20-308.)

Cross references. — Pleading of mistake as a defense, § 9-11-9. Equitable principles

regarding accident and mistake generally, § 23-2-20 et seq.

JUDICIAL DECISIONS

Elements of defense of mutual mistake of law. — Mutual mistake of law is good defense against action to recover money under contract of purchase when there is full knowledge of all facts, provided mistake be clearly proved and plaintiff cannot in good conscience receive money sued for. *Holmes v. Holmes*, 140 Ga. 217, 78 S.E. 903 (1913).

In cases contemplated by law, purchaser may sue for rescission in law or equity. *Lundin v. Hill*, 105 Ga. App. 449, 125 S.E.2d 105 (1962).

Same principles apply in law and equity as to defense of mistake. — When defendant in court of law seeks to avoid defendant's contract on ground of mistake, defendant must, by defendant's pleadings, allege grounds of mistake, as fully as defendant is required to do in court of equity to entitle defendant to relief. *Hargrove v. Bledsoe*, 78 Ga. App. 107, 50 S.E.2d 223 (1948).

Mutual mistake may be a good defense in law to enforcement of contract, but defendant seeking in court of law to avoid defendant's contract for this reason must allege grounds of mistake as fully as defendant

would be required to do in court of equity. *Mangham v. Hotel & Restaurant Supply Co.*, 107 Ga. App. 619, 131 S.E.2d 74 (1963).

One seeking to avoid obligation of contract by defense of mutual mistake in court of law is bound by same principles as in court of equity. *Romine, Inc. v. Savannah Steel Co.*, 117 Ga. App. 353, 160 S.E.2d 659 (1968).

Specificity with which to plead mutual mistake. — When party seeks to avoid contract because of mutual mistake, that party's pleading must show particular mistake and illustrate how it occurred, why terms of contract which pleader insist should have been inserted were left out, or how terms not agreed upon came to be inserted. *Mangham v. Hotel & Restaurant Supply Co.*, 107 Ga. App. 619, 131 S.E.2d 74 (1963).

When an employee alleged no genuine mutual mistake, but instead claimed that the employee did not think that the employee's invention was covered by the invention agreement the employee had with the employer, the employee's rescission claim based on mutual mistake failed. *Georgia-Pacific*

Corp. v. Lieberam, 959 F.2d 901 (11th Cir. 1992).

Mistake not due to negligence nor pertaining to fact in dispute. — A settlement contract based on a mistake of material fact, since the mistake was not due to the negligence of the party claiming mistake and since it did not pertain to a fact in dispute, may be invalidated on that ground like other agreements. *Insurance Concepts, Inc. v. Western Life Ins. Co.*, 639 F.2d 1108 (5th Cir. 1981).

Correction for one party's mistake or ignorance. — Absent special circumstances, a court cannot correct for the mistake or ignorance of one party when the party had the responsibility, and opportunity, to protect oneself. *Smith v. Seaboard Coast Line R.R.*, 639 F.2d 1235 (5th Cir. 1981).

Not court's province to pass on wisdom of particular agreement, even though the agreement's terms may have been accepted by one party as the result of oversight or poor cerebration. *Smith v. Seaboard Coast Line R.R.*, 639 F.2d 1235 (5th Cir. 1981).

Mistake in judgment or opinion as to value of property does not authorize judicial interference. *Hargrove v. Bledsoe*, 78 Ga. App. 107, 50 S.E.2d 223 (1948).

Equity will not relieve one from erroneous acts or omissions resulting from one's own negligence. *Mangham v. Hotel & Restaurant Supply Co.*, 107 Ga. App. 619, 131 S.E.2d 74 (1963).

Absent fraud, party cannot recover for misunderstanding resulting from party's own fault or negligence. — Party to contract, in absence of fraud, cannot avoid contract by reason of misunderstanding contract, unless it appears that the party's misunderstanding was not result of the party's own fault or negligence. *Bailey Co. v. West Lumber Co.*, 1 Ga. App. 398, 58 S.E. 120 (1907). See § 4581.

Unilateral mistake based upon defen-

dant's negligence in failing to determine the facts would not justify defendant's failure to perform under O.C.G.A. § 13-5-4. *Capitol Materials, Inc. v. Kellogg & Kimsey, Inc.*, 242 Ga. App. 584, 530 S.E.2d 488 (2000).

Mistake as to ownership of land prevented enforcement of notes given by true owner. — When, under mistake of fact as to true ownership of land, one gives notes for purchase price to another, when in fact party giving notes was true owner, party will not be bound thereby. *O'Neal v. Phillips*, 83 Ga. 556, 10 S.E. 352 (1889).

On facts, no mutual mistake within meaning of law. *State Hwy. Dep't v. MacDougald Constr. Co.*, 102 Ga. App. 254, 115 S.E.2d 863 (1960).

Summary judgment improper if questions of fact remained regarding whether quitclaim deed was contrary to parties' agreement. — Trial court erred in granting a son's motion for summary judgment as to a mother's counterclaim seeking to eject the son from a home and to have a quitclaim deed rescinded or reformed because material questions of fact remained regarding whether the terms of the quitclaim deed were, by mutual mistake, contrary to the agreement of the parties; the mother's deposition testimony could reasonably be construed to signify that the mother expressed her willingness to convey the property only if she retained a life estate and that the son accepted the conveyance subject to that condition. *Hall v. Hall*, No. A10A0695, 2010 Ga. App. LEXIS 360 (Apr. 6, 2010).

Cited in *Green v. Lowry*, 38 Ga. 548 (1868); *D.H. Overmyer Co. v. Joe Summers Roofing Co.*, 120 Ga. App. 188, 169 S.E.2d 821 (1969); *Citizens Bank v. Barber*, 123 Ga. App. 507, 181 S.E.2d 545 (1971); *Crider v. Scoma*, 142 Ga. App. 413, 236 S.E.2d 150 (1977); *Sepulvado v. Daniels Lincoln-Mercury, Inc.*, 170 Ga. App. 109, 316 S.E.2d 554 (1984); *Doyal v. Thornton*, 205 Ga. App. 74, 421 S.E.2d 314 (1992).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 104, 107, 131, 133, 148.

Am. Jur. Proof of Facts. — Mutual Mistake Over Physical Condition of Real Estate as Basis for Rescission of Contract, 48 POF3d 505.

C.J.S. — 17 C.J.S., Contracts, §§ 129, 134 et seq.

ALR. — Rescission of sale of corporate stock on account of mutual mistake due to error in corporate books, 5 ALR 255.

Validity of separation agreement as af-

fectured by fraud, coercion, unfairness, or mistake, 5 ALR 823.

Relief from contract of sale because of mistake as to amount of commodity which it calls for, 31 ALR 384.

Right of public contractor to allowance of extra expense over what would have been necessary if conditions had been as represented by the plans and specifications, 76 ALR 268.

Promise of additional compensation for completing building or construction contract, 138 ALR 136.

Rights and remedies as to premium where insured was under mistaken belief regarding value, nature, or existence of property subject of insurance, 138 ALR 924.

Reformation on ground of mutual mistake regarding character or extent of estate or title imported by language used in instrument, 141 ALR 826.

Mistake as to existence, practicability of

removal, or amount of minerals as ground for relief from mineral lease, 163 ALR 878.

Mistake, accident, inadvertence, etc., as ground for relief from termination or forfeiture of oil or gas lease for failure to complete well, commence drilling, or pay rental, strictly on time, 5 ALR2d 993.

Effect, as between stockbroker and customer, of broker's mistaken sale of security other than that intended by customer, 48 ALR3d 513.

Mistake or want of understanding as ground for revocation of consent to adoption or of agreement releasing infant to adoption placement agency, 74 ALR3d 489.

Public contracts: duty of public authority to disclose to contractor information, allegedly in its possession, affecting cost or feasibility of project, 86 ALR3d 182.

Right of bidder for state or municipal contract to rescind bid on ground that bid was based upon his own mistake or that of his employee, 2 ALR4th 991.

13-5-5. Fraud.

Fraud renders contracts voidable at the election of the injured party. (Orig. Code 1863, § 2715; Code 1868, § 2709; Code 1873, § 2751; Code 1882, § 2751; Civil Code 1895, § 3669; Civil Code 1910, § 4254; Code 1933, § 20-502.)

Cross references. — General rules of pleading and requirement of setting forth fraud as an affirmative defense, § 9-11-8. Pleading of special matters, § 9-11-9. Fraud generally, § 23-2-50 et seq.

Law reviews. — For article discussing effect of contracts involving fraud or inadequate consideration, see 4 Ga. L. Rev. 469 (1970). For annual survey of law of business associations, see 56 Mercer L. Rev. 77 (2004).

For note, "Incontestability Clauses in Georgia Insurance Contracts," see 13 Ga. L. Rev. 850 (1979).

For comment criticizing *Gignilliat v. Borg*, 131 Ga. App. 182, 205 S.E.2d 479 (1974), holding vendor's misrepresentation as to status of property under zoning ordinance not fraudulent, see 26 Mercer L. Rev. 349 (1974).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

EFFECT OF DISCLAIMERS

WHAT CONSTITUTES FRAUD

General Consideration

Fraud renders contract voidable at election of injured party. *Nalley & Co. v. Moore*, 51 Ga. App. 718, 181 S.E. 429 (1935).

Fraud, by which consent of party is obtained to contract of sale, renders sale voidable at election of injured party. *Neely v. Oliver Farm Equip. Sales Co.*, 52 Ga. App. 166, 182 S.E. 630 (1935).

If charge of fraud in procurement of contract is substantiated, written contract itself is voidable and subject to rescission at election of injured party. *Cone Mills Corp. v. A.G. Estes, Inc.*, 399 F. Supp. 938 (N.D. Ga. 1975).

Fraudulent contract not void, but voidable only, at instance of person defrauded. *East Tenn., V. & Ga. Ry. v. Hayes*, 83 Ga. 558, 10 S.E. 350 (1889).

In an action for tortious interference with contract, defendants' contention that the contract was void because the contract was procured by fraud was not allowed since defendants were not injured parties to the contract and lacked the power to treat the contract as void. *Phillips v. MacDougald*, 219 Ga. App. 152, 464 S.E.2d 390 (1995).

Buyer's daughter and her husband were strangers to the vehicle purchase by the buyer from the car dealership, even though the buyer purchased the vehicle for his daughter's possession and use, so the daughter and her husband could not deem the transaction void despite the allegedly fraudulent circumstances surrounding the transaction. *West v. Vill. Ford-Mercury, Inc.*, 256 Ga. App. 18, 567 S.E.2d 355 (2002).

Distinction between contract induced by fraud and breach of warranty. — There is a distinction between contract induced by fraud and mere breach of warranty; in former case title does not pass, and contract may be rescinded, while in latter case title does pass, and purchaser is relegated to purchaser's claim for damages. *Nalley & Co. v. Moore*, 51 Ga. App. 718, 181 S.E. 429 (1935).

One induced by fraud to sign written contract may set up fraud in defense to action on the contract. *Kimbrough v. Adams*, 65 Ga. App. 536, 16 S.E.2d 96 (1941).

In action at law founded on breach of contract, defendant may attack contract in court of law on ground that it was procured by fraud. *Hardware Mut. Cas. Co. v. Dooley*, 193 Ga. 882, 20 S.E.2d 420 (1942).

Victim of fraud may rescind contract or affirm and claim damages. — Fraud ordinarily gives injured party option either to rescind contract so induced, or, by affirming contract, to claim damages as compensation. *Barfield v. Farkas*, 40 Ga. App. 559, 150 S.E. 600 (1929); *Nalley & Co. v. Moore*, 51 Ga. App. 718, 181 S.E. 429 (1935); *Brown v.*

Ragsdale Motor Co., 65 Ga. App. 727, 16 S.E.2d 176 (1941).

Options available to one fraudulently induced to enter contract. — When one is fraudulently induced to enter into contract, one may rescind and recover back what one has paid, or, if one has not paid, one may resist any action brought against that one on the contract, or one may resist suit in equity by other side for specific performance, or one may personally sue in equity to have contract judicially canceled and rescinded. *Equitable Bldg. & Loan Ass'n v. Brady*, 171 Ga. 576, 156 S.E. 222 (1930), later appeal, 175 Ga. 43, 164 S.E. 674 (1932).

Mere payment of contractual obligation insufficient to constitute waiver of fraud as matter of law. *SCM Corp. v. Thermo Structural Prods., Inc.*, 153 Ga. App. 372, 265 S.E.2d 598 (1980).

Something must be done by party defrauded before contract can cease to bind. *East Tenn., V. & Ga. Ry. v. Hayes*, 83 Ga. 558, 10 S.E. 350 (1889).

Plaintiff, as far as it is in plaintiff's power, shall put defendant in status quo, by restoring and revesting defendant's former property in defendant, without putting defendant to an action to recover the property, before defendant can exercise defendant's own right to take back property sold, or bring action for the property. *East Tenn., V. & Ga. Ry. v. Hayes*, 83 Ga. 558, 10 S.E. 350 (1889).

Georgia courts require precise allegations and particular proof of all necessary elements of fraud. *Cone Mills Corp. v. A.G. Estes, Inc.*, 399 F. Supp. 938 (N.D. Ga. 1975).

Parol statements offered to show fraud in procurement do not contradict terms of written instrument. — Statements and representations in parol made by agent of party to contract, offered for purpose of showing that the statements and representations were falsely and fraudulently made for purpose of procuring execution of contract, and that therefore no valid contract is in existence, are not subject to objection that the statements and representations are matters in parol in contradiction of terms of written instrument. *Edge v. Alertox, Inc.*, 47 Ga. App. 598, 171 S.E. 181 (1933).

Jury charge as to punitive damages. — In an action for breach of contract, when there are matters of record relating to fraud, pu-

General Consideration (Cont'd)

nitive damages can be awarded. Thus, the evidence of participation in a fraudulent scheme justifies a district court in putting the question of punitive damages to the jury. *Gower v. Cohn*, 643 F.2d 1146 (5th Cir. 1981).

Waiver of fraud. — Even if the indorsers and makers of notes were induced to purchase a business and to execute notes by a bank officer's fraud, the indorsers and makers waived any fraud and ratified the notes by silence after the indorsers and makers learned of the officer's action and by payment on the notes. *Jernigan Auto Parts, Inc. v. Commercial State Bank*, 186 Ga. App. 267, 367 S.E.2d 250 (1988).

Validity of release. — A release is binding on the party signing the release whether based on adequate consideration or not, absent evidence of fraud and absent a fiduciary relationship between the parties. *Shoffner v. Fleet Fin., Inc.*, 212 Ga. App. 142, 441 S.E.2d 455 (1994).

Release should bar action because plaintiffs could not justify their blind reliance on representations regarding the validity of the prior foreclosure proceeding in executing the general release. *Shoffner v. Fleet Fin., Inc.*, 212 Ga. App. 142, 441 S.E.2d 455 (1994).

Cited in *Langston v. Roby*, 68 Ga. 406 (1882); *Stewart v. Rutherford*, 74 Ga. 435 (1885); *Hoffer v. Gladden*, 75 Ga. 532 (1885); *Massengill v. First Nat'l Bank*, 76 Ga. 341 (1886); *Chicago Bldg. & Mfg. Co. v. Summerour*, 101 Ga. 820, 29 S.E. 291 (1897); *Williams v. Moore-Gaunt Co.*, 3 Ga. App. 756, 60 S.E. 372 (1908); *Burgess v. Torrence*, 23 Ga. App. 193, 98 S.E. 170 (1919); *Snellgrove v. Dingelhof*, 25 Ga. App. 334, 103 S.E. 418 (1920); *Owens v. Jones-Kennedy Furn. Co.*, 28 Ga. App. 317, 111 S.E. 86 (1922); *Hinkle v. Hixon*, 154 Ga. 193, 113 S.E. 805 (1922); *Nipper v. Griffin Mercantile Co.*, 31 Ga. App. 211, 120 S.E. 439 (1923); *Coral Gables Corp. v. Hamilton*, 168 Ga. 182, 147 S.E. 494 (1929); *C.J. Howard, Inc. v. C.V. Nalley & Co.*, 44 Ga. App. 311, 161 S.E. 380 (1931); *Floyd v. Boss*, 174 Ga. 544, 163 S.E. 606 (1932); *Edge v. Alertox, Inc.*, 47 Ga. App. 598, 171 S.E. 181 (1933); *Schofield v. Burns*, 178 Ga. 186, 172 S.E. 569 (1934); *Daniel v. Dalton News Co.*, 48 Ga. App. 772,

173 S.E. 727 (1934); *Elliott v. Marshall*, 179 Ga. 639, 176 S.E. 770 (1934); *Haynes v. Elberton Motors, Inc.*, 57 Ga. App. 247, 194 S.E. 884 (1938); *Johnson v. Sherrer*, 197 Ga. 392, 29 S.E.2d 581 (1944); *Clark v. White*, 185 F.2d 528 (5th Cir. 1950); *Johnson v. Dollar*, 83 Ga. App. 219, 63 S.E.2d 408 (1951); *McBurney v. Woodward*, 84 Ga. App. 807, 67 S.E.2d 398 (1951); *Walker v. General Ins. Co.*, 214 Ga. 758, 107 S.E.2d 836 (1959); *Daugert v. Holland Furnace Co.*, 107 Ga. App. 566, 130 S.E.2d 763 (1963); *Elsner v. Cathcart Cartage Co.*, 124 Ga. App. 615, 184 S.E.2d 685 (1971); *Nelson Realty Co. v. Joiner*, 230 Ga. 36, 195 S.E.2d 441 (1973); *Lewis v. Citizens & S. Nat'l Bank*, 139 Ga. App. 855, 229 S.E.2d 765 (1976); *Williams v. Southland Corp.*, 143 Ga. App. 111, 237 S.E.2d 639 (1977); *Thompson v. Wilkins*, 143 Ga. App. 739, 240 S.E.2d 183 (1977); *Thornton & Co. v. Gwinnett Bank & Trust Co.*, 151 Ga. App. 641, 260 S.E.2d 765 (1979); *Morgan v. Hawkins*, 155 Ga. App. 836, 273 S.E.2d 221 (1980); *DOT v. Brooks*, 254 Ga. 303, 328 S.E.2d 705 (1985); *Gibbs v. Jefferson-Pilot Fire & Cas. Ins. Co.*, 178 Ga. App. 544, 343 S.E.2d 758 (1986); *Douglas v. Standard*, 191 Ga. App. 640, 382 S.E.2d 419 (1989); *Borden v. Pope Jeep-Eagle, Inc.*, 200 Ga. App. 176, 407 S.E.2d 128 (1991); *American Demolition, Inc. v. Hapeville Hotel Ltd. Partnership*, 202 Ga. App. 107, 413 S.E.2d 749 (1991); *Leventhal v. Seiter*, 208 Ga. App. 158, 430 S.E.2d 378 (1993); *Phillips v. Leisure Automotive Corp.*, 223 Ga. App. 225, 477 S.E.2d 380 (1996); *Lively v. S. Heritage Ins. Co.*, 256 Ga. App. 195, 568 S.E.2d 98 (2002).

Effect of Disclaimers

No warranty can prevent rescission for actual fraud in inducement. — No form of or limitation in warranty will protect party from rescission of contract on ground that the contract was induced by actual fraud. *Nalley & Co. v. Moore*, 51 Ga. App. 718, 181 S.E. 429 (1935).

Those who commit actual fraud which induces another to contract cannot protect themselves against answering for such fraud by any form of limitation which they may introduce in terms of such fraudulent contract if contract is rescinded by injured party. *Brown v. Ragsdale Motor Co.*, 65 Ga. App. 727, 16 S.E.2d 176 (1941).

Integration clause in contract has no bearing when fraud in procurement is in issue. *Williams v. Toomey*, 173 Ga. 199, 159 S.E. 866 (1931).

Stipulations in contract not upheld when fraud in inducement. — Stipulation in contract that seller will not be bound by any representations other than those printed thereon can have no bearing in case when fraud in procuring signing of instrument is issue. *Barrie v. Miller*, 104 Ga. 312, 30 S.E. 840 (1898).

A stipulation in a contract that the provisions thereof constitute the sole and entire agreement between the parties and that no modification thereof shall be binding on either party unless in writing and signed by the seller had no bearing in a case since fraud to induce the contract was the issue. *Potomac Leasing Co. v. Thrasher*, 181 Ga. App. 883, 354 S.E.2d 210 (1987).

What Constitutes Fraud

Elements of tort claim for fraud and deceit. — Defendant seeking damages by way of counterclaim in nature of tort claim for fraud and deceit must show: (1) that plaintiff (or someone acting for plaintiff) made representations; (2) that at time were known to be false (or what law regards as the equivalent of knowledge); (3) were for intention and purpose of deceiving defendant; (4) that defendant relied on the representations; and (5) that defendant sustained loss or damage as proximate result of representations. *American Food Servs., Inc. v. Goldsmith*, 121 Ga. App. 686, 175 S.E.2d 57 (1970); *Cone Mills Corp. v. A.G. Estes, Inc.*, 399 F. Supp. 938 (N.D. Ga. 1975).

Essential elements of action for fraud and deceit are: (1) that defendant made representations; (2) that at time defendant knew were false (or had what law regards as equivalent of knowledge); (3) that defendant made the representations with intention and purpose of deceiving plaintiff; (4) that plaintiff relied upon such representations; and (5) that plaintiff sustained alleged loss and damage as proximate result of the representations having been made. *McBurney v. Woodward*, 84 Ga. App. 807, 67 S.E.2d 398 (1951).

Misrepresentation designed to deceive renders sale voidable by injured party. — Fraud may exist from misrepresentation by

either party, made with design to deceive, or which does actually deceive the other party, and in latter case renders sale voidable at the election of party injured. *McBurney v. Woodward*, 84 Ga. App. 807, 67 S.E.2d 398 (1951).

Fraud cannot consist of mere broken promises, unfulfilled predictions, or erroneous conjecture as to future events. *Charter Medical Mgt. Co. v. Ware Manor, Inc.*, 159 Ga. App. 378, 283 S.E.2d 330 (1981).

A claim of fraud cannot be predicated on statements which are promissory in their nature as to future acts. *Beard v. McDowell*, 174 Ga. App. 793, 331 S.E.2d 104 (1985).

Representations to support claim of fraud must relate to existing fact and not future event. *American Food Servs., Inc. v. Goldsmith*, 121 Ga. App. 686, 175 S.E.2d 57 (1970).

Actual fraud can arise only when representations made relate to then existing or past facts, and cannot be predicated upon statements which are merely promissory in nature, referring to future acts or events. *Cone Mills Corp. v. A.G. Estes, Inc.*, 399 F. Supp. 938 (N.D. Ga. 1975).

As a matter of law, fraud cannot be predicated on statements which are promissory in their nature as to future acts. *Cosby v. A.M. Smyre Mfg. Co.*, 158 Ga. App. 587, 281 S.E.2d 332 (1981).

Misrepresentation about future event by one who knows it will never occur constitutes fraud. — Fraud can be predicated on misrepresentation as to a future event when defendant knows future event will not take place. *American Std., Inc. v. Jessee*, 150 Ga. App. 663, 258 S.E.2d 240 (1979).

Representation by party about future event which party knows will never occur supports claim of fraud. Mere broken promises, unfulfilled predictions, and erroneous conjectures do not meet this test. *American Food Servs., Inc. v. Goldsmith*, 121 Ga. App. 686, 175 S.E.2d 57 (1970).

Fraud cannot be predicated on promise which is unenforceable at time made. *American Std., Inc. v. Jessee*, 150 Ga. App. 663, 258 S.E.2d 240 (1979).

Misrepresentation as to status of the law, or as to a matter of law, or as to its effect upon the subject matter of a contract is a statement of opinion only and cannot afford a basis for a charge of fraud or deceit.

What Constitutes Fraud (Cont'd)

Charter Medical Mgt. Co. v. Ware Manor, Inc., 159 Ga. App. 378, 283 S.E.2d 330 (1981).

Reliance on general commendations or expressions of opinion, hope, and the like.

— Misrepresentations are not actionable unless the complaining party was justified in relying thereon in the exercise of common prudence and diligence. If the representation consists of general commendations or mere expressions of opinion, hope, expectation, and the like the party to whom it is made is not justified in relying upon it and assuming it to be true, the party is bound to make inquiry and examination personally so as to ascertain the truth. Charter Medical Mgt. Co. v. Ware Manor, Inc., 159 Ga. App. 378, 283 S.E.2d 330 (1981).

Fraud, to avoid contract, must induce party to enter contract. — Fraud which constitutes ground for voiding contract must be fraud which induced parties to enter contract. Gilreath v. Argo, 135 Ga. App. 849, 219 S.E.2d 461 (1975); Allen v. Sanders, 176 Ga. App. 647, 337 S.E.2d 428 (1985); Turner Outdoor Adv., Ltd. v. Fidelity E. Fin., Inc., 185 Ga. App. 815, 366 S.E.2d 201 (1988); Castellana v. Conyers Toyota, Inc., 200 Ga. App. 161, 407 S.E.2d 64 (1991).

Concealment of material facts may in itself amount to fraud when direct inquiry is made and truth evaded. Neely v. Oliver Farm Equip. Sales Co., 52 Ga. App. 166, 182 S.E. 630 (1935).

Inceptive fraud may support action for cancellation of instrument. — When failure to perform promised act is coupled with present intention not to perform, fraud is present. This is inceptive fraud, and is sufficient to support action for cancellation of written instrument. Cone Mills Corp. v. A.G. Estes, Inc., 399 F. Supp. 938 (N.D. Ga. 1975).

Constructive fraud may support action in equity. — Actual fraud is not essential to support action in equity to rescind a contract for fraud, or to plea of fraud to suit on contract; innocently made material misrep-

resentations which opposite party has right to act on, and does act on to that party's injury, and which amount only to constructive fraud, being sufficient in these last two instances. By a party of reasoning, actual fraud is not essential to setting aside of an accord and satisfaction. Jordan v. Belvin, 57 Ga. App. 719, 196 S.E. 132 (1938).

False statement is not fraudulent when there is no reason why it should be believed and acted upon. Branan v. Warfield & Lee, 3 Ga. App. 586, 60 S.E. 325 (1980); Harrison v. Lee, 13 Ga. App. 346, 79 S.E. 211 (1913); Charter Medical Mgt. Co. v. Ware Manor, Inc., 159 Ga. App. 378, 283 S.E.2d 330 (1981).

Dealer's talk, puffing or opinions, though false, will not avoid contract. — Representations under general head of dealer's talk are regarded as mere commendations, puffing, or expressions of opinion, and do not, though untrue, constitute false representations which will avoid contract. American Food Servs., Inc. v. Goldsmith, 121 Ga. App. 686, 175 S.E.2d 57 (1970).

Representation of car as "new". — The question of whether the condition of a car which had been used as a demonstrator and had significant mileage on the car, but represented to the buyer as "new", had been misrepresented, is one of fact for the jury. Bennett v. D.L. Claborn Buick, Inc., 202 Ga. App. 308, 414 S.E.2d 12 (1991).

When a customer sued a car dealer and the car salespeople for fraudulently inducing the customer to lease a new car that actually had been wrecked and repaired, the UCC, O.C.G.A. § 13-5-5, did not preclude the customer from pursuing a claim for fraud and rescinding the contract. Bickerstaff Auto., Inc. v. Tsepas, 258 Ga. App. 327, 574 S.E.2d 322 (2002).

No effort to rescind contract. — Plaintiff could not claim fraud since plaintiff did not seek to rescind the contract, but retained the contract's benefits; plaintiff is deemed to have affirmed the contract and is bound by the contract's terms. Mintz v. Barlow, 241 Ga. App. 860, 528 S.E.2d 306 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 142, 143, 178 et seq., 394. 37 Am. Jur. 2d, Fraud and Deceit, §§ 17, 42, 46.

C.J.S. — 17 C.J.S., Contracts, §§ 166, 195 et seq.

ALR. — Remedy of contractor, who has

partially performed before discovering fraud, as to character or amount of work, 2 ALR 1396.

Relief as regards outstanding money obligation in action for damages for fraud in inducing contract, 3 ALR 74.

Action on implied contract arising out of fraud as within statutes of limitation applicable to fraud, 3 ALR 1603.

Validity of separation agreement as affected by fraud, coercion, unfairness, or mistake, 5 ALR 823.

Validity and effect of stipulation to the effect that vendee or purchaser does not rely upon representations of vendor or seller, or the latter's agent, 10 ALR 1472.

Validity of agreement to pay an officer or employee of a bank or trust company to disclose the existence of, or to assist one to establish, a deposit, 18 ALR 979.

Fraud inducing deposits or subscription to stock in building and loan association as ground of rescission or preference where association is insolvent, 100 ALR 573.

Punitive or exemplary damages in action in tort based on fraudulent sale, 165 ALR 614.

Enforceability, as between parties, of an executory agreement made in fraud of creditors, 172 ALR 1121.

Proceeding under executory contract after discovering fraud as waiver of right to recover damages for the fraud, 13 ALR2d 807.

Right of action for fraud, duress, or the like, causing instant plaintiff to release or compromise a cause of action against third person, 58 ALR2d 500.

"Merger" clause in written contract as precluding conviction for false pretenses based on earlier oral false representations, 94 ALR2d 570.

Waiver of right to widow's allowance by postnuptial agreement, 9 ALR3d 955.

Seller's liability for fraud in connection with contract for the sale of long-term dancing lessons, 28 ALR3d 1412.

Zoning or other public restrictions on the use of property as affecting rights and remedies of parties to contract for the sale thereof, 39 ALR3d 362.

Public contracts: duty of public authority to disclose to contractor information, allegedly in its possession, affecting cost or feasibility of project, 86 ALR3d 182.

Claim of fraud in inducement of contract as subject to compulsory arbitration clause contained in contract, 11 ALR4th 774.

13-5-6. Duress.

Since the free assent of the parties is essential to a valid contract, duress, either by imprisonment, threats, or other acts, by which the free will of the party is restrained and his consent induced, renders the contract voidable at the election of the injured party. Legal imprisonment, if not used for illegal purposes, does not constitute duress. (Orig. Code 1863, § 2716; Code 1868, § 2710; Code 1873, § 2752; Code 1882, § 2752; Civil Code 1895, § 3670; Civil Code 1910, § 4255; Code 1933, § 20-503.)

Cross references. — General rules of pleading and requirement of setting forth duress as an affirmative defense, § 9-11-8.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

WHAT CONSTITUTES DURESS

THREATS OF PROSECUTION OR IMPRISONMENT

General Consideration

Section essentially modified strictly defined doctrine of duress at common law. Whitt v. Blount, 124 Ga. 671, 53 S.E. 205 (1906).

Undue influence defined. — Undue influence which overturns an otherwise legal contract is the exercise of sufficient control over the person, the validity of whose act is brought in question, to destroy one's free agency and constrain the person to do what the person would not have done if such control had not been exercised. Cobb v. Garner, 158 Ga. App. 110, 279 S.E.2d 280 (1981).

Contracts under duress voidable, not void. — O.C.G.A. § 13-5-6 does not render an otherwise valid contract made under duress void, but merely voidable at the instance of the injured party. Tidwell v. Critz, 248 Ga. 201, 282 S.E.2d 104 (1981).

Waiver and ratification generally. — Where the execution of a contract is procured by duress, the person executing the contract may, after the removal of duress, waive the duress and ratify the contract. Tidwell v. Critz, 248 Ga. 201, 282 S.E.2d 104 (1981).

Acceptance of contract benefits as waiver of duress claim. — When plaintiff takes no action to disaffirm a contract after plaintiff's employment is terminated and, in effect, ratifies the contract by accepting and retaining benefits under the contract, plaintiff waives any subsequent claim that the contract was procured under duress. Tidwell v. Critz, 248 Ga. 201, 282 S.E.2d 104 (1981).

Acts after removal of duress which amount to ratification. — Accepting and retaining benefits arising from a contract executed under duress after removal of the duress, will result in a ratification of the contract. Tidwell v. Critz, 248 Ga. 201, 282 S.E.2d 104 (1981).

Acquiescence in the contract after removal of the duress and an opportunity is afforded to avoid the contract will, under certain circumstances, amount to a ratification of the contract. Tidwell v. Critz, 248 Ga. 201, 282 S.E.2d 104 (1981).

Admission of liability under a contract, after removal of the duress, amounts to a ratification of the contract. Tidwell v. Critz,

248 Ga. 201, 282 S.E.2d 104 (1981).

Evidence of choice to disaffirm contract made under duress. — Once the complaining party is relieved from the operation of the duress the complaining party is in a position either to disaffirm the party's contract or to allow the contract to stand undisturbed as the free and formal disposition of the party's rights. If the party's choice is to disaffirm, it might be evidenced by suit timely brought or by another action disclosing the party's purpose to those who would be affected. Tidwell v. Critz, 248 Ga. 201, 282 S.E.2d 104 (1981).

When seeking relief from alleged duress proper method is to bring suit in equity and applicable statute of limitations is seven years. Knight v. Department of Transp., 239 Ga. 368, 236 S.E.2d 826 (1977).

Sufficiency of plea to show duress. — See Bond v. Kidd, 1 Ga. App. 798, 57 S.E. 944 (1907); Lucas v. Castelow, 8 Ga. App. 812, 70 S.E. 184 (1911); Lichtenstein v. Wilensky, 151 Ga. 353, 107 S.E. 49 (1921).

Cited in Bailey v. Devine, 123 Ga. 653, 51 S.E. 603, 107 Am. St. R. 153 (1905); Cromer v. Evett, 11 Ga. App. 654, 75 S.E. 1056 (1912); Epps v. Anderson, 28 Ga. App. 745, 113 S.E. 27 (1922); Habersham v. Merritt, 157 Ga. 695, 122 S.E. 37 (1924); Keller v. Levison, 165 Ga. 178, 140 S.E. 493 (1927); Davidson v. Citizens' Bank, 171 Ga. 81, 154 S.E. 775 (1930); Davison-Paxon Co. v. Walker, 174 Ga. 532, 163 S.E. 212 (1932); Louisville & N.R.R. v. Gattis, 180 Ga. 389, 178 S.E. 740 (1935); Mayor of Fort Valley v. Levin, 183 Ga. 837, 190 S.E. 14 (1937); Perryman v. State, 63 Ga. App. 819, 12 S.E.2d 388 (1940); McDaniel v. Bagby, 204 Ga. 750, 51 S.E.2d 805 (1949); Causey v. Matson, 215 Ga. 306, 110 S.E.2d 356 (1959); Hefner v. Hall, 223 Ga. 148, 154 S.E.2d 197 (1967); Jones v. Sheffield, 122 Ga. App. 574, 178 S.E.2d 299 (1970); Woods v. Wright, 163 Ga. App. 124, 292 S.E.2d 545 (1982); Fields v. Thompson, 164 Ga. App. 331, 297 S.E.2d 100 (1982); Ryder Truck Lines v. Goren Equip. Co., 576 F. Supp. 1348 (N.D. Ga. 1983); Bishop v. Westminster Schools, Inc., 196 Ga. App. 891, 397 S.E.2d 143 (1990); Families First v. Gooden, 211 Ga. App. 272, 439 S.E.2d 34 (1993); Miller v. Calhoun/Johnson Co., 230 Ga. App. 648, 497 S.E.2d 397 (1998).

What Constitutes Duress

Mere threats cannot constitute duress. *Newman v. City Council*, 42 Ga. App. 268, 155 S.E. 785 (1930).

Empty threat does not amount to duress. *Hoover v. Mobley*, 198 Ga. 68, 31 S.E.2d 9 (1944); *Yearwood v. National Bank*, 222 Ga. 709, 152 S.E.2d 360 (1966).

Threats to bring a civil suit do not constitute duress. — See *Transamerica Consumer Receivable Funding, Inc. v. Warhawk Invs., Inc.*, 842 F. Supp. 536 (M.D. Ga. 1994).

Duress is coercion constraining action or inaction contrary to victim's will. *Hoover v. Mobley*, 198 Ga. 68, 31 S.E.2d 9 (1944).

Duress must come from without, and not from within; duress must be exerted by other person or that person's agent, and cannot be creation of mind of person claiming the person's will has been restrained by fear. *King v. Lewis*, 188 Ga. 594, 4 S.E.2d 464 (1939).

Crucial element of duress is wrongful act to create and take advantage of untenable situation. *Chouinard v. Chouinard*, 568 F.2d 430 (5th Cir. 1978).

Duress requires acts or conduct of opposite party, not merely necessities of purported victim. *A-T-O, Inc. v. Stratton & Co.*, 486 F. Supp. 1323 (N.D. Ga. 1980).

Contract is voidable if undue or unjust advantage has been taken of person's economic necessity or distress to coerce the person into making agreement. However, duress claim of this nature must be based on acts or conduct of opposite party and not merely on necessities of purported victim. *Chouinard v. Chouinard*, 568 F.2d 430 (5th Cir. 1978).

Duress is a species of fraud in which compulsion in some form replaces deception in accomplishing injury, and, like fraud, constitutes a meritorious ground to set aside contract executed as result thereof. *King v. Lewis*, 188 Ga. 594, 4 S.E.2d 464 (1939); *Tidwell v. Critz*, 248 Ga. 201, 282 S.E.2d 104 (1981).

Threats must be sufficient to overcome mind and will of person of ordinary firmness. *Williams v. Rentz Banking Co.*, 112 Ga. App. 384, 145 S.E.2d 256 (1965); *Tidwell v. Critz*, 248 Ga. 201, 282 S.E.2d 104 (1981).

Duress requires acts effecting subversion and substitution of party's will. — Facts which are essential to constitute duress must

be such as are sufficient to subvert will of party alleged to be under duress, and to substitute for will of another. *Williams v. Rentz Banking Co.*, 112 Ga. App. 384, 145 S.E.2d 256 (1965).

Nature of acts or threats which constitute duress. — Duress which will avoid contract must consist of threats of bodily or other harm, or other means amounting to coercion, or tending to coerce will of another, and actually inducing the other to do act contrary to the other's free will. *Littlegreen v. Gardner*, 208 Ga. 523, 67 S.E.2d 713 (1951); *Tidwell v. Critz*, 248 Ga. 201, 282 S.E.2d 104 (1981).

Duress consists in any illegal imprisonment, or legal imprisonment used for illegal purpose, or threats of bodily or other harm, or other means amounting to coercion or tending to coerce will of another, and actually inducing the other to do act contrary to the other's free will. *Hazen v. Rich's, Inc.*, 137 Ga. App. 258, 223 S.E.2d 290 (1976).

Nature of threat of bodily harm which constitutes duress. — Threats of bodily harm, sufficient to overcome mind and will of person of ordinary firmness, and made for purpose of coercing and which do actually coerce another into executing promissory note, constitute duress and render such transaction voidable. *King v. Lewis*, 188 Ga. 594, 4 S.E.2d 464 (1939); *Calhoun v. Dowdy*, 207 Ga. 584, 63 S.E.2d 373 (1951).

"Business compulsion" or "economic duress" involves the taking of undue or unjust advantage of a person's economic necessity or distress to coerce the person into making a contract and is also recognized as a contractual defense if it is based upon acts or conducts of the opposite party which are wrongful or unlawful. *Charter Medical Mgt. Co. v. Ware Manor, Inc.*, 159 Ga. App. 378, 283 S.E.2d 330 (1981).

Neither reluctance, disadvantageous terms, unequal bargaining power, nor unfairness constitutes duress. — One may not void a contract on grounds of duress merely because one entered into the contract with reluctance, the contract is very disadvantageous to that person, the bargaining power of the parties was unequal, or there was some unfairness in the negotiations preceding the agreement. *Tidwell v. Critz*, 248 Ga. 201, 282 S.E.2d 104 (1981); *Miller, Stevenson & Steinichen, Inc. v. Fayette*

What Constitutes Duress (Cont'd)

County, 190 Ga. App. 777, 380 S.E.2d 73 (1989), *aff'd*, 196 Ga. App. 129, 395 S.E.2d 381 (1990).

Economic distress does not constitute legal duress under the standard of O.C.G.A. § 13-5-6. *Ackerman v. First Nat'l Bank*, 239 Ga. App. 304, 521 S.E.2d 221 (1999).

Contract voidable when undue or unjust advantage is taken of one's economic necessity or distress to coerce one into making agreement. *A-T-O, Inc. v. Stratton & Co.*, 486 F. Supp. 1323 (N.D. Ga. 1980).

Detention of another's chattels under proper circumstances might be sufficient duress to avoid a contract. *Charter Medical Mgt. Co. v. Ware Manor, Inc.*, 159 Ga. App. 378, 283 S.E.2d 330 (1981).

Seizure and retention of property until owner executes promissory note constitutes duress. — Seizure of property by force and holding the property until the owner executes promissory notes for the property's release without semblance of consideration is a species of duress, and court of equity will relieve maker by preventing their collection. *Barnett v. Central Line of Boats*, 51 Ga. 439 (1874).

Unlawful detention of another's goods under oppressive circumstances, or their threatened detention, will avoid contract on ground of duress, for reason that in such cases there is nothing but form of agreement, without its substance. *A-T-O, Inc. v. Stratton & Co.*, 486 F. Supp. 1323 (N.D. Ga. 1980).

Act must be wrongful to constitute duress, and it is not duress to threaten to do what one has a legal right to do. *Stroup v. Robbie Jon Dev. Corp.*, 159 Ga. App. 652, 284 S.E.2d 667 (1981).

Threat of losing a job or fear of such loss is not duress which will void a contract. *Tidwell v. Critz*, 248 Ga. 201, 282 S.E.2d 104 (1981).

Threat made without present apparent intent and ability to carry it out, not duress. — Mere empty threats in absence of present, apparent intent and ability to carry such threats into execution are insufficient to constitute duress that will void a deed. *Calhoun v. Dowdy*, 207 Ga. 584, 63 S.E.2d 373 (1951).

It is not sufficient to allege that note was

executed because of empty threat made by another; to sustain charge of duress it is necessary to show that there was apparent intention and ability to execute threat that would have coerced action or inaction contrary to victim's will. *Littlegreen v. Gardner*, 208 Ga. 523, 67 S.E.2d 713 (1951).

Mere threats or empty threats, when there is no apparent intention and ability to execute the threats, are not sufficient to constitute duress. *Williams v. Rentz Banking Co.*, 112 Ga. App. 384, 145 S.E.2d 256 (1965).

No duress absent reasonable apprehension that threat will be carried out. — While threat by husband to abandon his wife unless she signs note may in some instances amount to duress which will relieve her of liability on note to holder with notice, where circumstances show that wife had no reasonable apprehension of threat being carried into execution, bare making of it will not be such duress as to render note invalid. *Dorsey v. Bryans*, 143 Ga. 186, 84 S.E. 467, 1917A Ann. Cas. 172 (1915).

Lawful confinement in penitentiary not duress. — Duress is not shown when lack of choice results not from unlawful pressure but from lawful confinement in penitentiary. *Price v. Arrendale*, 119 Ga. App. 589, 168 S.E.2d 193 (1969).

Mere fact of imprisonment alone could not constitute duress, when defendant's imprisonment was not the result of any action on the part of plaintiff to effect execution of the note. *Crockett v. Shafer*, 166 Ga. App. 453, 304 S.E.2d 405 (1983).

An attorney's refusal to release file material to a former client prior to settlement of a fee dispute cannot constitute duress sufficient to permit the former client to avoid the client's obligations pursuant to a promissory note, the execution of which is made a prerequisite for the return of the file material, since the attorney has a statutory right to retain the former client's file materials in the attorney's possession until the attorney's fee claim is satisfied or the attorney is otherwise directed by court order. *Crockett v. Shafer*, 166 Ga. App. 453, 304 S.E.2d 405 (1983).

Note of putative father to settle bastardy proceedings not voidable because given while under arrest. — Note given by putative father to settle bastardy proceeding not void (now voidable), for duress merely because

given while under arrest under bastardy proceedings. *Jones v. Peterson*, 117 Ga. 58, 43 S.E. 417 (1903); *Gresham v. Hewatt*, 2 Ga. App. 71, 58 S.E. 309 (1907).

Lack of choice as to where and by whom surgery will be performed, not duress. — Lack of choice as to where and by whom a surgical operation will be performed does not ordinarily constitute duress so as to render voidable an operative permit signed by the patient. *Price v. Arrendale*, 119 Ga. App. 589, 168 S.E.2d 193 (1969).

Necessary elements to defeat of recovery of payee for duress produced by third party. — In order for married woman to defeat recovery by payee on promissory note made by her, upon ground that her signature thereto was procured by fraud and duress of her husband, she must not only show that such was the fact, but must also show that payee of note was either party to such fraud and duress, or that payee had knowledge thereof. *Burgess v. Torrence*, 23 Ga. App. 193, 98 S.E. 170 (1919).

Settlement of insurance claim. — Insured's claim that the insured was unduly coerced into settling the insured's claim because of physical and mental duress brought on by insurer's refusal to pay benefits, weariness of filing lawsuits against insurer, and compelling compromising offers to settle, pressure to pay medical bills by doctors, and insurer's telling the insured the contract was being drawn up for settlement under P.I.P. coverage were insufficient, as a matter of law, to raise a jury question as to whether the release is voidable. *Bailey v. Horace Mann Ins. Co.*, 207 Ga. App. 633, 428 S.E.2d 604 (1993).

Threats of Prosecution or Imprisonment

Threatened prosecution must be for act either criminal or which party threatened thought was criminal. *Hoover v. Mobley*, 198 Ga. 68, 31 S.E.2d 9 (1944).

Threats of criminal prosecution before warrant issued or proceedings commenced, do not constitute duress. *Hoover v. Mobley*, 198 Ga. 68, 31 S.E.2d 9 (1944); *Yearwood v. National Bank*, 222 Ga. 709, 152 S.E.2d 360 (1966).

Absent imminent or immediate danger of prosecution, threat to prosecute does not constitute duress. — In absence of proof

that child was in imminent or immediate danger of prosecution or that the child would in fact be prosecuted if endorsement was not made, statement to endorser that, if endorser failed to endorse, the endorser's child would be liable to prosecution did not amount to threat or show duress. *Augusta Motor Sales Co. v. King*, 33 Ga. App. 433, 126 S.E. 866 (1925).

It is not duress to bring or threaten to bring civil suit. *Chouinard v. Chouinard*, 568 F.2d 430 (5th Cir. 1978).

Parent may avoid contract given under duress of imprisonment of a child. *Bailey v. Devine*, 123 Ga. 653, 51 S.E. 603, 107 Am. St. R. 153 (1905); *Colclough v. Bank of Penfield*, 150 Ga. 318, 103 S.E. 490 (1920); *Bank of Penfield v. Colclough*, 154 Ga. 222, 114 S.E. 33 (1922).

Grantor may avoid conveyance induced by threat to prosecute child, although other consideration was given. — Specific performance of deed will not be decreed against a father, even where threats to prosecute the father's son were not entire consideration for such contract, but part of consideration was money loaned. *Swint v. Carr*, 76 Ga. 322, 2 Am. St. R. 44 (1886).

Suggestion of criminal responsibility. — The plaintiff did not improperly procure a promissory note under duress, notwithstanding the defendant's assertion that the plaintiff's attorney threatened the defendant with criminal prosecution for writing bad checks, since the plaintiff's attorney only intimated that the defendant could have criminal responsibility for writing bad checks. *Gouldstone v. Life Investors Ins. Co.*, 236 Ga. App. 813, 514 S.E.2d 54 (1999).

Waiver of defense. — Even if acts could otherwise have been construed as sufficient duress to void a note, reliance upon the defense of duress may be waived. *Frame v. Booth, Wade & Campbell*, 238 Ga. App. 428, 519 S.E.2d 237 (1999).

In an action on a note, where defendant was a sophisticated businessman who had consulted with counsel of choice for three months before signing the note, even if plaintiff's actions constituted economic duress, defendant waived any reliance upon this defense. *Frame v. Booth, Wade & Campbell*, 238 Ga. App. 428, 519 S.E.2d 237 (1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, § 153. 25 Am. Jur. 2d, Duress and Undue Influence, §§ 1, 3 et seq., 24, 229.

Am. Jur. Pleading and Practice Forms. — 8C Am. Jur. Pleading and Practice Forms, Duress and Undue Influence, § 1.

C.J.S. — 17 C.J.S., Contracts, § 168 et seq.

ALR. — Validity of contract executed under duress exercised by third person, 4 ALR 864; 62 ALR 1477.

Validity of separation agreement as affected by fraud, coercion, unfairness, or mistake, 5 ALR 823.

Innocence of the person threatened as affecting the rights or remedies in respect of contracts made, or money paid, to prevent or suppress a criminal prosecution, 17 ALR 325.

Seller's concealment of ownership of other property inducing exclusion of same from contract as actionable fraud, 26 ALR 990.

Validity of contract for repayment of embezzled money, 32 ALR 422.

Threat of withdrawal or withholding of banking accommodation as duress, 33 ALR 127.

Duress by company furnishing power or the like, 34 ALR 185.

Duress in insisting upon release before delivery of property where parties are not on equal footing, 70 ALR 711.

Validity, construction, applicability, and effect of provision in real estate mortgage regarding payment of taxes or assessments by mortgagee, 74 ALR 506.

Doctrine of "business compulsion", 79 ALR 655.

Undue influence by third person in which

immediate beneficiary did not participate, 96 ALR 613.

What amounts to acceptance by owner of work done under contract for construction or repair of building which will support a recovery on quantum meruit, 107 ALR 1411.

Contract in settlement of labor dispute as avoidable upon ground of duress, 145 ALR 1171.

Right of action for fraud, duress, or the like, causing instant plaintiff to release or compromise a cause of action against third person, 58 ALR2d 500.

Ratification of contract voidable for duress, 77 ALR2d 426.

What constitutes "duress" in obtaining parent's consent to adoption of child or surrender of child to adoption agency, 74 ALR3d 527.

Economic duress or business compulsion in execution of promissory note, 79 ALR3d 598.

Validity of release from civil liability where release is executed by person while incarcerated, 86 ALR3d 1230.

Liability for interference with at will business relationship, 5 ALR4th 9.

Liability of third party for interference with prospective contractual relationship between two other parties, 6 ALR4th 195.

Refusal to pay debt as economic duress or business compulsion avoiding compromise or release, 9 ALR4th 942.

Economic duress or business compulsion in execution of contract for sale of real property, 12 ALR4th 1262.

What constitutes duress by employer or former employer vitiating employee's release of employer from claims arising out of employment, 30 ALR4th 294.

13-5-7. Rescission or release.

A rescission of a contract by consent or a release by the other contracting party shall be a complete defense. (Orig. Code 1863, § 2800; Code 1868, § 2808; Code 1873, § 2859; Code 1882, § 2859; Civil Code 1895, § 3710; Civil Code 1910, § 4304; Code 1933, § 20-905.)

Cross references. — General rules of pleading and requirement of setting forth release as an affirmative defense, § 9-11-8.

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Generally speaking, rescission is in toto. It abrogates contract not partially but completely. *Lytle v. Scottish Am. Mtg. Co.*, 122 Ga. 458, 50 S.E. 402 (1905).

Contract may be rescinded by mutual consent of parties. *Stephens v. Wilson*, 58 Ga. App. 24, 197 S.E. 350 (1938).

Parties may by mutual consent abandon contract so as to make contract not thereafter binding. *Manry v. Selph*, 77 Ga. App. 808, 50 S.E.2d 27 (1948); *M.W. Buttrill, Inc. v. Air Conditioning Contractors*, 158 Ga. App. 122, 279 S.E.2d 296 (1981).

Mutual consent necessary for rescission. — If a contract is made, one party to the contract can not rescind the contract by merely giving notice to the other of one's intention to do so, without the agreement or assent of such other; but the contract may be rescinded with the assent of both parties. *Central of Ga. Ry. v. Gortatowsky*, 123 Ga. 366, 51 S.E. 469 (1905).

Agreement to rescind must be executed before this statute will apply. *Hoffman v. Franklin Motor Car Co.*, 32 Ga. App. 229, 122 S.E. 896 (1924) (see O.C.G.A. § 13-5-7).

Rescission contemplates and requires restoration of status quo. *Sommer v. International Harvester Co. of Am.*, 56 Ga. App. 655, 193 S.E. 476 (1937).

When contract is rescinded, parties are not to be left where rescission finds the parties; original status must be restored, or equivalent therefor must be provided in contract or furnished by law. *Lytle v. Scottish Am. Mtg. Co.*, 122 Ga. 458, 50 S.E. 402 (1905); *Eller v. McMillan*, 174 Ga. 729, 163 S.E. 910 (1932).

Evidence of rescission may be by conduct and not by words. *M.W. Buttrill, Inc. v. Air Conditioning Contractors*, 158 Ga. App. 122, 279 S.E.2d 296 (1981).

Doctrine of restitution inapplicable to rescissions by mutual consent. — Doctrine of restitution, as applicable to rescission of contracts, applied only when one party sought to rescind contract without consent of other under former Civil Code 1910, § 4306 (see O.C.G.A. § 13-4-62). It had no application to rescission of contract by mutual agreement of parties under former Civil Code 1910, § 4304 (see O.C.G.A. § 13-5-7). *Manley v. Underwood*, 27 Ga. App. 822, 110 S.E. 49 (1921).

Terms of agreement of rescission may require restitution. *Steen & Marshall v. Harris*, 81 Ga. 681, 8 S.E. 206 (1888).

While actual fraud necessary for rescission at law, equity may allow rescission for constructive fraud. — While only actual fraud will authorize ex parte rescission of sale of personality so as to enable aggrieved party to sue at law, as in trover, for property that one may have delivered to other under contract, a sale either of realty or of personality may be rescinded by court of equity for mere constructive fraud, where other essentials of case are established. *Puckett v. Reese*, 203 Ga. 716, 48 S.E.2d 297 (1948).

Release must be supported by consideration. *Riggins v. Pomona Prods. Co.*, 82 Ga. App. 636, 61 S.E.2d 682 (1950).

Agreement to release one of two joint makers of note requires consideration. *Fowler v. Coker*, 107 Ga. 817, 33 S.E. 661 (1899).

In rescission, abandonment or cancellation, mutual promises and agreement provide sufficient consideration. *Riggins v. Pomona Prods. Co.*, 82 Ga. App. 636, 61 S.E.2d 682 (1950).

Mutual consent to rescind contract is sufficient consideration. *Hardy v. Maddox*, 72 Ga. App. 707, 34 S.E.2d 903 (1945).

In agreement to rescind executory agreement, consideration on part of each is the other's renunciation. — While a valid executed contract cannot be discharged by simple agreement, but only by performance, by release under seal, or by accord and satisfaction, one that is executory (that is, one that has not been acted upon) may be discharged by agreement of parties that the agreement shall no longer bind either of them; consideration on part of each being other's renunciation. *Manry v. Selph*, 77 Ga. App. 808, 50 S.E.2d 27 (1948); *Loadman v. Davis*, 210 Ga. 520, 81 S.E.2d 465 (1954).

Surrender by each party of rights under contract is sufficient consideration for rescission. — Contract may be rescinded by mutual consent, in which case surrender by each party of the party's rights under the contract is sufficient consideration; but it is also possible that party to valid contract might require some additional consideration before surrendering valuable rights

under the contract. *Warren v. Gray*, 90 Ga. App. 398, 83 S.E.2d 86 (1954).

Executory written contract may be rescinded by subsequent oral agreement based upon mutual promises. *Manry v. Selph*, 77 Ga. App. 808, 50 S.E.2d 27 (1948).

Rescission of executory conditional sale where purchase money notes already transferred to third person. — When no part of purchase money has been paid, sale may be rescinded by mutual consent, though purchase money notes have been transferred to third person, provided seller takes up notes in consequence of rescission, and either returns them to maker or holds the notes subject to the maker's order. *Steen & Marshall v. Harris*, 81 Ga. 681, 8 S.E. 206 (1888).

When rescission of sale complete. — Rescission of sale is complete as soon as relation of debtor and creditor for whole purchase money is dissolved, and this is accomplished when purchaser holds property for seller, and seller holds notes for purchaser. *Steen & Marshall v. Harris*, 81 Ga. 681, 8 S.E. 206 (1888).

Summary judgment improper where material issue of fact remained as to oral rescission. — It was error to grant summary judgment to a corporation in the corporation's suit to recover for services performed for a limited liability company where an affidavit created a material issue of fact as to whether, before the time period for which payment was sought, the parties had mutually entered into an oral agreement rescinding their prior written agreement. *WorksiteRx, LLC v. DrTango, Inc.*, 286 Ga. App. 284, 648 S.E.2d 775 (2007).

Executory agreement to rescind not accord and satisfaction absent express agreement to that effect. *Redman v. Woods*, 42 Ga. App. 713, 157 S.E. 252 (1931); *Cohutta Talc Co. v. Gulf Ref. Co.*, 47 Ga. App. 439, 170 S.E. 545 (1933).

Rescission and recovery of damages for contract breach are inconsistent remedies. — There cannot be rescission by buyer coupled with recovery for damages by reason of alleged breach of contract; the two remedies are inconsistent. *Sommer v. International*

Harvester Co. of Am., 56 Ga. App. 655, 193 S.E. 476 (1937).

Rescission abrogates contract, not partially but completely. *Eller v. McMillan*, 174 Ga. 729, 163 S.E. 910 (1932).

Valid rescission renders agreement inoperative and no action can be maintained upon the agreement. — If there is mutual consent to rescind exclusive listing contract, unaffected by fraud, entire agreement becomes inoperative and there can be no action upon the agreement. *Hardy v. Maddox*, 72 Ga. App. 707, 34 S.E.2d 903 (1945).

Upon rescission, damages, if any, determined not by rescinded contract, but by equity. *Lytle v. Scottish Am. Mtg. Co.*, 122 Ga. 458, 50 S.E. 402 (1905); *Eller v. McMillan*, 174 Ga. 729, 163 S.E. 910 (1932).

General release does not necessarily absolve strangers to the release agreement. *Brown v. Moseley*, 175 Ga. App. 282, 333 S.E.2d 162 (1985).

Cited in *Bell v. Hutchings*, 86 Ga. 562, 12 S.E. 974 (1891); *Haigler v. Adams*, 5 Ga. App. 637, 63 S.E. 715 (1909); *Daniel v. Burson*, 16 Ga. App. 39, 84 S.E. 490 (1915); *Haygood v. Kennedy*, 27 Ga. App. 689, 109 S.E. 522 (1921); *Clark v. Powell*, 30 Ga. App. 198, 117 S.E. 250 (1923); *Hoffman v. Franklin Motor Car Co.*, 32 Ga. App. 229, 122 S.E. 896 (1924); *Robinson v. Odom*, 35 Ga. App. 262, 133 S.E. 53 (1926); *Rural Elec. Appliance Co. v. Joiner*, 69 Ga. App. 353, 25 S.E.2d 428 (1943); *Cohen v. Cohen*, 200 Ga. 33, 35 S.E.2d 908 (1945); *Leakey v. Duke*, 77 Ga. App. 431, 48 S.E.2d 709 (1948); *Vlass v. Walker*, 86 Ga. App. 742, 72 S.E.2d 464 (1952); *Owens v. Service Fire Ins. Co.*, 90 Ga. App. 553, 83 S.E.2d 249 (1954); *Farr v. McCook*, 95 Ga. App. 749, 98 S.E.2d 584 (1957); *Swanson v. Chase*, 107 Ga. App. 295, 129 S.E.2d 873 (1963); *Knight v. Millard*, 119 Ga. App. 696, 168 S.E.2d 331 (1969); *Olivetti Leasing Corp. v. Metro-Plastics, Inc.*, 128 Ga. App. 401, 196 S.E.2d 686 (1973); *Johnson Ventures, Inc. v. Barkin*, 141 Ga. App. 810, 234 S.E.2d 340 (1977); *Griffin v. Adams*, 175 Ga. App. 715, 334 S.E.2d 42 (1985); *Miller v. Economy Trading & Liquidating, Inc.*, 193 Ga. App. 344, 387 S.E.2d 620 (1989); *Beasley v. Agricredit Acceptance Corp.*, 224 Ga. App. 372, 480 S.E.2d 257 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Release, §§ 1, 4, 6, 8, 16.

C.J.S. — 17 C.J.S., Contracts, § 129. 17A C.J.S., Contracts, §§ 385, 389, 392, 413 et seq., 525.

ALR. — Mutual rescission of contract as affecting right to damages for previous breach, 24 ALR 253.

Stamp or transfer tax as payable in respect of tender or return of securities or documents incident to rescission of contract, 100 ALR 1420.

Pecuniary damage as essential to rescission of contract for purchase of real or personal property, 106 ALR 125.

Repossession of chattels by seller upon their return or abandonment by buyer as effecting a mutual rescission or as evidence thereof, 106 ALR 703.

Assignability of right to rescind or of right to return of money or other property as incident of rescission, 110 ALR 849; 162 ALR 743.

Breach of obligation to pay tax or assessment on land sold as ground for rescission of contract, 139 ALR 971.

Reconveyance to grantor of land previously conveyed by him in consideration of support of grantor and other persons by grantee, as affecting such other persons, 150 ALR 412.

Failure to revive judgment against a number jointly, as to some of them, as making applicable the rule that a release of one is a release of all, 160 ALR 678.

Compensation as alternative relief upon denial of rescission to purchaser of land, 175 ALR 686.

Collision insurance: insured's release of tortfeasor before settlement by insurer as releasing insurer from liability, 38 ALR2d 1095.

What constitutes reservation of right to terminate, rescind, or modify contract, as against third party beneficiary, 44 ALR2d 1270.

Timeliness of tender or offer of return of consideration for release or compromise, required as a condition of setting it aside, 53 ALR2d 757.

Right of action for fraud, duress, or the like, causing instant plaintiff to release or compromise a cause of action against third person, 58 ALR2d 500.

Applicability of statute of frauds to agreement to rescind contract for sale of land, 42 ALR3d 242.

Vendor and purchaser: mutual mistake as to physical condition of realty as ground for rescission, 50 ALR3d 1188.

Refusal to pay debt as economic duress or business compulsion avoiding compromise or release, 9 ALR4th 942.

13-5-8. Noncompliance with condition, failure of consideration, or other act as defense.

A condition, precedent or subsequent, not complied with, insufficiency or failure of consideration, or any act of the opposite party, by which the obligation of the contract has ceased, may be pleaded as a defense. (Orig. Code 1863, § 2798; Code 1868, § 2806; Code 1873, § 2857; Code 1882, § 2857; Civil Code 1895, § 3707; Civil Code 1910, § 4301; Code 1933, § 20-902.)

Cross references. — General rules of pleading and requirement of setting forth failure of consideration as an affirmative

defense, § 9-11-8. Pleading of special matters, § 9-11-9.

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ANALYSIS

GENERAL CONSIDERATION

CONDITIONS PRECEDENT

FAILURE OF CONSIDERATION

General Consideration

Failure to perform without legal excuse or other party's fault bars recovery under contract. — When plaintiff fails to show legal reason to excuse plaintiff's nonperformance or that such was caused by act or fault of defendant, plaintiff cannot recover under expressed terms of contract. *Clarke's Super Gas, Inc. v. Tri-State Sys.*, 129 Ga. App. 650, 200 S.E.2d 472 (1973).

Upon anticipatory repudiation, innocent party may consider oneself absolved from future performance and has election of several possible remedies, including right to rescind contract altogether and recover value of any performance one has already rendered. *CCE Fed. Credit Union v. Chesser*, 150 Ga. App. 328, 258 S.E.2d 2 (1979).

Cited in *Watkins v. Stulb & Vorhauer*, 23 Ga. App. 181, 98 S.E. 94 (1919); *Rogers v. Southern Fertilizer & Chem. Co.*, 36 Ga. App. 229, 136 S.E. 106 (1926); *Kansas City Life Ins. Co. v. Williams*, 59 Ga. App. 66, 200 S.E. 329 (1938); *Gibbs v. H.T. Henning Co.*, 189 Ga. 675, 7 S.E.2d 238 (1940); *Hall v. Southern Sales Co.*, 81 Ga. App. 392, 58 S.E.2d 925 (1950); *Drennon Food Prods. Co. v. Drennon*, 104 Ga. App. 19, 120 S.E.2d 902 (1961); *Holiday Homes, Inc. v. Bragg*, 132 Ga. App. 594, 208 S.E.2d 608 (1974); *American Fletcher Mtg. Co. v. First Am. Inv. Corp.*, 463 F. Supp. 186 (N.D. Ga. 1978); *Reisman v. Martori, Meyer, Hendricks, & Victor*, 155 Ga. App. 551, 271 S.E.2d 685 (1980); *Henco Adv., Inc. v. Geographics, Inc.*, 155 Ga. App. 571, 271 S.E.2d 704 (1980); *Crowe, Carter & Assocs. v. Hyde*, 163 Ga. App. 816, 295 S.E.2d 353 (1982); *Hill Aircraft & Leasing Corp. v. Planes, Inc.*, 169 Ga. App. 161, 312 S.E.2d 119 (1983); *Jim Walter Homes, Inc. v. Strickland*, 185 Ga. App. 306, 363 S.E.2d 834 (1987).

Conditions Precedent

No recovery on contract dependent upon performance of conditions precedent which have not been complied with. *Thurmond v. Sovereign Camp, W.O.W.*, 171 Ga. 446, 155 S.E. 760 (1930).

When recovery depends upon performance of condition precedent, plaintiff must allege and prove performance or excuse. — When plaintiff's right to recover on contract depends upon performance of con-

dition precedent, plaintiff must allege and prove performance of such condition precedent or allege sufficient legal excuse for the contract's nonperformance; however, it is sufficient compliance with this provision for plaintiff to allege facts which of themselves raise presumption that conditions precedent in contract have been complied with. *Kansas City Life Ins. Co. v. Williams*, 59 Ga. App. 66, 200 S.E. 329 (1938), later appeal, 62 Ga. App. 707, 9 S.E.2d 680 (1940).

When right to recover under contract contains condition precedent, petition seeking recovery under contract must allege compliance with condition precedent or allege legal excuse for noncompliance with the contract. *Nutting v. Wilson*, 75 Ga. App. 148, 42 S.E.2d 575 (1947).

Failure of Consideration

Consideration open to inquiry between original parties to show its absence, illegality, or failure. — Between original parties, consideration expressed in contract is ordinarily open to inquiry for purpose of showing that contract was in fact executed without consideration and is nudum pactum, or that consideration was originally illegal and contract void, or that consideration has subsequently failed in whole or in part. *Herrington v. Herrington*, 70 Ga. App. 768, 29 S.E.2d 516 (1944).

Total or partial failure of consideration is permissible defense to action founded upon any contract. *Robbins v. Hays*, 107 Ga. App. 12, 128 S.E.2d 546 (1962).

Failure of consideration, in whole or part, may be pled in defense to executory promise. — If consideration, apparently good or valuable, fails either wholly or in part before promise is executed, such failure may be pled in defense to promise. *Finney v. Cadwallader*, 55 Ga. 75 (1875).

Failure of consideration should be set up in proper plea, not in general demurrer (now motion to dismiss). *Planters Rural Tel. Coop. v. Chance*, 105 Ga. App. 270, 124 S.E.2d 300 (1962).

Plea of failure to consideration does not add to or vary contract. — Plea of breach of warranty and of failure of consideration does not add to or vary contract between parties, nor is it necessary to allege therein fraud, accident, or mistake. *Aultman & Co. v. Mason*, 83 Ga. 212, 9 S.E. 536 (1889).

RESEARCH REFERENCES

C.J.S. — 17A C.J.S., Contracts, §§ 548, 552.

ALR. — Presence of noxious weeds as ground for rescission of contract for purchase of land, 2 ALR 1511.

Rights and remedies in respect of the property upon the death, in the lifetime of grantor, of the grantee in a deed in consideration of future support, 34 ALR 136.

Rights and remedies as between parties to a conditional sale after the seller has repossessed himself of the property, 37 ALR 91; 83 ALR 959; 99 ALR 1288; 49 ALR2d 15.

Failure to make promised improvements on land as ground for rescission of contract for purchase of part thereof, 67 ALR 809.

Failure to procure occupational or business license or permit as affecting validity or enforceability of contract, 118 ALR 646.

Architect's or engineer's compensation as affected by inability to carry out plan or specifications at amount satisfactory to employer, 127 ALR 410.

Performance by vendor of covenant to make improvement as condition of his right to foreclose or forfeit contract, 128 ALR 656.

Agreement postponing payment of preexisting debt until happening of some specific contingency wholly or partially within debtor-promisor's control as requiring payment within a reasonable time, even though the contingent event has not occurred, 148 ALR 1075.

Rights of parties to contract the performance of which is interfered with or prevented by war conditions or acts of government in prosecution of war, 158 ALR 1446.

Rights of parties to a timber contract upon failure of purchaser to remove the timber within the time fixed or within a reasonable time, 164 ALR 423.

Broker's liability to prospective purchaser for refund of deposit or earnest money where contract fails because of defects in vendor's title, 38 ALR2d 1382.

Construction and effect of provision in private building and construction contract that work must be done to satisfaction of owner, 44 ALR2d 1114.

Rights and duties of parties to conditional sales contract as to resale of repossessed property, 49 ALR2d 15.

Effect of provision in real-estate option or land sale contract making the contract subject to zoning or rezoning of the property, 76 ALR2d 1195.

Right of lessor to cancel oil or gas lease for breach of implied obligation to explore and develop further after initial discovery of oil or gas, in absence of showing reasonable expectation of profit to lessee from further drilling, 79 ALR2d 792.

Construction and effect of clause making lease contingent or conditional upon the lessee obtaining a use permit from public building or zoning authorities, 90 ALR2d 1031.

Failure of artisan or construction contractor to comply with statute or regulation requiring a work permit or submission of plans as affecting his right to recover compensation from contractee, 26 ALR3d 1395.

Breach or repudiation of contract as affecting right to enforce arbitration clause therein, 32 ALR3d 377.

Lessee's breach of or default under lease agreement as affecting his right in respect of option to purchase under the lease, 53 ALR3d 435.

Failure of vendor to comply with statute or ordinance requiring approval or recording of plat prior to conveyance of property as rendering sale void or voidable, 77 ALR3d 1058.

Sufficiency of real-estate buyer's efforts to secure financing upon which sale is contingent, 78 ALR3d 880.

Failure of creditor, or creditor's assignee, to secure credit insurance as affecting rights or liabilities of debtor, upon debtor's loss, 88 ALR3d 794.

Inability to obtain license, permit, or charter required for tenant's business as defense to enforcement of lease, 89 ALR3d 329.

Limitation to quantum meruit recovery, where attorney employed under contingent fee contract is discharged without cause, 92 ALR3d 690.

13-5-9. Total or partial failure of consideration generally.

If the consideration for a promise, apparently good or valuable, fails either wholly or in part before the promise is executed, the failure of consideration may be pleaded in defense to the promise as provided for in subsection (c) of Code Section 9-11-8. If the failure of consideration is partial, an apportionment shall be made according to the facts of each case. (Orig. Code 1863, § 2712; Code 1868, § 2706; Code 1873, § 2748; Code 1882, § 2748; Civil Code 1895, § 3665; Civil Code 1910, § 4250; Code 1933, § 20-310.)

Law reviews. — For article discussing failure of consideration, see 4 Mercer L. Rev. 327 (1953).

For comment on *Miami Butterine Co. v. Franki*, 190 Ga. 88, 8 S.E.2d 398 (1940), see 3 Ga. B.J. 51 (1941).

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Total or partial failure of consideration is permissible defense to action founded upon any contract. *Robbins v. Hays*, 107 Ga. App. 12, 128 S.E.2d 546 (1962).

Although an equipment note was supported by ample consideration when the note was executed, there was at least a partial failure of consideration after that time due to a corporate defendant's failure or refusal to deliver possession of five pieces of the equipment, or to transfer title to any of the equipment, to the deceased. *Midway R.R. Constr. Co. v. Beck*, 281 Ga. App. 412, 636 S.E.2d 110 (2006).

Guarantor's assertion of defense. — Defense of failure of consideration is not personal to a principal and thus is an available defense to a guarantor. *Jones v. Dixie O'Brien Div.*, 174 Ga. App. 67, 329 S.E.2d 256 (1985).

Failure of consideration must be specially pleaded. *McGehee v. Rinker*, 9 Ga. App. 147, 70 S.E. 962 (1911).

Failure of consideration should be set up by proper plea, not by general demurrer. *Planters Rural Tel. Coop. v. Chance*, 105 Ga. App. 270, 124 S.E.2d 300 (1962).

Plea of failure of consideration must set out fully facts relied on to support the defense. *Martin v. Bartow Iron Works*, 35 Ga. 320, 16 F. Cas. 888 (N.D. Ga. 1867); *Taylor v. Hinton*, 66 Ga. 743 (1881).

Parol evidence is admissible to show partial or total failure of consideration of contract. *Pitts v. Allen*, 72 Ga. 69 (1883); *Reese v. Strickland*, 96 Ga. 784, 22 S.E. 323 (1895).

In an action to recover on two promissory notes, because material fact issues remained regarding the consideration given for the promissory notes, creating an ambiguity for which parol evidence was admissible, and as to whether the notes were signed as part of the same transaction, summary judgment to either the lender or the debtor was inappropriate. *Foreman v. Chattooga Int'l Techs., Inc.*, 289 Ga. App. 894, 658 S.E.2d 470 (2008).

Plea of failure of consideration does not add to or vary contract between parties. *Aultman & Co. v. Mason*, 83 Ga. 212, 9 S.E. 536 (1889).

Total failure of consideration warrants directed verdict. — When it appears, from uncontradicted evidence, that there is a total failure of consideration as to the contract sued on, it is not error to direct a verdict in favor of defendant. *Reynolds v. Nevin*, 1 Ga. App. 269, 57 S.E. 918 (1907).

Defense of constructive eviction is based upon principle of failure of consideration. — Constructive eviction is a specialized defense in rent cases grounded on general principles of contract law respecting failure of consideration, and may involve either total or partial failure of consideration. *Piano & Organ Ctr., Inc. v. Southland Bonded Whse., Inc.*, 139 Ga. App. 480, 228 S.E.2d 615 (1976).

Teacher's misrepresentations about teaching qualifications as basis for defense of failure of consideration. — It is a good defense to action by teacher upon written

contract to pay teacher stipulated sum per month for services in teaching at private school, that in order to induce the person by whom the teacher was employed to sign the contract, the teacher falsely and fraudulently represented to the person that the teacher possessed certain specified and essential qualifications as a teacher, which the teacher did not in fact possess. Such defense is available to show failure of consideration, either total or partial. *Connor v. Lasseter*, 98 Ga. 708, 25 S.E. 830 (1896).

Failure to pay consideration promised, although constituting breach, does not render conveyance invalid for lack of consideration. *Jones v. Brawner*, 151 Ga. App. 437, 260 S.E.2d 385 (1979).

Trial court properly granted summary judgment to an attorney in the attorney's action to collect fees due under a written fee agreement with a former client as the attorney provided the services outlined within the contract, and the former client failed to produce any competent evidence supporting an affirmative defense of failure of consideration after the attorney made a prima facie case for summary judgment. *Browning v. Alan Mullinax & Assocs., P.C.*, 288 Ga. App. 43, 653 S.E.2d 786 (2007).

Cited in *Williams & Lee v. Wylley*, 45 Ga. 580 (1872); *Seawright v. Dickson*, 16 Ga. App. 436, 85 S.E. 625 (1915); *Ford v.*

Serenado Mfg. Co., 27 Ga. App. 535, 109 S.E. 415 (1921); *Spells v. Swift & Co.*, 34 Ga. App. 620, 130 S.E. 593 (1925); *Branch v. Blackshear Mfg. Co.*, 48 Ga. App. 356, 172 S.E. 586 (1934); *A.D.L. Sales Co. v. Gailey*, 48 Ga. App. 798, 173 S.E. 734 (1934); *Citizens' Bank v. Hall*, 179 Ga. 662, 177 S.E. 496 (1934); *Barnes v. Goodner*, 77 Ga. App. 448, 49 S.E.2d 128 (1948); *Hall v. Southern Sales Co.*, 81 Ga. App. 392, 58 S.E.2d 925 (1950); *Romine, Inc. v. Savannah Steel Co.*, 117 Ga. App. 353, 160 S.E.2d 659 (1968); *Wenke v. Norton*, 120 Ga. App. 70, 169 S.E.2d 663 (1969); *Anchor Sign Co. v. PS Heating & Air Conditioning Co.*, 125 Ga. App. 207, 186 S.E.2d 892 (1971); *Coast Scopitone, Inc. v. Self*, 127 Ga. App. 124, 192 S.E.2d 513 (1972); *Olivetti Leasing Corp. v. Metro-Plastics, Inc.*, 128 Ga. App. 401, 196 S.E.2d 686 (1973); *Hathaway v. Gorfine*, 134 Ga. App. 748, 216 S.E.2d 338 (1975); *Stuckey v. Kahn*, 140 Ga. App. 602, 231 S.E.2d 565 (1976); *Pepsico Truck Rental, Inc. v. Eastern Foods, Inc.*, 145 Ga. App. 410, 243 S.E.2d 662 (1978); *Henco Adv., Inc. v. Geographics, Inc.*, 155 Ga. App. 571, 271 S.E.2d 704 (1980); *Morgan v. Hawkins*, 155 Ga. App. 836, 273 S.E.2d 221 (1980); *Jim Walter Homes, Inc. v. Strickland*, 185 Ga. App. 306, 363 S.E.2d 834 (1987); *Imex Int'l v. Wires Eng'g*, 261 Ga. App. 329, 583 S.E.2d 117 (2003); *Han v. Han*, 295 Ga. App. 1, 670 S.E.2d 842 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 86, 87, 397 et seq.

C.J.S. — 17 C.J.S., Contracts, §§ 71, 129 et seq. 17A C.J.S., Contracts, §§ 573, 583, 604.

ALR. — Necessity of consideration to support option under seal, 21 ALR 137.

Death of obligor as affecting executory obligation in consideration of promise to marry obligor, 34 ALR 86.

Rights and remedies in respect of the property upon the death, in the lifetime of grantor, of the grantee in a deed in consideration of future support, 34 ALR 136.

Forbearance to sue on original obligation as consideration for note payable on demand, 141 ALR 1481.

Rights of parties to contract the performance of which is interfered with or prevented by war conditions or acts of govern-

ment in prosecution of war, 150 ALR 1413; 151 ALR 1447; 152 ALR 1447; 153 ALR 1417; 154 ALR 1445; 155 ALR 1447; 156 ALR 1446; 157 ALR 1446; 158 ALR 1446.

Statute providing for apportionment between lessor and lessee of a tax imposed upon the producer of oil, gas, or other natural production as violation of the constitutional provision against impairment of the obligation of contracts, 160 ALR 980.

Basis of recovery for partial performance of contract, full performance of which is prevented by destruction of subject matter, 170 ALR 980.

Broker's liability to prospective purchaser for refund for deposit or earnest money where contract fails because of defects in vendor's title, 38 ALR2d 1382.

Measure and elements of damages in ac-

tion against physician for breach of contract to achieve particular result or cure, 99 ALR3d 303.

13-5-10. Failure to perform dependent covenant.

Where covenants are dependent, the failure of performance by the opposing party may be a good defense. (Orig. Code 1863, § 2799; Code 1868, § 2807; Code 1873, § 2858; Code 1882, § 2858; Civil Code 1895, § 3709; Civil Code 1910, § 4303; Code 1933, § 20-904.)

JUDICIAL DECISIONS

Covenants of grantor to make deed, and of grantee to pay the money, are mutual and dependent covenants, and action lies in favor of grantor for money or grantor's offer to perform, and grantee thereupon failing or refusing to pay money. *Booth v. Saffold*, 46 Ga. 278 (1872).

Cited in *Watkins v. Stulb & Vorhauer*, 23 Ga. App. 181, 98 S.E. 94 (1910); *Brenard Mfg. Co. v. Kingston Supply Co.*, 22 Ga. App. 280, 95 S.E. 1028 (1918); *Gibbs v. H.T.*

Henning Co., 189 Ga. 675, 7 S.E.2d 238 (1940); *American Fletcher Mtg. Co. v. First Am. Inv. Corp.*, 463 F. Supp. 186 (N.D. Ga. 1978); *Hartrampf v. Citizens & S. Realty Investors*, 157 Ga. App. 879, 278 S.E.2d 750 (1981); *Complete Trucklease, Inc. v. Auto Rental & Leasing, Inc.*, 160 Ga. App. 568, 288 S.E.2d 75 (1981); *Thompson v. Crouch Contracting Co.*, 164 Ga. App. 532, 297 S.E.2d 524 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 322, 355, 358, 362.

C.J.S. — 17A C.J.S., Contracts, §§ 320 et seq., 344, 390, 425, 452.

ALR. — Performance by vendor of covenant to make improvement as condition of

his right to foreclose or forfeit contract, 128 ALR 656.

Right to exercise option to renew or extend lease as affected by tenant's breach of other covenants or conditions, 23 ALR4th 908.

13-5-11. Part performance.

In a severable contract or one admitting of apportionment, a part performance may be a defense pro tanto. (Orig. Code 1863, § 2813; Code 1868, § 2821; Code 1873, § 2872; Code 1882, § 2872; Civil Code 1895, § 3726; Civil Code 1910, § 4320; Code 1933, § 20-1103.)

JUDICIAL DECISIONS

Cited in *Ellis v. Von Kamp*, 100 Ga. App. 60, 110 S.E.2d 97 (1959); *Stein Steel &*

Supply Co. v. Briggs Mfg. Co., 110 Ga. App. 489, 138 S.E.2d 910 (1964).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, § 399.

C.J.S. — 17A C.J.S., Contracts, § 520.

ALR. — Doctrine of part performance as applied to contract embracing more than one subject matter, 38 ALR 693.

Acceptance of principal sum as affecting right to interest, 100 ALR 96.

May part performance or part payment which will take oral contract out of statute of frauds be predicated upon giving up present position, employment, business or profession, or opportunities in that field, 125 ALR 399.

Liabilities or risks of loss arising out of contract for repairs or additions to, or installations in, existing building which, without

fault of either party, is destroyed pending performance, 28 ALR3d 788.

Limitation to quantum meruit recovery, where attorney employed under contingent fee contract is discharged without cause, 92 ALR3d 690.

Limitation to quantum meruit recovery where attorney employed under contingent fee contract is discharged without cause, 56 ALR5th 1.

ARTICLE 2

STATUTE OF FRAUDS

Law reviews. — For comment on the statute of frauds, see 47 Emory L.J. 253 (1998).

JUDICIAL DECISIONS

Statute of frauds is no bar to claim of unjust enrichment. — In an action for restitution for improvements to property under a theory of unjust enrichment, the statute of frauds did not affect such a claim since unjust enrichment applies when there is no legal contract. *Smith v. McClung*, 215 Ga. App. 786, 452 S.E.2d 229 (1994).

When possession and valuable improvements were relied upon, for specific performance they must have been by virtue of and on faith of oral contract or promise, so as to take case out of statute of frauds and constitute equivalent of a writing by showing acts

unequivocally referring to alleged contract or promise. The burden rests on alleged promisee to bring the promisee's case within these facts, if the promisee did not show other exceptions under former Code 1933, § 37-802 (see O.C.G.A. § 23-2-131) and without such proof the promisee was not entitled to specific performance. *Taylor v. Cureton*, 196 Ga. 28, 25 S.E.2d 815 (1943).

Cited in *McKee v. Cartledge*, 79 Ga. App. 629, 54 S.E.2d 665 (1949); *Hudson v. Venture Indus., Inc.*, 243 Ga. 116, 252 S.E.2d 606 (1979).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Terms of Oral Contract with Decedent, 39 POF2d 91.
Act of God, 6 POF3d 319.

Establishing the Part Performance Exception to the Statute of Frauds in Real Estate Transactions, 55 POF3d 441.

ALR. — Right of beneficiary to enforce contract between third persons to provide for him by will, 2 ALR 1193; 33 ALR 739; 73 ALR 1395.

Effect of the statute of frauds upon the right to modify, by subsequent parol agreement, a written contract required by the statute to be in writing, 17 ALR 10; 29 ALR 1095; 80 ALR 539; 118 ALR 1511.

Statute of frauds: warranty or guaranty in

respect of the subject-matter of a contract between third persons, which does in terms embrace such an obligation, 19 ALR 1033.

Agreements in relation to exchange or remittance as within statute of frauds, 19 ALR 1140.

Admission by pleading of a parol contract as preventing pleader from taking advantage of the statute of frauds, 22 ALR 723.

Pleadings, depositions, testimony, or statements in court as constituting a sufficient writing within the statute of frauds, 22 ALR 735.

Agreement to release, discharge, or assign real estate mortgage as within statute of frauds, 32 ALR 874.

Accepting paid employment or remaining in such employment as part performance which will take oral contract to convey or devise real property out of statute of frauds, 40 ALR 223.

Rights of parties under oral agreement to buy land or bid it in at judicial sale for another, 42 ALR 10; 135 ALR 232; 27 ALR2d 1285.

Necessity and sufficiency of consideration for modification of real estate broker's contract, 42 ALR 987.

Promise by other than the principal to indemnify a surety as one to answer for the debt, default, or miscarriage of another, 68 ALR 347.

May part performance of oral contract to convey be predicated upon possession or improvement by one spouse of real property of other, 74 ALR 218.

Promise to pay another's antecedent debt in consideration of agreement to cancel it as within statute of frauds as a promise to pay debt default or miscarriage of another, 74 ALR 1025.

Undelivered deed or escrow, pursuant to oral contract, as satisfying statute of frauds, 100 ALR 196.

Agreement to be bound jointly with another for the obligation covered by an existing contract on which latter is liable as within provision of statute of frauds relating to promise to answer for debt, default, or miscarriage of another, 101 ALR 1252.

Option for renewal or extension of contract for a year or less as affecting applicability of statute of frauds or other public regulation regarding contracts not to be performed within a year, 111 ALR 1105.

Acceptance which will satisfy statute of frauds where purchaser of goods is in possession at time of sale, 111 ALR 1312.

Parol lease for term of a year to commence in future as within statute of frauds, 111 ALR 1465.

May part performance or part payment which will take oral contract out of statute of frauds be predicated upon giving up present position, employment, business or profession, or opportunities in that field, 125 ALR 399.

Part performance to take oral contract of lease out of statute of frauds predicated upon acts or conduct of one in possession of the property under another contract or right, 125 ALR 1468.

Signing of contract or memorandum by agent of undisclosed principal as satisfying statute of frauds, 138 ALR 330.

Sufficiency as regards statute of frauds of description of oil and gas lease in written contract or memorandum for sale or assignment of the same, 141 ALR 814.

Brokerage or agency contract concerning real property as within statute of frauds, 151 ALR 648.

Check or note as memorandum satisfying statute of frauds, 153 ALR 1112.

Manner of pleading statute of frauds as defense, 158 ALR 89.

Oral agreement restricting use of real property as within statute of frauds, 5 ALR2d 1316.

Check as payment within contemplation of statute of frauds, 8 ALR2d 251.

Undelivered lease or contract (other than for sale of land), or undelivered memorandum thereof, as satisfying statute of frauds, 12 ALR2d 508.

Broker's right to commission where customer repudiates or fails to complete contract or promise which is oral or not specifically enforceable, 12 ALR2d 1410.

Failure to object to parol evidence, or voluntary introduction thereof, as waiver of defense of statute of frauds, 15 ALR2d 1330.

Question, as one of law for court or of fact for jury, whether oral promise was an original one or was a collateral promise to answer for the debt, default, or miscarriage of another, 20 ALR2d 246.

Rights of parties under oral agreement to buy or bid in land for another, 27 ALR2d 1285.

Oral acceptance of written offer by party sought to be charged as satisfying statute of frauds, 30 ALR2d 972.

Validity and effect of promise not to make a will, 32 ALR2d 370.

Real-estate broker's right to recover in quantum meruit for services although contract is not in writing as required by statute, 41 ALR2d 905.

Admissibility of parol evidence to connect signed and unsigned documents relied upon as memorandum to satisfy statute of frauds, 81 ALR2d 991.

Enforceability, under statute of frauds provision as to contracts not to be performed within a year, or oral employment contract for more than one year but specifically made

terminable upon death of either party, 88 ALR2d 701.

Liabilities or risks of loss arising out of contract for repairs or additions to, or installations in, existing building which, without fault of either party, is destroyed pending performance, 28 ALR3d 788.

Sufficiency, under statute of frauds, of description or designation of property in real-estate brokerage contract, 30 ALR3d 935.

Promissory estoppel as basis for avoidance of statute of frauds, 56 ALR3d 1037.

Exceptions to rule that oral gifts of land

are unenforceable under statute of frauds, 83 ALR3d 1294.

Construction and application of UCC § 2-201(3)(b) rendering contract of sale enforceable notwithstanding statute of frauds, to extent it is admitted in pleading, testimony, or otherwise in court, 88 ALR3d 416.

Liability for interference with invalid or unenforceable contracts, 96 ALR3d 1294.

Promise by one other than principal to indemnify one agreeing to become surety or guarantor as within statute of frauds, 13 ALR4th 1153.

13-5-30. Agreements required to be in writing.

To make the following obligations binding on the promisor, the promise must be in writing and signed by the party to be charged therewith or some person lawfully authorized by him:

(1) A promise by an executor, administrator, guardian, or trustee to answer damages out of his own estate;

(2) A promise to answer for the debt, default, or miscarriage of another;

(3) Any agreement made upon consideration of marriage, except marriage articles as provided in Article 3 of Chapter 3 of Title 19;

(4) Any contract for sale of lands, or any interest in, or concerning lands;

(5) Any agreement that is not to be performed within one year from the making thereof;

(6) Any promise to revive a debt barred by a statute of limitation; and

(7) Any commitment to lend money. (29 Car. II, c. 3, Cobb's 1851 Digest, p. 1127; Ga. L. 1851-52, p. 243, § 1; Ga. L. 1855-56, p. 233, § 25; Ga. L. 1855-56, p. 238, § 1; Code 1863, § 1952; Code 1868, § 1940; Code 1873, § 1950; Ga. L. 1880-81, p. 62, § 1; Code 1882, § 1950; Civil Code 1895, § 2693; Civil Code 1910, § 3222; Code 1933, § 20-401; Ga. L. 1962, p. 156, § 1; Ga. L. 1988, p. 403, § 1.)

Cross references. — Parol contract between employer and overseer, § 10-6-121. Limitation of recovery on parol contracts for sale of personal property, § 11-1-206. Requirement of writing to support contract for sale of goods for price of \$500.00 or more, § 11-2-201. When part performance removes agreement from operation of this section, § 13-5-31. Validity of parol contracts

creating landlord and tenant relationship, § 44-7-2.

Law reviews. — For article discussing options to purchase realty in Georgia, with respect to the statute of frauds, see 8 Ga. St. B.J. 229 (1971). For article discussing the advantages of contract rescission as a remedy for fraud, with respect to the parol evidence rule and the statute of frauds, in light of City

Dodge, Inc. v. Gardner, 232 Ga. 766, 208 S.E.2d 794 (1974), see 11 Ga. St. B.J. 172 (1975). For article, "Promissory Estoppel and the Georgia Statute of Frauds," see 15 Ga. L. Rev. 204 (1980). For article, "Defending the Lawsuit: A First-Round Checklist," see 22 Ga. St. B.J. 24 (1985). For annual survey of law of contracts, see 38 Mercer L. Rev. 107 (1986). For annual survey article on commercial law, see 50 Mercer L. Rev. 193 (1998). For survey article on labor and employment law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 303 (2003). For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For article, "The Cost of Consent: Optimal Standardization in the Law of Contract," see 58 Emory L.J. 1401 (2009).

For note discussing statute of frauds considerations relating to the finance clause in realty sales contracts, see 8 Ga. St. B.J. 118

(1971). For note questioning the applicability of the statute of frauds to the facts in the case of Thomas v. Harris, 127 Ga. App. 361, 193 S.E.2d 260 (1972), appearing below, see 8 Ga. L. Rev. 186 (1973).

For comment on Baxley Hdwe. Co. v. Morris, 165 Ga. 359, 140 S.E. 869 (1927), see 1 Ga. L. Rev. No. 3 P. 51 (1927). For comment on Cohen v. Pullman Co., 243 F.2d 725 (5th Cir. 1957), holding that an oral agreement to sell land which is unenforceable because of the statute of frauds cannot be the basis for recovery of damages in fraud and deceit as the purpose of the statute of frauds is to prevent persons from being liable for nonperformance of such claimed promises, see 20 Ga. B.J. 427 (1958). For comment, "Boats Against the Current: The Courts and the Statute of Frauds," see 47 Emory L.J. 253 (1998).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

WRITING REQUIREMENT GENERALLY

PROMISES TO ANSWER FOR DEBTS OF ANOTHER

1. IN GENERAL
2. WRITING
3. APPLICATION

AGREEMENTS MADE IN CONSIDERATION OF MARRIAGE

CONTRACTS TRANSFERRING INTERESTS IN LAND

1. IN GENERAL
2. INDEFINITE OR UNASCERTAINED BOUNDARIES
3. WRITING
4. APPLICATION

AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR

PROMISES TO REVIVE DEBTS BARRED BY STATUTES OF LIMITATIONS

COMMITMENT TO LEND MONEY

AGREEMENTS INVOLVING INSURANCE

EFFECT OF FULL OR PART PERFORMANCE

PLEADINGS AND PRACTICE

General Consideration

For discussion of history of section, see *Turner v. Lorillard Co.*, 100 Ga. 645, 28 S.E. 383, 62 Am. St. R. 345 (1897).

Purpose for statute of frauds is to preclude admission of parol evidence to vary, modify, or contradict otherwise clear agreement. However, rule does not apply in cases where instrument merely shows incompleteness on the instrument's face; under these

circumstances, extrinsic evidence is allowed to establish other agreements referable to incompleteness when not inharmonious with basic writing. *Module Mobile, Inc. v. Fulton Nat'l Bank*, 150 Ga. App. 808, 258 S.E.2d 614 (1979).

Violation of statute does not affect validity of contract for purposes other than enforcement. — Parole contract unenforceable by reason of statute of frauds is nevertheless a valid, subsisting contract as between persons

other than contracting parties, for purposes other than recovery upon the contract. *Waynesboro Planing Mill v. Perkins Mfg. Co.*, 35 Ga. App. 767, 134 S.E. 831 (1926).

Statute of frauds is no bar to relief in quantum meruit. *Dawn Mem. Park, Inc. v. Southern Cemetery Consultants*, 115 Ga. App. 180, 154 S.E.2d 258 (1967).

Former Code 1933, § 61-102 (see O.C.G.A. § 44-7-2) was but an extension of paragraphs (4) and (5) of former Code 1933, § 20-401 (see O.C.G.A. § 13-5-30) and was in essence a portion of the statute of frauds and derived therefrom. *Blanton v. Moseley*, 133 Ga. App. 144, 210 S.E.2d 368 (1974).

"Letter of intent" stating terms for proposed sale of plant and equipment therein, which sale was to be contingent on a future agreement as to an inventory of assets, involved a "package deal" for real estate and goods and was thus governed by (and failed under) O.C.G.A. § 13-5-30 rather than the less stringent standards of O.C.G.A. § 11-2-201. *Beaulieu of Am., Inc. v. Coronet Indus., Inc.*, 173 Ga. App. 556, 327 S.E.2d 508 (1985).

Parol evidence may not supply essential elements of contract. — Parol evidence is not admissible to supply any missing essential elements of a contract required to be in writing by the statute of frauds. *Sawyer v. Roberts*, 208 Ga. App. 870, 432 S.E.2d 610 (1993).

Written contract within statute of frauds cannot be modified by subsequent agreement in parol. *Sanders v. Vaughn*, 223 Ga. 274, 154 S.E.2d 616 (1967); *Payne v. Robertson, Beiter & Conner, Inc.*, 133 Ga. App. 502, 211 S.E.2d 440 (1974); *Littman v. Suburban Opticians*, 244 Ga. 702, 261 S.E.2d 607 (1979).

Contract required by statute of frauds to be in writing cannot be modified by subsequent agreement in parol. *B-Lee's Sales Co. v. Shelton*, 141 Ga. App. 870, 234 S.E.2d 702 (1977).

Written agreement not modifiable by oral statements. — Contract for sale of land which must, under law be in writing, and which accordingly is put in writing and duly executed, cannot be subsequently modified by parol agreement. *Willis v. Fields*, 132 Ga. 242, 63 S.E. 828 (1909); *Moore v. Collier*, 133 Ga. 762, 66 S.E. 1080 (1910); *Jarman v.*

Westbrook, 134 Ga. 19, 67 S.E. 403 (1910); *Elrod v. Camp, Flanigan & Toole*, 150 Ga. 48, 102 S.E. 357 (1920).

Contract required by statute of frauds to be in writing may not be changed as to its nature and terms by subsequent oral agreement. *Planters Cotton-Oil Co. v. Bell*, 54 Ga. App. 433, 188 S.E. 41 (1936).

Contract which must, under statute of frauds, be in writing, and which accordingly is put in writing and duly executed, cannot be subsequently modified by parol agreement. *Gulf Oil Corp. v. Willcoxon*, 211 Ga. 462, 86 S.E.2d 507 (1955).

Evidence of antagonistic and inconsistent understanding. — Evidence as to an alleged understanding which is antagonistic to and inconsistent with the terms of the instrument is inadmissible to vary such terms and legally insufficient to sustain a defense of fraud. *Curtis v. First Nat'l Bank*, 158 Ga. App. 379, 280 S.E.2d 404 (1981).

Modifications of agreements within statute must be written. — When contract is required to be in writing, modification of the contract must also be in writing. *Houston v. Jefferson Std. Life Ins. Co.*, 119 Ga. App. 729, 168 S.E.2d 843 (1969).

As the contract of guaranty had to be in writing under the statute of frauds, so likewise, under the general rule, any proposed modification thereof, to be effective, must also have been in writing. *Hendricks v. Enterprise Fin. Corp.*, 199 Ga. App. 577, 405 S.E.2d 566 (1991).

Mistake is ground for reformation of agreement within statute. — Agreements, whether executed or executory, within or without statute of frauds, whether for conveyance of real or personal property, will be reformed by courts of equity, on ground of mistake. *Head v. Stephens*, 215 Ga. 184, 109 S.E.2d 772 (1959), later appeal, 218 Ga. 191, 126 S.E.2d 623 (1962).

Constructive trusts are implied trusts, and are not within statute of frauds. *Williams v. Whitfield*, 242 Ga. 639, 250 S.E.2d 486 (1978).

Generally compromise agreements need not be in writing unless subject matter thereof is within statute of frauds or local statutes require compromises to be in writing. *Hale v. Lipham*, 61 Ga. App. 191, 6 S.E.2d 115 (1939), later appeal, 64 Ga. App. 796, 14 S.E.2d 236 (1941).

General Consideration (Cont'd)

Authority to execute contract required by law to be in writing must be in writing. Hubert Realty Co. v. Bland, 79 Ga. App. 321, 53 S.E.2d 691 (1949); Nalley v. Whitaker, 102 Ga. App. 230, 115 S.E.2d 790 (1960).

Authority of agent executing contract within statute of frauds must be in writing. Butler v. Godley, 51 Ga. App. 784, 181 S.E. 494 (1935). But see Brandon v. Pritchett, 126 Ga. 286, 55 S.E. 241, 7 Ann. Cas. 1093 (1906).

Authority to make memorandum required by statute may be conferred by parol. — There is no statute in this state requiring authority to make memorandum required by statute of frauds to be in writing, and such authority may be conferred by parol. Brandon v. Pritchett, 126 Ga. 286, 55 S.E. 241, 7 Ann. Cas. 1093 (1906), disagreed with, Byrd v. Piha, 165 Ga. 397, 141 S.E. 48 (1927).

Mere effort to orally ratify such authority will not suffice. Hubert Realty Co. v. Bland, 79 Ga. App. 321, 53 S.E.2d 691 (1949). But see Union Camp Corp. v. Dyal, 460 F.2d 678 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972).

Parol ratification of agent's unauthorized written contract binds owner. — Parol ratification of contract for sale of land, made by one without authority assuming to act as agent in behalf of owner is valid and binding upon owner, providing agent signed memorandum which in the memorandum's terms complied with provisions of statute of frauds, which showed upon the memorandum's face that the memorandum was executed in behalf of owner. Brandon v. Pritchett, 126 Ga. 286, 55 S.E. 241, 7 Ann. Cas. 1093 (1906), disagreed with, Byrd v. Piha, 165 Ga. 397, 141 S.E. 48 (1927).

One dealing with agent charged with notice that authority must be in writing. Nalley v. Whitaker, 102 Ga. App. 230, 115 S.E.2d 790 (1960).

One entering into 15-year lease with agent is charged with notice that agent's authority to execute lease is required by law to be in writing and is under duty to inquire and ascertain whether such written authority exists and what limits of authority are, and such person is guilty of negligence in failing to make such inquiry. Union Camp Corp. v. Dyal, 460 F.2d 678 (5th Cir.), cert. denied,

409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972).

Compromise of pending cause by parties and attorneys, performed within reasonable time, need not be written. — When agreement for compromise of pending cause is made by parties and attorneys, whereby one party is to do certain acts, such agreement, upon performance or offer to perform according to the agreement's terms within reasonable time, becomes binding on parties, and puts end to original subject matter of controversy. Such an agreement need not be in writing. Fulford v. Fulford, 225 Ga. 9, 165 S.E.2d 848 (1969).

Question of mutuality is distinct and apart from any question that might arise under statute. Johnston v. Trippe, 33 F. 530 (N.D. Ga. 1887).

Court required to submit statute of frauds defense to jury. — See National Indep. Theatre Exhibitors, Inc. v. Charter Fin. Group, Inc., 747 F.2d 1396 (11th Cir. 1984), cert. denied sub nom. Patterson v. National Indep. Theatre Exhibitors, Inc., 471 U.S. 1056, 105 S. Ct. 2120, 85 L. Ed. 2d 484 (1985).

Sub-subcontractor's oral agreement held enforceable. — Sub-subcontractor's agreement with subcontractor to complete certain construction work and to submit bills to the subcontractor for the subcontractor's equipment and labor was not within the statute of frauds, and the fact that it was an oral contract did not make the contract unenforceable. Sanders v. Commercial Cas. Ins. Co., 226 Ga. App. 119, 485 S.E.2d 264 (1997).

Cited in Baker, Wilcox & Co. v. Herndon, 17 Ga. 568 (1855); Sorrell v. Jackson, 30 Ga. 901 (1860); Black v. McBain, 32 Ga. 128 (1861); D. Goode & Son v. Rawlins, 44 Ga. 593 (1872); Finney v. Cadwallader, 55 Ga. 75 (1875); Wimberly v. Bryan, 55 Ga. 198 (1875); Reed v. Thomas & McNeal, 66 Ga. 595 (1881); Johnson v. Latimer, 71 Ga. 470 (1883); Wooten v. Wilcox, Stilson & Co., 87 Ga. 474, 13 S.E. 595 (1891); Howell v. Shewell, 96 Ga. 454, 23 S.E. 310, 51 Am. St. R. 148 (1895); Strauss v. Garrett & Sons, 101 Ga. 307, 28 S.E. 850 (1897); Corbin v. Durden, 126 Ga. 429, 55 S.E. 30 (1906); Kinderland v. Kirk, 131 Ga. 454, 62 S.E. 582 (1908); Hill v. Jones, 7 Ga. App. 394, 66 S.E. 1099 (1910); Hammond v. Hammond, 135

Ga. 768, 70 S.E. 588 (1911); *Pidcock v. Nace*, 14 Ga. App. 183, 80 S.E. 526 (1914); *Mims v. Gillis*, 19 Ga. App. 53, 90 S.E. 1035 (1916); *Moore v. Adams*, 153 Ga. 709, 113 S.E. 383, 23 ALR 925 (1922); *Sutherland v. Terrell*, 30 Ga. App. 134, 118 S.E. 69 (1923); *Killarney Realty Co. v. Wimpey*, 30 Ga. App. 390, 118 S.E. 581 (1923); *Armstrong v. Reynolds*, 33 Ga. App. 27, 125 S.E. 512 (1924); *Beasley v. Howard*, 34 Ga. App. 102, 128 S.E. 203 (1925); *Pope v. Ellis*, 34 Ga. App. 185, 129 S.E. 11 (1925); *Kennington v. Small*, 36 Ga. App. 176, 136 S.E. 326 (1926); *Gragg v. Hall*, 164 Ga. 628, 139 S.E. 339 (1927); *Scheuer Bros. & Co. v. Hushinsky*, 37 Ga. App. 318, 140 S.E. 394 (1927); *Scott v. Williams*, 167 Ga. 386, 145 S.E. 651 (1928); *Chenoweth v. Williams*, 39 Ga. App. 344, 147 S.E. 180 (1929); *Eberhart v. Texas Co.*, 36 F.2d 198 (5th Cir. 1929); *Baldwin v. McLendon*, 170 Ga. 437, 153 S.E. 18 (1930); *Elrod v. McConnell*, 170 Ga. 892, 154 S.E. 449 (1930); *O'Farrell v. Willoughby*, 171 Ga. 149, 154 S.E. 911 (1930); *Giradot v. Giradot*, 172 Ga. 230, 157 S.E. 282 (1931); *Dixon v. Ernest L. Rhodes & Co.*, 44 Ga. App. 678, 162 S.E. 716 (1932); *Wright v. Harber*, 175 Ga. 696, 165 S.E. 616 (1932); *Shell Petro. Corp. v. Jackson*, 47 Ga. App. 667, 171 S.E. 171 (1933); *Broyles v. Haas*, 48 Ga. App. 321, 172 S.E. 742 (1934); *Pope v. Barnett*, 50 Ga. App. 199, 177 S.E. 358 (1934); *Douglas v. Austin-Western Rd. Mach. Co.*, 180 Ga. 29, 177 S.E. 912 (1934); *Marston v. Downing Co.*, 73 F.2d 94 (5th Cir. 1934); *Gaskins v. Moore*, 50 Ga. App. 529, 179 S.E. 422 (1935); *Pate v. Carrollton Clinic*, 52 Ga. App. 774, 184 S.E. 780 (1936); *Neuhoff v. Swift & Co.*, 54 Ga. App. 651, 188 S.E. 831 (1936); *Cary v. Neel*, 54 Ga. App. 860, 189 S.E. 575 (1936); *Dameron v. Liberty Nat'l Life Ins. Co.*, 56 Ga. App. 257, 192 S.E. 446 (1937); *Kontos v. Jordan*, 57 Ga. App. 267, 195 S.E. 210 (1938); *Neely v. Sheppard*, 185 Ga. 771, 196 S.E. 452 (1938); *Hale v. Lipham*, 61 Ga. App. 191, 6 S.E.2d 115 (1939); *Pryor v. Cureton*, 186 Ga. 892, 199 S.E. 175 (1938); *Averitt v. Swainsboro Methodist Church*, 190 Ga. 549, 9 S.E.2d 888 (1940); *Feagin v. Georgia-Carolina Inv. Co.*, 63 Ga. App. 815, 11 S.E.2d 813 (1940); *West v. Vandiviere*, 192 Ga. 90, 14 S.E.2d 711 (1941); *Cleapor v. Atlanta, B. & C.R.R.*, 123 F.2d 374 (5th Cir. 1941); *Atkinson v. England*, 194 Ga. 854, 22 S.E.2d 798 (1942); *Meeks v. Adams La. Co.*, 49 F. Supp. 489 (S.D. Ga. 1943); *Mays v. Perry*, 196 Ga. 729, 27 S.E.2d 698 (1943); *Myers v. Adcock*, 198 Ga. 180, 31 S.E.2d 160 (1944); *Hotel Candler, Inc. v. Candler*, 198 Ga. 339, 31 S.E.2d 693 (1944); *Hall v. Turner*, 198 Ga. 763, 32 S.E.2d 829 (1945); *Green v. Ford*, 72 Ga. App. 681, 34 S.E.2d 913 (1945); *Minor v. Sutton*, 73 Ga. App. 253, 36 S.E.2d 158 (1945); *Waller v. American Life Ins. Co.*, 75 Ga. App. 76, 41 S.E.2d 910 (1947); *Smith v. Knight*, 75 Ga. App. 178, 42 S.E.2d 570 (1947); *Dorsey v. Clements*, 202 Ga. 820, 44 S.E.2d 783 (1947); *Head v. Lee*, 203 Ga. 191, 45 S.E.2d 666 (1947); *Wells v. H.W. Lay & Co.*, 78 Ga. App. 364, 50 S.E.2d 755 (1948); *Larkins v. Boyd*, 205 Ga. 69, 52 S.E.2d 307 (1949); *Barron v. Anderson*, 205 Ga. 487, 53 S.E.2d 682 (1949); *Monroe v. Goldberg*, 80 Ga. App. 770, 57 S.E.2d 448 (1950); *Great Am. Indem. Co. v. Horkan*, 206 Ga. 451, 57 S.E.2d 487 (1950); *Warwick v. Ocean Pond Fishing Club*, 206 Ga. 680, 58 S.E.2d 383 (1950); *Alderman v. Crenshaw*, 84 Ga. App. 344, 66 S.E.2d 265 (1951); *Harris v. Underwood*, 208 Ga. 247, 66 S.E.2d 332 (1951); *Fimian v. Guy F. Atkinson Co.*, 209 Ga. 113, 70 S.E.2d 762 (1952); *Green v. W.A. Lathem & Sons*, 86 Ga. App. 335, 71 S.E.2d 790 (1952); *Tompkins v. Tompkins*, 88 Ga. App. 563, 76 S.E.2d 819 (1953); *Wolf v. Arant*, 88 Ga. App. 568, 77 S.E.2d 116 (1953); *United States v. Ridley*, 120 F. Supp. 530 (N.D. Ga. 1954); *Gulf Oil Corp. v. Willcoxon*, 211 Ga. 462, 86 S.E.2d 507 (1955); *Williams v. Appliances, Inc.*, 91 Ga. App. 608, 86 S.E.2d 632 (1955); *Wilson v. Whitmire*, 212 Ga. 287, 92 S.E.2d 20 (1956); *Miller v. Shaw*, 212 Ga. 302, 92 S.E.2d 98 (1956); *Hay v. Butts*, 95 Ga. App. 285, 97 S.E.2d 720 (1957); *Home Bldg. & Loan Ass'n v. Hester*, 213 Ga. 393, 99 S.E.2d 87 (1957); *Cohen v. Pullman Co.*, 243 F.2d 725 (5th Cir. 1957); *Ross & Ross Auctioneers v. Testa*, 96 Ga. App. 821, 101 S.E.2d 767 (1958); *Dell v. Kugel*, 99 Ga. App. 551, 109 S.E.2d 532 (1959); *Langford v. Milwaukee Ins. Co.*, 101 Ga. App. 92, 113 S.E.2d 165 (1960); *Summerour v. Burt*, 102 Ga. App. 687, 117 S.E.2d 542 (1960); *Jennings v. Stewart*, 106 Ga. App. 689, 127 S.E.2d 842 (1962); *Snellgrove v. Plywood Supply Co.*, 108 Ga. App. 87, 131 S.E.2d 839 (1963); *Henderson v. Henderson*, 219 Ga. 310, 133 S.E.2d 251 (1963); *Cox v. Wilson*, 109 Ga. App. 652, 137 S.E.2d 47 (1964); *Yarborough*

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v. Horis A. Ward, Inc., 110 Ga. App. 295, 138 S.E.2d 439 (1964); Brown v. Wall, 110 Ga. App. 400, 138 S.E.2d 698 (1964); Adamson v. Maddox, 111 Ga. App. 533, 142 S.E.2d 313 (1965); Harper v. Georgian Villa, Inc., 222 Ga. 130, 149 S.E.2d 90 (1966); Moon v. Stone Mt. Mem. Ass'n, 223 Ga. 696, 157 S.E.2d 461 (1967); Fulford v. Fulford, 225 Ga. 9, 165 S.E.2d 848 (1969); Goette v. Darvoe, 119 Ga. App. 320, 166 S.E.2d 912 (1969); Forest Servs., Inc. v. Fidelity & Cas. Co., 120 Ga. App. 600, 171 S.E.2d 743 (1969); Whitley v. Patrick, 226 Ga. 87, 172 S.E.2d 692 (1970); Rader v. Rayette Faberge, Inc., 123 Ga. App. 328, 181 S.E.2d 83 (1971); Paradies & Co. v. Southeastern Personnel, Inc., 124 Ga. App. 825, 186 S.E.2d 304 (1971); In re Am. Ventures, Inc., 340 F. Supp. 279 (N.D. Ga. 1971); Kenimer v. Thompson, 128 Ga. App. 253, 196 S.E.2d 363 (1973); Roberts v. Harrell, 230 Ga. 454, 197 S.E.2d 704 (1973); Builders Homes of Ga., Inc. v. Wallace Pump & Supply Co., 128 Ga. App. 779, 197 S.E.2d 839 (1973); Willis v. Kemp, 130 Ga. App. 758, 204 S.E.2d 486 (1974); Hendrix v. Scarborough, 131 Ga. App. 342, 206 S.E.2d 42 (1974); Walker v. Anderson, 131 Ga. App. 596, 206 S.E.2d 833 (1974); Plantation Land Co. v. Bradshaw, 232 Ga. 435, 207 S.E.2d 49 (1974); Robinson Explosives, Inc. v. Dalon Contracting Co., 132 Ga. App. 849, 209 S.E.2d 264 (1974); Blanton v. Moseley, 133 Ga. App. 144, 210 S.E.2d 368 (1974); Alodex Corp. v. Brawner, 134 Ga. App. 630, 215 S.E.2d 527 (1975); Columbia Nitrogen Corp. v. Dean's Power Oil Co., 136 Ga. App. 879, 222 S.E.2d 602 (1975); National Egg Co. v. Schneider Egg Co., 519 F.2d 1145 (5th Cir. 1975); Mullins v. Noland Co., 406 F. Supp. 206 (N.D. Ga. 1975); Zorn v. Robertson, 237 Ga. 395, 228 S.E.2d 804 (1976); Ellis v. Savannah Bank & Trust Co., 237 Ga. 612, 229 S.E.2d 417 (1976); Haire v. Cook, 237 Ga. 639, 229 S.E.2d 436 (1976); Reynolds v. Estate of Reynolds, 238 Ga. 1, 230 S.E.2d 842 (1976); Smith v. Hornbuckle, 140 Ga. App. 871, 232 S.E.2d 149 (1977); Krueger v. Paul, 141 Ga. App. 73, 232 S.E.2d 611 (1977); Atlantis Realty Co. v. Morris, 142 Ga. App. 470, 236 S.E.2d 163 (1977); Lewis v. Dan Vaden Chevrolet, Inc., 142 Ga. App. 725, 236 S.E.2d 866 (1977); Bennett Oil Co. v. Harrell, 143

Ga. App. 268, 238 S.E.2d 267 (1977); Citizens & S. Bank v. Bailey, 144 Ga. App. 550, 241 S.E.2d 443 (1978); Rogers v. Joyner, 145 Ga. App. 179, 243 S.E.2d 249 (1978); Grace v. Roan, 145 Ga. App. 776, 245 S.E.2d 17 (1978); Crosby v. Jones, 241 Ga. 558, 246 S.E.2d 677 (1978); Moorman Ingram Tractors, Inc. v. Harrington Mfg. Co., 146 Ga. App. 398, 247 S.E.2d 159 (1978); Hudson v. Venture Indus., Inc., 147 Ga. App. 31, 248 S.E.2d 9 (1978); Gellis v. B.L.I. Constr. Co., 148 Ga. App. 527, 251 S.E.2d 800 (1978); Hudson v. Venture Indus., Inc., 243 Ga. 116, 252 S.E.2d 606 (1979); Garden of Eden, Inc. v. Eastern Sav. Bank, 244 Ga. 63, 257 S.E.2d 897 (1979); Knight v. Munday, 152 Ga. App. 406, 263 S.E.2d 188 (1979); Sellers v. Hall, 153 Ga. App. 189, 265 S.E.2d 81 (1980); Allen & Bean, Inc. v. American Bankers Ins. Co., 153 Ga. App. 617, 266 S.E.2d 295 (1980); Smith v. Jones, 154 Ga. App. 629, 269 S.E.2d 471 (1980); Coastal States Equip. Co. v. Heilweil Indus., Inc., 155 Ga. App. 896, 273 S.E.2d 627 (1980); Wall v. Federal Land Bank, 156 Ga. App. 368, 274 S.E.2d 753 (1980); Gunter v. Hutcheson, 492 F. Supp. 546 (N.D. Ga. 1980); Sabin Meyer Regional Sales Corp. v. Citizens Bank, 502 F. Supp. 557 (N.D. Ga. 1980); Wiggins v. White, 157 Ga. App. 49, 276 S.E.2d 104 (1981); Good v. Tri-Cep, Inc., 248 Ga. 684, 285 S.E.2d 527 (1982); Mynatt v. Tom Washburn & Assocs., 161 Ga. App. 168, 288 S.E.2d 122 (1982); McLain v. Heard, 162 Ga. App. 480, 291 S.E.2d 781 (1982); Allen v. Brackett, 165 Ga. App. 415, 301 S.E.2d 486 (1983); Sierra Assocs., Ltd. v. Continental Ill. Nat'l Bank & Trust Co., 169 Ga. App. 784, 315 S.E.2d 250 (1984); Llop v. McDaniel, Chorey & Taylor, 171 Ga. App. 400, 320 S.E.2d 244 (1984); B.J. Howard Corp. v. Skinner, Wilson & Strickland, 172 Ga. App. 180, 322 S.E.2d 306 (1984); McCumbers v. Trans-Columbia, Inc., 172 Ga. App. 275, 322 S.E.2d 516 (1984); Beckworth v. Beckworth, 255 Ga. 241, 336 S.E.2d 782 (1985); In re Int'l Horizons, Inc., 51 Bankr. 747 (Bankr. N.D. Ga. 1985); Walker v. Williams, 177 Ga. App. 830, 341 S.E.2d 487 (1986); Wells v. W.S. Williams, Jr., Inc., 178 Ga. App. 202, 342 S.E.2d 384 (1986); Dobbs v. Titan Properties, Inc., 178 Ga. App. 389, 343 S.E.2d 419 (1986); 20/20 Vision Ctr., Inc. v. Hudgens, 256 Ga. 130, 345 S.E.2d 330 (1986); Fowler v. Essex Co., 179 Ga. App. 597, 347 S.E.2d 348 (1986);

Tarbutton v. All That Tract or Parcel of Land Known as Carter Place, 641 F. Supp. 521 (M.D. Ga. 1986); Johnson v. Sackett, 256 Ga. 552, 350 S.E.2d 419 (1986); Management Recruiters of Atlanta N., Inc. v. J & B Smith Co., 184 Ga. App. 662, 362 S.E.2d 462 (1987); Dickens v. Calhoun First Nat'l Bank, 189 Ga. App. 798, 377 S.E.2d 715 (1989); Moran v. NAV Servs., 189 Ga. App. 825, 377 S.E.2d 909 (1989); Gigandet v. Lighting Galleries, Inc., 191 Ga. App. 536, 382 S.E.2d 600 (1989); Stolz v. Shulman, 191 Ga. App. 864, 383 S.E.2d 559 (1989); K's Co. v. Galleria Mall Assocs., 192 Ga. App. 866, 386 S.E.2d 672 (1989); Bread of Life Baptist Church v. Price, 194 Ga. App. 693, 392 S.E.2d 15 (1990); Foreman v. Eastern Foods, Inc., 195 Ga. App. 332, 393 S.E.2d 695 (1990); Baxley Veneer & Clete Co. v. Maddox, 198 Ga. App. 235, 401 S.E.2d 282 (1990); Wimpey v. Bissinger, 198 Ga. App. 784, 403 S.E.2d 78 (1991); Baxley Veneer & Clete Co. v. Maddox, 261 Ga. 309, 404 S.E.2d 554 (1991); Cohen v. William Goldberg & Co., 202 Ga. App. 172, 413 S.E.2d 759 (1991); White House, Inc. v. Winkler, 202 Ga. App. 603, 415 S.E.2d 185 (1992); Daniell v. Clein, 206 Ga. App. 377, 425 S.E.2d 344 (1992); Golden v. National Serv. Indus., 210 Ga. App. 53, 435 S.E.2d 270 (1993); Breckenridge Creste Apts., Ltd. v. Citicorp Mtg., Inc., 826 F. Supp. 460 (N.D. Ga. 1993); Cherokee Falls Invs., Inc. v. Smith, 213 Ga. App. 603, 445 S.E.2d 572 (1994); Peach State Meat Co. v. Excel Corp., 860 F. Supp. 849 (M.D. Ga. 1994); Toncee, Inc. v. Thomas, 219 Ga. App. 539, 466 S.E.2d 27 (1995); Barnes v. Whatley, 221 Ga. App. 110, 470 S.E.2d 498 (1996); Acuff v. Proctor, 267 Ga. 85, 475 S.E.2d 616 (1996); Sharp v. Sumner, 272 Ga. 338, 528 S.E.2d 791 (2000); S & A Indus., Inc. v. Bank Atlanta, 247 Ga. App. 377, 543 S.E.2d 743 (2000); Paul Dean Corp. v. Kilgore, 252 Ga. App. 587, 556 S.E.2d 228 (2001); Ades v. Werther, 256 Ga. App. 8, 567 S.E.2d 340 (2002); Overton Apparel, Inc. v. Russell Corp., 264 Ga. App. 306, 590 S.E.2d 260 (2003); Miller v. Lomax, 266 Ga. App. 93, 596 S.E.2d 232 (2004); Henry v. Blankenship, 284 Ga. App. 578, 644 S.E.2d 419 (2007).

Writing Requirement Generally

Nature and purpose of writing required under statute see Virginia Lumber Corp. v.

Williamson Tie Co., 44 Ga. App. 618, 162 S.E. 723 (1931).

Writing must be complete in itself, leaving nothing to rest in parol. F.C. Brooks & Sons v. Shell Oil Co., 226 Ga. 435, 175 S.E.2d 557 (1970).

Writing must be complete. — Writings relied upon to remove transaction from statute of frauds must be complete in themselves, and must contain the entire agreement, and must disclose subject matter, parties thereto, and all terms of undertaking. Campbell Tile & Mantel Co. v. S.A. Lynch Enter. Fin. Corp., 45 Ga. App. 555, 165 S.E. 457 (1932).

To suffice as memorandum under statute, writing must be complete in itself, leaving nothing to rest in parol; entire agreement must be expressed in writing or writings relied upon to take transaction out of statute, and memorandum must disclose subject matter of contract, parties thereto, promise or undertaking, and terms and conditions. Graham v. Nash Loan Co., 51 Ga. App. 521, 181 S.E. 105 (1935).

When writings are relied upon to take transaction out of statute of frauds, the writings must be complete within themselves, must contain entire agreement, must disclose subject matter, parties thereto, and all terms of undertaking; such writings must in some way indicate not only who is promisor, but who is promisee, as well. Cashin v. Markwalter, 208 Ga. 444, 67 S.E.2d 226 (1951).

Writing or memorandum of contract, to meet requirements of statute of frauds, must be complete in itself, with nothing left to parol. It must show all terms of contract, parties, and their assent thereto, in addition to showing fact that there was a contract between the parties. Cofer v. Wofford Oil Co., 85 Ga. App. 444, 69 S.E.2d 674 (1952); American Std., Inc. v. Jessee, 150 Ga. App. 663, 258 S.E.2d 240 (1979).

In an action premised on allegations of a breach of a land sales contract between a group of sellers and an investor, because the only evidence showing any authority to act as an agent for the sellers was based on hearsay, and not on a writing, and no exception applied, two of the sellers were entitled to a directed verdict against the investor pursuant to O.C.G.A. § 13-5-30(4). Dunn v. Venture Bldg. Group, Inc., 283 Ga. App. 500,

Writing Requirement Generally (Cont'd)

642 S.E.2d 156 (2007).

Every essential element of contract must be expressed in writing to comply with statute. *Tippins v. Phillips*, 123 Ga. 415, 51 S.E. 410 (1905); *Durham v. Davison*, 156 Ga. 49, 118 S.E. 736 (1923); *Massell Realty Co. v. Hanbury*, 165 Ga. 534, 141 S.E. 653 (1928); *Stoneypher v. Georgia Power Co.*, 183 Ga. 498, 189 S.E. 13 (1936).

Written memorandum cannot depend upon parol evidence to supply necessary or additional portions of contract but must be complete in itself. *Hamby v. Truitt*, 14 Ga. App. 515, 81 S.E. 593 (1914).

An interest rate which is designated with respect to the prime rate is a term "in writing" sufficient to satisfy the statute of frauds. *Stewart v. National Bank*, 174 Ga. App. 892, 332 S.E.2d 19 (1985).

Parol evidence admissible to clarify and explain ambiguities of written instrument. *Williams v. Smith*, 71 Ga. App. 632, 31 S.E.2d 873 (1944).

Parol evidence admissible to prevent admission of defective writing. — While parol evidence will never be admitted in aid of one who has incomplete writing, parol evidence will be admitted to defeat one who is attempting to impose upon court writing which is not really in compliance with statute. *Turner v. Lorillard Co.*, 100 Ga. 645, 28 S.E. 383, 62 Am. St. R. 345 (1897).

Various writings cannot be connected by parol evidence. — There may be various writings, provided the writings refer one to another, but the writings cannot be correlated and connected together by parol evidence. *Industrial Welding & Tool Supplies, Inc. v. CIT Corp.*, 157 Ga. App. 611, 278 S.E.2d 50 (1981).

Effect of section on writings not purporting to be entire agreement between parties. — Provision of O.C.G.A. § 24-6-2 that if a writing does not purport to be entire agreement between parties, parol evidence is admissible to prove other portions thereof not inconsistent with the writing, is inapplicable to a contract of guaranty because such contracts are required to be entirely in writing under O.C.G.A. § 13-5-30. *Builder's Supply Corp. v. Taylor*, 164 Ga. App. 127, 296 S.E.2d 417 (1982).

Essential elements of writings relied on to satisfy statute. — When writings are relied

on to take transaction out of statute of frauds the writings must: (a) identify buyer and seller; (b) describe subject matter of contract; and (c) name consideration. *Powell v. Adderholdt*, 230 Ga. 211, 196 S.E.2d 420 (1973).

For letters by and between parties to amount to written lease, the parties must disclose subject matter of contract, parties thereto, promise or undertaking, and terms and conditions. *Peter E. Blum & Co. v. First Bank Bldg. Corp.*, 156 Ga. App. 680, 275 S.E.2d 751 (1980).

Requirements for valid contract for sale of real estate. — To constitute valid sale of real estate which will support suit for specific performance, writing relied on to take transaction out of statute of frauds must: (a) identify buyer and seller; (b) describe subject matter of contract; and (c) name consideration. *Pierce v. Rush*, 210 Ga. 718, 82 S.E.2d 649 (1954).

Contract for sale of real estate is valid and binding if it is in writing, specifies parties, seller and buyer, identifies thing sold and contains agreement as to price to be paid. *Morgan v. Hemphill*, 214 Ga. 555, 105 S.E.2d 580, answer conformed to, 98 Ga. App. 732, 106 S.E.2d 865 (1958).

Contemporaneous writings. — Signed, contemporaneous writings used to explain each other under O.C.G.A. § 24-6-3 comply with the statute of frauds whether or not the writings are cross-referenced. *Baker v. Jellibeans, Inc.*, 252 Ga. 458, 314 S.E.2d 874 (1984).

To satisfy statute, memorandum must in some way indicate who are parties to contract. *Maxwell v. Tucker*, 118 Ga. App. 695, 165 S.E.2d 459 (1968).

Parties to contract must be identified. — Memorandum relied upon to take sale at auction out of operation of statute of frauds must in some way indicate or show who are parties to contract; not only who is purchaser, but who is seller. *Pierce v. Rush*, 210 Ga. 718, 82 S.E.2d 649 (1954).

Any designation of vendors, vendees, lessors, or lessees, which clearly discloses the parties, is sufficient. *Maxwell v. Tucker*, 118 Ga. App. 695, 165 S.E.2d 459 (1968).

Writing within meaning of statute of frauds must bind party sought to be charged. *Houston v. Jefferson Std. Life Ins. Co.*, 119 Ga. App. 729, 168 S.E.2d 843 (1969); *Indus-*

trial Welding & Tool Supplies, Inc. v. CIT Corp., 157 Ga. App. 611, 278 S.E.2d 50 (1981).

Although both parties need not assent in writing, writing must show that both did assent. — When party relies upon written memorandum, that party must show not only terms of contract, but also that both parties assented to those terms. It is not necessary that both parties assent in writing, but writing must show that both parties assented. Otherwise writing does not evidence contract. *In re Hartley*, 29 F.2d 916 (M.D. Ga. 1929).

Writing must itself or with other writings identify debt without parol evidence. — Writing referred to in statute of frauds, must either itself or in connection with other writings identify debt which is subject of promise, without aid of parol evidence. *Little v. Whiting ex rel. Peerless Bread Mach. Co.*, 42 Ga. App. 146, 155 S.E. 345 (1930); *Caldwell v. Rogers*, 140 Ga. App. 231, 230 S.E.2d 368 (1976).

Entries in corporate records may suffice as writing. — All that statute of frauds requires is written evidence of agreement. Memorandum may even consist of entries made by party to be charged on party or party's agent's books, so entries in records of corporation may prove contract by the corporation. *Massell Realty Co. v. Hanbury*, 165 Ga. 534, 141 S.E. 653 (1928).

Satisfaction of statute with several writings which together contain entire agreement. — Statute of frauds does not require that all terms of contract be agreed to or written down at one and the same time, nor on one piece of paper; but where memorandum of bargain is found on separate pieces of paper, which contain whole bargain, the papers form together such memorandum as will satisfy the statute, provided contents of signed paper make such reference to other written paper or papers as to enable court to construe whole of papers together as containing all terms of bargain. *North & Co. v. Mendel & Bro.*, 73 Ga. 400, 54 Am. R. 879 (1884); *Turner v. Lorillard Co.*, 100 Ga. 645, 28 S.E. 383, 62 Am. St. R. 345 (1897); *Killarney Realty Co. v. Wimpey*, 30 Ga. App. 390, 118 S.E. 581 (1923); *Houston v. Jefferson Std. Life Ins. Co.*, 119 Ga. App. 729, 168 S.E.2d 843 (1969).

Statute of frauds does not require that all

the terms of the contract should be agreed to or written down at one and the same time, nor on one piece of paper. But when the memorandum of the bargain is found on separate pieces of paper, and when these papers contain the whole bargain, the papers form together such a memorandum as will satisfy the statute, provided the contents of the signed paper make such references to the other written paper or papers as to enable the court to construe the whole of the papers together as containing all the terms of the bargain. *Industrial Welding & Tool Supplies, Inc. v. CIT Corp.*, 157 Ga. App. 611, 278 S.E.2d 50 (1981).

Statute of frauds, O.C.G.A. § 13-5-30, did not require that all the terms of a contract should be agreed to or written down at one and the same time, nor on one piece of paper; but where the memorandum or the bargain was found on separate pieces of paper, and where these papers contained the whole bargain, the papers formed together such a memorandum as would satisfy the statute, provided the contents of the signed paper made such references to the other written paper or papers as to enable the court to construe the whole of the papers together as containing all the terms of the bargain. *Cox v. U.S. Mkts., Inc.*, 278 Ga. App. 287, 628 S.E.2d 701 (2006).

Satisfaction of statute by part performance. — Part performance is not sufficient to remove an oral agreement from the requirements of paragraph (6) of O.C.G.A. § 13-5-30 unless the part performance is consistent with the presence of a contract and inconsistent with the lack of a contract. *Alkeril Chems., Inc. v. O'Lenick*, 202 Ga. App. 230, 414 S.E.2d 257 (1991), cert. denied, 202 Ga. App. 905, 414 S.E.2d 257 (1992).

Statute not satisfied when parol evidence necessary to connect signed paper with other unsigned ones. If it is necessary to adduce parol evidence to connect signed paper with others unsigned, by reason of absence of any internal evidence in signed paper to show reference to or connection with unsigned papers, then the several papers taken together do not constitute written memorandum of bargain so as to satisfy statute. *North & Co. v. Mendel & Bro.*, 73 Ga. 400, 54 Am. R. 879 (1884); *Turner v. Lorillard Co.*, 100 Ga. 645, 28 S.E. 383, 62 Am. St. R. 345

Writing Requirement Generally (Cont'd)

(1897); *Killarney Realty Co. v. Wimpey*, 30 Ga. App. 390, 118 S.E. 581 (1923).

Oral extension of credit unenforceable.

— Mere act of lending any sum to a borrower will not serve to render enforceable an alleged oral agreement to lend some additional sum, nor will it allow for the predication of fraud since such an agreement is unenforceable from the agreement's inception. *Studdard v. George D. Warthen Bank*, 207 Ga. App. 80, 427 S.E.2d 58 (1993).

Equal dignity rule. — Verbal authorization from a decedent was sufficient to create a valid agency relationship between the decedent and a brother and a wife so as to allow the brother and wife to withdraw money for the decedent from the accounts on a periodic basis; the equal dignity rule did not apply in this case because the instruments at issue were not subject to the statute of frauds outlined in O.C.G.A. § 13-5-30. *Rowland v. Rowland*, 2005 U.S. Dist. LEXIS 30296 (N.D. Ga. Nov. 16, 2005).

Seller did not need to rely on oral promise to pay. — Gasoline supplier was not justified in relying on an oral promise of a service station lessee with respect to the payment of a commission to the supplier, and to pay certain incentive money that the supplier owed to a gas retailer, if a service station was re-branded to another retailer's name, as it was an oral promise pursuant to paragraphs (2) and (5) of O.C.G.A. § 13-5-30. *Sommers Co. v. Moore*, 275 Ga. App. 604, 621 S.E.2d 789 (2005).

Promises to Answer for Debts of Another**1. In General**

Contracts to answer for debt of another must be in writing to bind promisor. *Scoggins v. Hill*, 90 Ga. App. 283, 82 S.E.2d 739 (1954).

All contracts or obligations to pay debts of another must be reduced to writing. *Alsobrook v. Taylor*, 181 Ga. 10, 181 S.E. 182 (1935).

Statute of frauds requires a promise to answer for the debt of another to be in writing. *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981).

Promise within paragraph (2) of O.C.G.A. § 13-5-30 must be written and for consider-

ation. — Promise to answer for debt, default, or miscarriage of another, in order to be binding, must be in writing and be supported by consideration. It is nudum pactum unless some benefit accrues to debtor or promisor. *Fred Didschuneit & Son v. Enochs Lumber & Mfg. Co.*, 42 Ga. App. 527, 156 S.E. 720 (1931).

Absence of notary seal and signature of guarantors. — Jury verdict imposing liability on guarantors for a debt of a corporation was reversed since there was no evidence that the guarantors wrote their names on or otherwise signed the guaranty, since a witness's opinion that the guaranty "appeared" to be executed by the guarantors lacked any basis whatsoever, other than the fact that the guarantors' names appeared on the signature lines, and since notary attestation was invalid, if for no other reason, because the guaranty did not contain a notary seal. *Friedrich v. APAC-Georgia, Inc.*, 265 Ga. App. 769, 595 S.E.2d 620 (2004).

Absence of written agreement. — Even if there had been an implied contract between a priest and the priest's common-law wife, under the statute of frauds the priest's employer was not liable for debt in the absence of a written agreement to assume the debt. *Long v. Marino*, 212 Ga. App. 113, 441 S.E.2d 475 (1994).

Trial court properly determined that a child's claim that the child's parent agreed to make payments which the child owed on a promissory note, in order to preserve the child's interest in land, was unenforceable under O.C.G.A. § 13-5-30 because the child was unable to produce a writing signed by the parent which confirmed the child's claim. *Revis v. Jowers*, 264 Ga. App. 13, 589 S.E.2d 657 (2003).

Parol agreement, absolute or conditional, to pay debt of third person, is void. *Johnson v. Morris*, 21 Ga. 238 (1857).

Parol evidence. — Trial court erred in denying a guarantor's motion for summary judgment on grounds that the guaranty was unenforceable by the creditor under the statute of frauds because the guarantor was insufficiently identified in the guaranty; the trial court was not authorized to determine the identity of the guarantor by inference, as this entailed consideration of impermissible parol evidence. *Haralson v. John Deere Co.*, 262 Ga. App. 385, 585 S.E.2d 711 (2003).

When a promissory note and personal guaranty were read together, it was clear that "L. Henry Enterprises, Inc." and "Larry Henry Enterprises, Inc." were used interchangeably in the understanding and intention of the parties and the fact that the corporate name differed slightly between the documents did not provide the borrowers the opportunity to escape liability; as a result, the trial court properly granted summary judgment to the lender with regard to the lender's suit against the borrowers upon default on the note. *L. Henry Enters. v. Verifone, Inc.*, 273 Ga. App. 195, 614 S.E.2d 841 (2005).

Substitution of third party for promisor.

— Promise to pay the debt of another which is an original undertaking by which the promisor becomes liable is not within the statute of frauds, i.e., those promises required by the statute to be in writing do not include an original undertaking in which the new promisor, for valuable consideration, substitutes the promisor as the party who is to perform and the original promisor is released. *Donald H. Gordon Co. v. Carswell*, 184 Ga. App. 701, 362 S.E.2d 483 (1987).

When a creditor, the creditor's debtor, and a third person who owes the debtor agree in parol that such third person shall be substituted for the debtor and that the latter shall be released, to take such a transaction without the operation of the statute of frauds, it must appear that the person substituted for the debtor was, by agreement between the creditor, the debtor, and the third party, substituted for the original debtor, who was released from the promise. *Donald H. Gordon Co. v. Carswell*, 184 Ga. App. 701, 362 S.E.2d 483 (1987).

Promise to answer for debt, default, or miscarriage of another means some definite person. Promise made by individual for unnamed person and in undertaking in which promisor is primarily liable does not come under provisions of statute. *Darby v. Saffold & Sharpe*, 49 Ga. App. 81, 174 S.E. 250 (1934); *Scott Hudgens Realty & Mtg., Inc. v. Executive Action, Inc.*, 125 Ga. App. 81, 186 S.E.2d 504 (1971).

If guaranty omitted name of principal debtor, the guaranty was unenforceable, and the failure of a document to state the identity of the entity whom the guarantor agreed

to indemnify was fatal; because a personal guaranty did not identify the principal debtor by name, the denial of the guarantors' summary judgment motion was error. *McDonald v. Ferguson Enters.*, 274 Ga. App. 526, 618 S.E.2d 45 (2005).

Building material suppliers could not recover on a personal guaranty allegedly signed by the former president of a builder because the guaranty was fatally flawed; the guaranty failed to identify the principal debtor. *Atlanta Glass, Inc. v. Tucker*, 291 Ga. App. 760, 663 S.E.2d 272 (2008).

Liability for spouse's pre-marital obligations. — Member of an electric cooperative was not liable for payment of past due amount owed on an account established by member's wife prior to the marriage. *Walton Elec. Membership Corp. v. Snyder*, 226 Ga. App. 673, 487 S.E.2d 613 (1997), *aff'd*, 270 Ga. 62, 508 S.E.2d 167 (1998).

2. Writing

Essentials of writing evidencing promise within scope of paragraph (2) of O.C.G.A. § 13-5-30. — To bind promisor, written

promise of one who undertakes to pay debt of another under the statute of frauds must contain clear statement of agreement, indicate knowledge of amount promised to be paid, and show who is promisee, as well as promisor. Terms of promise to assume debt of another cannot be settled by parol. *Johnson v. Rycroft*, 4 Ga. App. 547, 61 S.E. 1052 (1908).

In order to bind promisor, written promise of one who undertakes to pay debt of another must contain clear statement of agreement, indicate knowledge of amount promised to be paid, and show who is promisee as well as promisor; agreement may be gathered from letters written by promisor. *Butler v. Godley*, 51 Ga. App. 784, 181 S.E. 494 (1935).

Under paragraph (2) of the statute of frauds, written promise must contain clear statement of agreement, indicate knowledge of amount promised to be paid, and show who is promisee as well as promisor. *Caldwell v. Rogers*, 140 Ga. 231, 230 S.E.2d 368 (1976).

Terms of promise to assume debt of another cannot be established by parol. *Caldwell v. Rogers*, 140 Ga. App. 231, 230 S.E.2d 368 (1976).

Promises to Answer for Debts of**Another** (Cont'd)**2. Writing** (Cont'd)

Written promise to pay debt of another must identify debt without aid of parol evidence. — Writing relied on to satisfy provision of statute of frauds requiring that promise to pay debt of another be in writing must either itself or in connection with other writings identify debt which is subject of promise, without aid of parol evidence. *Pearce & Co. v. Stone Tobacco*, 125 Ga. 444, 54 S.E. 103 (1906); *Butler v. Godley*, 51 Ga. App. 784, 181 S.E. 494 (1935).

Writing relied on to satisfy provision of statute of frauds which requires promise to answer for debt, default, or miscarriage of another to be in writing must either itself or in connection with other writings identify debt which is subject of promise, without aid of parol evidence. *Graham v. Nash Loan Co.*, 51 Ga. App. 521, 181 S.E. 105 (1935).

Writing under paragraph (2) of O.C.G.A. § 13-5-30 must state time when debt due. —

If writing under paragraph (2) of the statute of frauds does not set forth time at which debt becomes due, it is not complete within itself; it fails to satisfy statute of frauds. *Caldwell v. Rogers*, 140 Ga. App. 231, 230 S.E.2d 368 (1976).

Incomplete writing was unenforceable. — Writing which left blank both the name of the principal debtor and the name of the person individually guaranteeing the indebtedness was unenforceable. *Sysco Food Servs., Inc. v. Coleman*, 227 Ga. App. 460, 489 S.E.2d 568 (1997).

Signed addendum sufficient. — Even though a personal guarantee was not signed, a separate, signed addendum thereto satisfied the statute of frauds writing requirement because the guarantee and addendum made reference to each other. *Charles S. Martin Distrib. Co. v. Berhardt Furn. Co.*, 213 Ga. App. 481, 445 S.E.2d 297 (1994).

Guaranty agreement sufficient. — Trial court did not err in granting summary judgment to the promisee where, in the guaranty agreements at issue, the guarantor "unconditionally guaranteed the payment of the Promissory Note set forth above....," and the promissory note specified the name of the principal debtor. *Roach v. C.L. Wigington Enters., Inc.*, 246 Ga. App. 36, 539 S.E.2d 543 (2000).

Guaranty agreement insufficient. — Trial court did not err in granting partial summary judgment to the former business partners on the separate entity partners' counterclaim; the claim that the former business partners were liable for breach of an oral compensation agreement, regarding the one separate entity partner's claim for wages for operating the business was barred by the statute of frauds, as it involved a promise to answer for the debt of another, which was required to be in writing pursuant to O.C.G.A. § 15-5-30(2) and since nothing in the one separate entity partner's conduct was consistent with the lack of an employment agreement, the part performance doctrine could not be invoked as an exception to render the writing requirement unenforceable. *Carter v. Parish*, 274 Ga. App. 97, 616 S.E.2d 877 (2005).

Account books, per se, are not sufficient to charge defendant with debts and accounts of third persons. *Bower v. Smith*, 8 Ga. 74 (1850).

Company president's oral promise. — Trial court did not err in holding that president and largest stockholder of company could be sued individually for payment of debts where credit was extended in reliance upon president's oral promise that president would be responsible for credit extended to company. *Lindsey v. Heard Oil Co.*, 170 Ga. App. 572, 317 S.E.2d 597 (1984).

Claim for breach of oral guaranty did not arise since the corporate officer and owner of a mortgage company orally told investors that the officer would be personally obligated on each and every loan, would personally manage their money, and would be involved with the management of the corporation. *Albee v. Krasnoff*, 255 Ga. App. 738, 566 S.E.2d 455 (2002).

3. Application

Promise to pay another's debt must be collateral or secondary to require writing. — Promise within paragraph (2) of statute of frauds is that collateral contract by which second promisor become bound along with original promise. *Evans v. Griffin*, 1 Ga. App. 327, 57 S.E. 921 (1907).

For promise to pay debt of another to be within statute of frauds the promise must be one which is collateral or secondary and is merely superadded to that of another. *Scott*

Hudgens Realty & Mtg., Inc. v. Executive Action, Inc., 125 Ga. App. 81, 186 S.E.2d 504 (1971).

Promise which must be in writing under paragraph (2) of the statute of frauds is collateral promise, resulting in second promisor becoming bound along with original promisor. *Ross v. W.P. Stephens Lumber Co.*, 138 Ga. App. 748, 227 S.E.2d 486 (1976).

Promise of surety is within statute. — Promise of surety in order to be binding upon promisor must be in writing and signed by party to be charged therewith. *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136, answer conformed to, 47 Ga. App. 665, 171 S.E. 143 (1933).

Guaranty contract. — Lessor could not recover on an equipment lease guaranty because the guaranty omitted essential elements and the lease could not supply the missing elements since this required consideration of parol evidence which was inadmissible for a contract required by the statute of frauds to be in writing. *Dabbs v. Key Equip. Fin., Inc.*, No. A10A0825, 2010 Ga. App. LEXIS 379 (Apr. 7, 2010).

Agreement to endorse notes in payment of another's debt to third person must be written. *Massell Realty Co. v. Hanbury*, 165 Ga. 534, 141 S.E. 653 (1928).

Agreement to pay account of another to prevent that person's prosecution must be written. *Bush v. Roberts*, 4 Ga. App. 531, 62 S.E. 92 (1908).

Owner's promise to pay for work done by plaintiff for contractor was within statute of frauds, and being in parol was invalid. *Holcombe v. Parker*, 99 Ga. App. 616, 109 S.E.2d 348 (1959).

Promise to pay another's debt whereby promisor becomes primarily liable, not within statute. — Promise to pay debt of another arising out of some new and original consideration, benefit, or harm, moving between new contracting parties, is not within statute of frauds although it may be in form a promise to pay debt of another, and although performance of such new contract will have effect of extinguishing liability of original debtor. *Thomason v. Pease Co.*, 47 Ga. App. 776, 171 S.E. 467 (1933).

Promise to pay debt of another which is an original undertaking by which promisor becomes primarily liable is not within statute of

frauds. *Scott Hudgens Realty & Mtg., Inc. v. Executive Action, Inc.*, 125 Ga. App. 81, 186 S.E.2d 504 (1971).

Promises required by paragraph (2) of the statute of frauds do not include original undertaking whereby the new promisor, for valuable consideration, substitutes oneself as party who is to perform, and releases original promisor. *State Hwy. Dep't v. Eagle Constr. Co.*, 125 Ga. App. 678, 188 S.E.2d 810 (1972); *Howard, Weil, Labouisse, Fredericks, Inc. v. Abercrombie*, 140 Ga. App. 436, 231 S.E.2d 451 (1976).

There is no need for writing if new promisor, for valuable consideration, substitutes oneself as party who is to perform, and releases original promisor from liability. *Ross v. W.P. Stephens Lumber Co.*, 138 Ga. App. 748, 227 S.E.2d 486 (1976).

Promise to answer for debt of another must be in writing unless the promise is original undertaking by one to become primarily liable. *Chastain-Roberts Co. v. Better Brands, Inc.*, 141 Ga. App. 186, 233 S.E.2d 5 (1977).

Promise required by O.C.G.A. § 13-5-30 to be in writing does not include an original undertaking. Thus, when the promisor "guarantees" another's debt with additional qualifying words, such as promising to see that the creditor gets paid, and that the promisor is responsible for the bill, and credit is extended in reliance upon such words, the jury would be authorized to find that this was an original undertaking. *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981).

Oral representation that real estate broker "would see to it that [developers] would be paid on the first draw of any subsequent construction loan" might be used to hold the broker liable contractually as an original undertaking, though it would not sustain liability for negligent failure to insure the payment two years later. *Community Fed. Sav. & Loan Ass'n v. Foster Developers, Inc.*, 179 Ga. App. 861, 348 S.E.2d 326 (1986).

If the agreement of the third party guarantor is an original undertaking, that is, one furthering one's own interests rather than underwriting the debt of another, it is not within the statute of frauds. *Schwab U.S.A., Inc. v. Perpetual Mach. Co.*, 241 Ga. App. 13, 525 S.E.2d 719 (1999).

Statute inapplicable to promise to answer for another's debt based upon consideration

Promises to Answer for Debts of Another (Cont'd)

3. Application (Cont'd)

moving to promisor. — When promise to be answerable for debt of another is based upon consideration which moves to benefit promisor by inducing delay in institution of proceedings that might break up business of original debtor, in which business promisor is pecuniarily interested, obligation is in fact that person's own debt, notwithstanding its form, and consequently not within statute of frauds. *Thomason v. Pease Co.*, 47 Ga. App. 776, 171 S.E. 467 (1933).

Substitution of debtor with one indebted to debtor, not within statute. — Paragraph (2) of statute of frauds does not include original undertaking whereby new promisor, for valuable consideration between the new promisor and promisee, substitutes oneself as party to perform and releases original promisor. *Evans v. Griffin*, 1 Ga. App. 327, 57 S.E. 921 (1907); *Foote v. Reece & Son*, 17 Ga. App. 799, 88 S.E. 689 (1916); *Williams v. Garrison*, 21 Ga. App. 44, 93 S.E. 510 (1917).

When a creditor, the creditor's debtor, and a third person who owes debtor agree in parol that such third person shall be substituted for debtor and that latter shall be released, the case is not within statute of frauds, so as to require agreement to be in writing, but debt is extinguished as to debtor, and third person becomes by substitution debtor in the original debtor's place. *Foote v. Reece & Son*, 17 Ga. App. 799, 88 S.E. 689 (1916); *Carr-Lee Grocery Co. v. Brannen*, 46 Ga. App. 225, 167 S.E. 536 (1932).

Agreement to pay loan in consideration of releasing third person from contract not within paragraph (2) of statute of frauds. *Evans v. Griffin*, 1 Ga. App. 327, 57 S.E. 921 (1907).

Promise to indemnify another for becoming security to a third, is not within statute, and need not be in writing. *Jones v. Shorter*, 1 Ga. 294, 44 Am. Dec. 649 (1846).

Implied promise to indemnify maker of promissory note arose out of written assumption of loan for which note had been given, i.e., promise to answer for debt of another, and such promise of indemnification was not required to be in writing. *Giordano v. Federal Land Bank*, 163 Ga. App. 390, 294 S.E.2d 634 (1982).

Subrogation agreement between debtor and one paying debtor's debt need not be written. — Agreement between debtor and one paying debtor's debt that latter shall be subrogated to rights of original creditor need not be in writing. *Lee v. Holman*, 182 Ga. 559, 186 S.E. 189 (1936).

Bonds and other surety contracts are within contemplation of statute. — See *Continental Ins. Co. v. Gazaway*, 216 Ga. App. 125, 453 S.E.2d 91 (1994).

Partner's signatures on a contract assigning a franchise to the partnership that did not unequivocally state that the partners personally guaranteed the partnership's debt, did not bind the partners individually, and was unenforceable against the partners pursuant to the statute of frauds, O.C.G.A. § 13-5-30(2). *Groth v. Ace Cash Express, Inc.*, 276 Ga. App. 350, 623 S.E.2d 208 (2005).

Promise by assignee of bonds for title to pay purchase money not within paragraph (2) of statute of frauds. — One taking bond for titles by assignment under contract to pay purchase money due to original vendor may be compelled by court of equity to perform one's contract. It is not a parol promise to answer for debt of another under the statute of frauds. *Ford v. Finney*, 35 Ga. 258 (1866).

Grantee's promise to assume payment of loan deed on property purchased not within statute of frauds. — Promise of grantee to assume payment of indebtedness represented by loan deed on property grantee purchased was a part of the consideration grantee agreed to pay for the property. It is true that in doing so grantee incidentally discharged a debt of the grantor, but this does not bring the grantee's promise within operation of statute of frauds. *Brice v. National Bondholders Corp.*, 187 Ga. 511, 1 S.E.2d 426 (1939).

Agent's promise to collect or guarantee collection of loan not within paragraph (2) of statute of frauds. — Neither agent's promise to collect loan nor agreement, as part of contract of agency, to guarantee the loan, constitutes promise to answer for debt, default, or miscarriage of another, and statute of frauds is not applicable. *Benton v. Roberts*, 35 Ga. App. 749, 134 S.E. 846 (1926), later appeal, 168 Ga. 769, 149 S.E. 35 (1929).

Agreement to take land subject to specified encumbrance is not agreement to assume and pay encumbrance; there must be words importing promise to pay debt to render grantee personally liable. *Alsobrook v. Taylor*, 181 Ga. 10, 181 S.E. 182 (1935).

Contract creating policy of fidelity insurance not considered promise to answer for another's debt. — Contract creating policy of fidelity insurance is not to be classed as an undertaking of guaranty or suretyship, and it thus is not a promise to answer for the debt, default, or miscarriage of another within meaning of statute of frauds. *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136, answer conformed to, 47 Ga. App. 665, 171 S.E. 143 (1933).

Defense counsel's alleged oral promise to vouch for the appearance of counsel's client was in the nature of a suretyship, not an original, independent undertaking, and in the absence of a writing was unenforceable. *Cramer v. State*, 191 Ga. App. 493, 382 S.E.2d 200 (1989).

Amount and time of payments established by subsequent invoices. — When a written guaranty agreement promising to pay for "any and all materials billed" to a third party did not state a specific amount to be paid or the time the debt was to become due, such matter could be established by invoices for materials purchased subsequent to the making of the agreement. *Schroeder v. Hunter Douglas, Inc.*, 172 Ga. App. 897, 324 S.E.2d 746 (1984).

Proving identity of principal debtor. — In action to recover on contract of guaranty, parol evidence was not admissible to prove identity of principal debtor, the identity not having been provided by subject written agreement. *Builder's Supply Corp. v. Taylor*, 164 Ga. App. 127, 296 S.E.2d 417 (1982); *Roden Elec. Supply, Inc. v. Faulkner*, 240 Ga. App. 556, 524 S.E.2d 247 (1999).

If the creditor's name is the only identity omitted from the letter of guaranty, the creditor may use evidence submitted by the debtor to prove the creditor's identity, and the debtor will not be allowed to assert a statute of frauds defense to the contract. *Murray v. Pratt-Dudley Bldrs. Supply Co.*, 176 Ga. App. 225, 335 S.E.2d 443 (1985).

No requirement to specifically denominate principal debtor. — There is no requirement that a guaranty specifically denomi-

nate a party as the "principal debtor" on a credit application. Therefore, since the contract identified the principal debtor as the "customer," parol evidence would be admissible to help explain any ambiguity as to whom that term refers. *Capital Color Printing, Inc. v. Ahern*, 291 Ga. App. 101, 661 S.E.2d 578 (2008).

Evidence of promise required. — Paragraph (2) of O.C.G.A. § 13-5-30 inapplicable in case where, even if a loan was made by plaintiff to defendant's father and not to defendant, there was no evidence that defendant promised to assume the debt of defendant's father. *Mills v. Barton*, 205 Ga. App. 413, 422 S.E.2d 269 (1992).

The controlling document, a credit application, was invalid since it did not identify the principal debtor; the trial court could not determine the identity of the debtor without making inferences or considering impermissible parol evidence. *Fontaine v. Gordon Contractors Bldg. Supply, Inc.*, 255 Ga. App. 839, 567 S.E.2d 324 (2002).

Guaranty contract sufficiently met the requirements of O.C.G.A. § 13-5-30(2) that it identify the debt, the promisee, and the promisor because the guaranty contract was attached to the promissory note which it guaranteed, referred to that promissory note, and the guaranty contract's obligations could be completely identified by this reference. *Cox v. U.S. Mkts., Inc.*, 278 Ga. App. 287, 628 S.E.2d 701 (2006).

Agreements Made in Consideration of Marriage

Prenuptial parol agreement to make and execute in writing a settlement after marriage is within statute of frauds. *Bradley v. Saddler*, 54 Ga. 681 (1875).

Promise to marry is not agreement within paragraph (3) of statute of frauds. *Spence v. Carter*, 33 Ga. App. 279, 125 S.E. 883 (1924).

Exception to paragraph (3) contained in Article 3 of Chapter 3 of Title 19 see *Reynolds v. Reynolds*, 217 Ga. 234, 123 S.E.2d 115 (1961).

Contracts Transferring Interests in Land

1. In General

Discussion of history of paragraph (4) of section of statute of frauds see *Roughton v.*

Contracts Transferring Interests in Land (Cont'd)

1. In General (Cont'd)

Rawlings, 88 Ga. 819, 16 S.E. 89 (1892); Woo v. Markwalter, 210 Ga. 156, 78 S.E.2d 473 (1953).

All contracts as to sale of lands or any interest therein must be reduced in writing. Alsobrook v. Taylor, 181 Ga. 10, 181 S.E. 182 (1935).

Contracts "concerning" land. — An alleged oral agreement under which the plaintiff was to furnish certain services and the defendant was required to pay plaintiff ten percent of the value of development property was not subject to the statute of frauds, notwithstanding that it concerned land, because it did not involve the sale of, or conveyance of an interest in, land. Weatherby v. Barsk, 248 Ga. App. 848, 545 S.E.2d 701 (2001).

An option to purchase land falls within that portion of the statute of frauds pertaining to "any contract for the sale of lands, or any interest in, or concerning lands." Pacific Grove Holding, L.L.C. v. Hardy, 243 Ga. App. 161, 532 S.E.2d 710 (2000).

Because a real estate option contract in favor of a buyer lacked the amount or number of installments, the allocation of interest on the payments, or the duration of the loan, the contract violated the statute of frauds, O.C.G.A. § 13-5-30; thus, the trial court properly granted summary judgment to the sellers. A. S. Reeves & Co., Inc. v. McMickle, 270 Ga. App. 132, 605 S.E.2d 857 (2004).

Written authority must be shown to support agent's sale or lease of principal's lands. Union Camp Corp. v. Dyal, 460 F.2d 678 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972).

Application to nonjudicial foreclosure sales. — Statute of frauds applied to a sale conducted pursuant to a power of sale contained in a security deed. James v. Safari Enters., Inc., 244 Ga. App. 813, 537 S.E.2d 103 (2000).

Oral authority may suffice when principal ratifies act or is otherwise estopped from raising issue. Union Camp Corp. v. Dyal, 460 F.2d 678 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972).

Parol purchase of lands is obnoxious to

statute of frauds. Blance v. Goodnow, 68 Ga. 264 (1881).

Distinction between easements and license. — There is distinction between privilege or easement, carrying interest in land, and requiring writing within statute of frauds to support it, and license which gives authority to do particular act or series of acts upon land of another for purpose of improvement only, without possessing any estate therein, which is not within statute. Jenkins v. Brown, 48 Ga. App. 480, 173 S.E. 257 (1934).

In a suit brought by a property owner seeking to specifically perform an oral agreement to purchase a strip of real estate, the trial court properly denied the property owner's request for an interlocutory judgment based on a violation of the statute of frauds and because another held a first right of refusal over the sale/purchase of the property. However, the trial court erred by concluding that the property owner had not obtained a parol license to use the strip since the property owner had made expenditures to improve the land and, as to the right of first refusal held by another, the grant of a parol license was not the equivalent to a sale of the property to have in anyway interfered with that right. Meinhardt v. Christianson, 289 Ga. App. 238, 656 S.E.2d 568 (2008).

Statute of frauds no defense when party acts on promise to party's detriment. — Defense that promise to purchase property and assume mortgage is not actionable under the statute of frauds as not having been in writing is without merit when other party acted on promise to the party's detriment. Scott v. Lumpkin, 153 Ga. App. 17, 264 S.E.2d 514 (1980).

Petition for breach of contract within statute need not allege contract was written. — Petition in action for breach of contract for sale of land is not demurrable because it fails to allege that such contract was in writing as required by the statute of frauds. Taliaferro v. Smiley, 112 Ga. 62, 37 S.E. 106 (1900).

Testimony relating to oral agreement to purchase land, inadmissible unless within exception to statute. Walters v. Missouri State Life Ins. Co., 53 Ga. App. 347, 185 S.E. 572 (1936).

Parol real estate trusts may be established in direct contradiction of statute on ground of fraud; and whenever a case of fraud is made by the bill, parol evidence will be

received for purpose of sustaining that case, even though effect of such evidence is to alter or vary written instrument, and although benefit of statute be insisted upon by defendant. *Smith v. Harvey-Given Co.*, 182 Ga. 410, 185 S.E. 793 (1936), later appeal, 183 Ga. 783, 190 S.E. 19 (1937).

Statute not violated by showing that consideration of deed is performance of parol agreement. *Duggan v. Dennard*, 171 Ga. 622, 156 S.E. 315 (1930).

Oral testimony as to promisor's admission of land contract does not obviate statute. — Provisions of the statute of frauds requiring land contracts to be in writing cannot be nullified by oral testimony that the promisor had made statements admitting the contract which is sought to be enforced. *Powell v. Adderholdt*, 230 Ga. 211, 196 S.E.2d 420 (1973).

Distinction between actions in equity and at law to remove conveyance from paragraph (4) of statute of frauds. — Rule that contract with respect to interest in land is not taken out of statute of frauds for reason that party alleging contract was not in possession of property applies to cases in equity for specific performance or damages in lieu thereof, and not to actions at law for damages for breach of contract. *Moore v. Deal*, 75 Ga. App. 823, 44 S.E.2d 571 (1947).

It is proper to charge that an interest in real estate must be evidenced in writing. — See *Columbus Bank & Trust Co. v. Cohn*, 644 F.2d 1040 (5th Cir. 1981).

In an action by surviving siblings against an heir at law, claiming that the siblings were the rightful owners of certain realty because the decedent had promised to devise the property to the siblings, the trial court did not err by instructing the jury on the statute of frauds because O.C.G.A. § 13-5-30(4) required contracts affecting title to land to be in writing and the title of realty was the subject of the siblings' complaint. *Swann v. Shorter*, 262 Ga. App. 808, 586 S.E.2d 711 (2003).

Real estate partnerships. — Partnership formed for the purpose of acquiring interest in tracts of land must be executed in writing. *Shivers v. Sexton*, 164 Ga. App. 490, 296 S.E.2d 749 (1982).

Evidence of oral agreement to pay a sum representing equitable holding in property was not inadmissible under O.C.G.A.

§ 13-5-30 as it was specifically exempted by O.C.G.A. § 13-5-31(2) as an agreement upon which conveyance of the property had been based. *Kolb v. Holmes*, 207 Ga. App. 184, 427 S.E.2d 562 (1993).

Handwritten lease agreement. — Trial court erred in finding that a handwritten agreement between the parties constituted an enforceable lease in the landlord's dispossessory action as the only terms listed in the document were a payment schedule and brief damages and indemnification provisions, but there was no indication of when the lease term began or which property was covered; the statute of frauds, O.C.G.A. § 13-5-30(5), was violated, and because the affirmative defense of estoppel under O.C.G.A. § 9-11-8(c) was not raised by the parties, it was error for the trial court to have raised the defense sua sponte. *Nacoochee Corp. v. Suwanee Inv. Partners, LLC*, 275 Ga. App. 444, 620 S.E.2d 641 (2005).

2. Indefinite or Unascertained Boundaries

Indefinite or unascertained boundary may be established by parol agreement. — When boundary line between two estates is indefinite or unascertained, owners may by parol agreement establish division line which will afterwards control their deeds, notwithstanding statute of frauds. *Brown v. Hester*, 169 Ga. 410, 150 S.E. 556 (1929); *Williamson v. Prather*, 188 Ga. 545, 4 S.E.2d 140 (1939).

Parol agreement between adjoining landowners to fix a boundary line between their respective tracts theretofore unascertained, uncertain, or disputed is not within operation of the statute of frauds for reason that no estate is created. *Tietjen v. Dobson*, 170 Ga. 123, 152 S.E. 222 (1930).

When dividing line between coterminous owners is indefinite, unascertained, or disputed, owners may by parol agreement, duly executed, establish line which will control their deeds, notwithstanding statute of frauds. *Holland v. Shackelford*, 220 Ga. 104, 137 S.E.2d 298 (1964).

Descriptive keys in contract of sale. — Trial court properly granted a seller's motion for partial summary judgment, and denied the escrow agent's motion to dismiss, in a suit filed by the seller to recover the earnest money deposit as the property description contained in the sales contract satisfied the Georgia statute of frauds,

Contracts Transferring Interests in Land (Cont'd)
2. Indefinite or Unascertained Boundaries (Cont'd)

O.C.G.A. § 13-5-30, in that the sales contract made plain that the buyers agreed to purchase a shopping center, by name, located at a particular intersection, and that the property was encumbered by a recorded promissory note payable by the seller, secured by a recorded deed; in light of the descriptive keys within the sales contract, the trial court could properly consider extrinsic evidence. *Nhan v. Wellington Square, LLC*, 263 Ga. App. 717, 589 S.E.2d 285 (2003).

Trial court properly granted a real estate seller's motion to dismiss an action by a purchaser, alleging breach of contract and specific performance, as the real estate purchase agreement did not provide an adequate description of the property, and exhibits attached to the pleading did not enhance the description but instead, offered contradictions therein. *Hendon Props. v. Cinema Dev., LLC*, 275 Ga. App. 434, 620 S.E.2d 644 (2005).

Because a consent order that involved rights to real property did not incorporate or reference a document that contained a property description, nor did the order provide a key for such description of real property that was part of the parties' consent order, the order did not satisfy the requirements of the statute of frauds, pursuant to O.C.G.A. § 13-5-30(4), and a contempt finding based on such order was not supported. *Carden v. Carden*, 276 Ga. App. 43, 622 S.E.2d 389 (2005).

A property description in a backup contract was too vague to satisfy the statute of frauds; the backup contract did not refer specifically to the primary contract or incorporate the property description in that contract by reference, and there was no "key" that opened the door to extrinsic evidence leading unerringly to the land in question. *Daniel Mill, LLC v. Lyons*, 283 Ga. App. 604, 642 S.E.2d 226 (2007).

Land description insufficient. — "Any additional properties" easement provision in agreement by landowner to convey land and easement rights to city did not satisfy the statute of frauds, as the provision failed to specify any property location; thus, the mas-

ter plan could not serve as a key to point unerringly to property at issue. *Gold Creek SL, LLC v. City of Dawsonville*, 290 Ga. App. 807, 660 S.E.2d 858 (2008).

Purchase agreement for the sale of a convenience store was unenforceable because the property description clearly failed to identify the land at issue with the requisite certainty because the agreement merely provided a street address. Although the address could be a key through which the boundaries could have been established by extrinsic evidence, no such evidence was produced. *Salim v. Solaiman*, 302 Ga. App. 607, 691 S.E.2d 389 (2010).

Land description was sufficient. — Trial court erred in finding that a real estate sales contract did not contain a sufficient description of the land to be sold where the contract described the land as being in two land lots of a specific district and section, designated the map and parcel number as shown by the tax assessor's office, referred to the plat book and page number, which in turn described the property in detail and referred to a survey plat, and specified that the buyer was to acquire the rear one acre of the property as shown per a survey conducted before closing; because only one side of the property fronted a road, language indicating that the "rear" half of the property was sufficient to indicate that portion of the land the transferor intended to convey. *Kay v. W.B. Anderson Feed & Poultry Co.*, 278 Ga. App. 674, 629 S.E.2d 408 (2006).

Agreement by landowner to convey land and easement rights to city sufficiently described certain land so as to satisfy the statute of frauds; agreement provided a key that indicated the intention by the landowner to convey a particular tract of land and certain easements, the precise boundaries and location of which could be determined by extrinsic evidence. *Gold Creek SL, LLC v. City of Dawsonville*, 290 Ga. App. 807, 660 S.E.2d 858 (2008).

Parties to such agreement must know or reasonably believe boundary is disputed or unascertained. — Coterminous proprietors must know or reasonably believe boundary is disputed or unascertained before the proprietors can orally agree to or acquiesce in new line. Otherwise, their agreement, whether express or implied, runs afoul of paragraph (4) of the statute of frauds. *United States v.*

Williams, 441 F.2d 637 (5th Cir. 1971).

Such agreement valid and binding if accompanied by possession or otherwise duly executed. — Parol agreement between coterminous proprietors, that certain line is true dividing line, is valid and binding as between the proprietors, if agreement is accompanied by possession of agreed line or is otherwise duly executed, and if boundary line between two tracts is indefinite, unascertained, or disputed. *Callaway v. Armour*, 207 Ga. 229, 60 S.E.2d 367 (1950).

Such agreement creates no estate, since owners hold to line under title deeds rather than parol transfer. — Parol agreement between adjoining landowners to fix boundary line between their respective tracts theretofore unascertained, uncertain, or disputed is not within operation of statute of frauds for reason that no estate is created. When boundary line is established by consent, coterminous proprietors hold up to it by virtue of their title deeds, and not by virtue of parol transfer. *Callaway v. Armour*, 207 Ga. 229, 60 S.E.2d 367 (1950).

Such agreement operates merely as agreement regarding what has already been conveyed. — It is necessary in order to establish a dividing line between coterminous landowners by parol agreement alone that line is unascertained, uncertain, or disputed and only basis for ruling that such agreement is not within statute of frauds is that in instances where it is applicable it does not operate as a conveyance of land, but merely as agreement with respect to what has already been conveyed. *Smith v. Lanier*, 199 Ga. 255, 34 S.E.2d 91 (1945).

Exercise of option to purchase prohibited. — When a party who leased certain land from the land's supposed owner, who could not read, attempted to enforce an option to purchase the land, which was included in documents the lessee gave the owner to sign, the option was unenforceable under O.C.G.A. § 13-5-30(4) because the documents did not adequately describe the land, and their reference to a tax appraisal was insufficient because the deed and survey referred to by the appraisal described a parcel of a different size and location. *Makowski v. Waldrop*, 262 Ga. App. 130, 584 S.E.2d 714 (2003).

3. Writing

Every essential element of contract for sale of land must be expressed in writing. *Smith v. Wilkinson*, 208 Ga. 489, 67 S.E.2d 698 (1951).

Lender and attorney were properly granted summary judgment against a home buyer's breach of contract, fraud, and conspiracy claims as: (1) there was no evidence of a written purchase agreement for the home and the land it was placed on; and (2) a simple reading of the contract by the buyer would have protected against any alleged misrepresentations; moreover, to the extent that the home buyer's claim of a conspiracy depended upon the viability of the fraud and breach of contract claims, it also failed. *Parrish v. Jackson W. Jones, P.C.*, 278 Ga. App. 645, 629 S.E.2d 468 (2006).

Oral agreement unenforceable. — In a case arising out of a dispute between a hotel management company and purchasers of a hotel, an alleged oral agreement that the hotel management company sought to enforce did not comply with the requirements of the statute of frauds, O.C.G.A. § 13-5-30(5). *BMC-Benchmark Mgmt. Co. v. Ceebraid-Signal Corp.*, No. 08-10519, 2008 U.S. App. LEXIS 19502 (11th Cir. Sept. 8, 2008) (Unpublished).

Writings insufficient to satisfy statute when parol evidence necessary to connect or explain writings. — When several writings are relied on to establish sale of land or of timber growing thereon, or to show authorization by owner for another to sell the land, and parol evidence is necessary to connect and explain such writings, such writings will not satisfy the statute of frauds. *Peacock v. Horne*, 159 Ga. 707, 126 S.E. 813 (1925).

Terms of payment, as well as purchase price, must be set out in writing. — When amount of purchase price fixed by contract for sale of real estate is certain and definite, but terms of payment are indefinite and uncertain, writing is not a contract and confers no rights and imposes no liability. *Morgan v. Hemphill*, 214 Ga. 555, 105 S.E.2d 580, answer conformed to, 98 Ga. App. 732, 106 S.E.2d 865 (1958).

When parties have agreed upon purchase price, the price must be set out in written agreement for sale of land and cannot be

Contracts Transferring Interests in Land (Cont'd)

3. Writing (Cont'd)

shown by parol. *Stonecypher v. Georgia Power Co.*, 183 Ga. 498, 189 S.E. 13 (1936).

Amendment of lease-option agreement. — Lessor's letter to the lessee containing an offer to amend a lease-option agreement by changing the purchase price satisfied the statute of frauds because the offer was in writing. *Smith v. Davis*, 245 Ga. App. 34, 536 S.E.2d 261 (2000).

Contract for purchase of lands need only be signed by party against whom enforcement sought. *Fraser v. Jarrett*, 153 Ga. 441, 112 S.E. 487 (1922).

Writing confirming oral amendment. — Under paragraph (4) of O.C.G.A. § 13-5-30, buyer signed letter expressly confirming terms of oral amendment to defer payment of additional earnest money and under paragraph (2) of that section sellers fully performed contract in reliance on promise to pay earnest money; therefore, statute of frauds was satisfied. *Ware v. Renfro*, 231 Ga. App. 529, 499 S.E.2d 907 (1998).

Contract for sale of land, partly in writing and partly in parol, is unenforceable by reason of statute of frauds. *Thompson v. Colonial Trust Co.*, 35 Ga. App. 12, 131 S.E. 921 (1926); *Stanaland v. Stephens*, 78 Ga. App. 68, 50 S.E.2d 258 (1948).

Contract involving purchase and sale of lands, which has been partly reduced to writing and partly rests in parol, does not meet requirement of statute of frauds and is incapable of enforcement, unless circumstances of transaction bring the transaction within exceptions to general rule. *Stonecypher v. Georgia Power Co.*, 183 Ga. 498, 189 S.E. 13 (1936).

Because O.C.G.A. § 13-5-30 requires that every essential element of the sale must be expressed in the writing, a contract for the sale of land, which is partly in writing and partly in parol, is not enforceable. *Smith v. Cox*, 247 Ga. 563, 277 S.E.2d 512 (1981).

Under the statute of frauds, a contract transferring an interest in land is unenforceable if it is partly in writing and partly in parol. *Stamps v. Ford Motor Co.*, 650 F. Supp. 390 (N.D. Ga. 1986).

Description of land conveyed is essential element of agreement. — One essential ele-

ment of agreement is that land be so described that the land is capable of identification. *Tippins v. Phillips*, 123 Ga. 415, 51 S.E. 410 (1905); *Durham v. Davison*, 156 Ga. 49, 118 S.E. 736 (1923).

In contracts for sale of land, description of land conveyed is one essential element of agreement and must be expressed in writing. *Stonecypher v. Georgia Power Co.*, 183 Ga. 498, 189 S.E. 13 (1936).

Reason for requiring property description. — A principle point of requiring a sufficient description of property to render enforceable the sales contract is not merely to satisfy the buyers but to create marketable title. *Schirmer v. Amoroso*, 209 Ga. App. 682, 434 S.E.2d 80 (1993).

Sufficiency of description in contracts selling or transferring interests in land. — While it is not necessary that land be described with such precision that the land's location and identity are apparent from description alone, description must be sufficiently clear to indicate with reasonable certainty the land intended to be conveyed. *Tippins v. Phillips*, 123 Ga. 415, 51 S.E. 410 (1905); *Durham v. Davison*, 156 Ga. 49, 118 S.E. 736 (1923).

Contract for sale of land to be valid, binding, and enforceable must describe land to be sold with same degree of certainty as that required of deed conveying realty. *Smith v. Wilkinson*, 208 Ga. 489, 67 S.E.2d 698 (1951).

Lease of standing timber must describe land upon which timber stands with sufficient certainty for identification or give key by which it may be identified. *Newton v. Allen*, 220 Ga. 681, 141 S.E.2d 417 (1965).

Description containing key by which land can be located with aid of extrinsic evidence suffices. — If description in deed is ambiguous but sufficient to furnish key to boundary, extrinsic evidence may be used to correctly apply description to true boundary intended by parties. *Miller v. Rackley*, 199 Ga. 370, 34 S.E.2d 438 (1945).

Deed is sufficient to pass title, and will not be declared void for uncertainty of description, if descriptive averments are certain, or if they afford key by which land can be definitely located by aid of extrinsic evidence. *Smith v. Wilkinson*, 208 Ga. 489, 67 S.E.2d 698 (1951).

Parol evidence admissible to explain ambiguities in description. — While parol evi-

dence may be admitted to explain ambiguities in description, it cannot be admitted to supply description which is entirely wanting in writing. *Douglass v. Bunn*, 110 Ga. 159, 35 S.E. 339 (1900).

4. Application

Agreement to sell land upon tender of specified amount within given time. — Agreement resting wholly in parol, whereby one promises to sell to another an interest in land upon tender within given time of specified amount, is within this provision clearly. *Lyons v. Bass*, 108 Ga. 573, 34 S.E. 721 (1899).

Mortgages, deeds to secure debt, and deeds of trust. — No mortgage, deed to secure debt, or deed of trust may be created in Georgia unless it be in writing and properly witnessed and executed by owner of interest in land. *FDIC v. Willis*, 497 F. Supp. 272 (S.D. Ga. 1980).

Oral modification to agreement not enforceable. — Defendant was not required to give credit to the plaintiff for the full amount paid by a third party to purchase a portion of the land leased by the defendant to the plaintiffs pursuant to a lease/purchase agreement since the purported oral modification of the agreement, i.e., to reduce the purchase price by the amount paid by the third party, was never reduced to writing and never became a part of the lease/purchase agreement. *Walden v. Smith*, 249 Ga. App. 32, 546 S.E.2d 808 (2001).

Option for purchase of land falls within purview of paragraph (4) of the statute of frauds. *Florence v. Rankin-Whitten Realty Co.*, 101 Ga. App. 333, 114 S.E.2d 70 (1960).

Statute of frauds applies to option to purchase. — Difference between option and contract for sale and purchase of land is not such as to remove option agreement from operation of statute of frauds. *Neely v. Sheppard*, 185 Ga. 771, 196 S.E. 452 (1938).

While option to purchase land may not pass any interest in land before exercise of option, statute of frauds applies to such transactions. *Neely v. Sheppard*, 185 Ga. 771, 196 S.E. 452 (1938).

Agreement to reconvey property. — When the warranty deed made no mention of any agreement to reconvey the subject property and appeared complete on the deed's face, making it unnecessary for the court to look

to other evidence to clarify any ambiguities, the statute of frauds prevented the debtor from asserting that there existed at the time of the conveyance an oral agreement to reconvey the property. *SMS Inv. Assocs. v. Peachtree City*, 180 Bankr. 694 (Bankr. N.D. Ga. 1995).

Letter by developer's representative stating that upon payment of the money, the city would deed the area in question back to the developer was not a writing sufficient to meet the requirements of the statute of frauds since neither the city nor any person lawfully authorized by the city signed the letter. *SMS Inv. Assocs. v. Peachtree City*, 180 Bankr. 694 (Bankr. N.D. Ga. 1995).

Option to purchase rented premises is contract required by statute to be written. *Robinson v. Odom*, 35 Ga. App. 262, 133 S.E. 53 (1926).

Partition agreement falls within statute of frauds and must be in writing. *Thurmond v. Thurmond*, 179 Ga. 831, 177 S.E. 719 (1934).

Lease contracts conveying estates for years fall within statute of frauds. *Newton v. Allen*, 220 Ga. 681, 141 S.E.2d 417 (1965).

Lease of real estate for period of seven years falls within statute of frauds. *Baxley Hdwe. Co. v. Morris*, 165 Ga. 359, 140 S.E. 869 (1927), later appeal, 168 Ga. 769, 149 S.E. 35 (1929).

Option to renew lease. — Purported lease renewal was void and inoperative when there was no writing as required by the statute of frauds to authorize the exercise of an option to renew the lease for another three-year term. *Brookhill Mgt. Corp. v. Shah*, 197 Ga. App. 305, 398 S.E.2d 290 (1990).

Purchase agreement for an apartment building, one of eight apartment buildings on a plat, which did not describe the building which was to be bought and was so vague that nothing would have prevented buyers from selling the same building twice, was insufficiently descriptive and too vague to satisfy the statute of frauds. *Schirmer v. Amoroso*, 209 Ga. App. 682, 434 S.E.2d 80 (1993).

Agreement between spouses as to testamentary disposition of separate estates in realty. — Husband and wife, each of them owning separate estates in realty, may not enter into oral agreement whereby they relinquish their right to inherit from each

Contracts Transferring Interests in Land (Cont'd)

4. Application (Cont'd)

other, upon consideration that heirs of each will take their respective estates and that neither of them will execute a will directing disposition of their estates. Such a contract is within statute of frauds and is executory and testamentary in character. *Griffin v. Driver*, 202 Ga. 111, 42 S.E.2d 368 (1947).

Contract to adopt child and leave one-half of estate to child comes clearly within statute. *Savannah Bank & Trust Co. v. Wolff*, 191 Ga. 111, 11 S.E.2d 766 (1940).

Promise to take care of decedent's family. — Woman's naked promise to take care of decedent's wife and daughter, without actual performance, was insufficient to permit enforcement of decedent's oral promise to make a will devising land. *Martin v. Silvey*, 200 Ga. App. 127, 407 S.E.2d 97 (1991).

Contract of sale of growing trees concerns interest in realty, and under the statute of frauds must be in writing. *Corbin v. Durden*, 126 Ga. 429, 55 S.E. 30 (1906); *Baucom v. Pioneer Land Co.*, 148 Ga. 633, 97 S.E. 671 (1918).

Until severed from realty, timber is part thereof and falls within provisions of statute of frauds. *Langdale Co. v. Day*, 115 Ga. App. 30, 153 S.E.2d 671 (1967).

Contract for sale of standing timber to remain standing for fixed period. — Contract for sale of standing timber is one involving interest in land within meaning of paragraph (4) of the statute of frauds when such timber is to remain standing for fixed period of time. *Seabolt v. Christian*, 82 Ga. App. 167, 60 S.E.2d 540 (1950).

Contract for sale of standing timber to be cut without appreciable delay. — Contract for sale of standing timber which is to be cut and sawed into lumber without appreciable delay after sale does not involve interest in land within meaning of paragraph (4) of the statute of frauds. *Seabolt v. Christian*, 82 Ga. App. 167, 60 S.E.2d 540 (1950).

Contract to resell land to original seller falls within paragraph (4) of the statute of frauds. *Amerson v. Cox*, 35 Ga. App. 83, 132 S.E. 105 (1926).

Sale of land by auctioneer is within statute of frauds. *Peek v. Muse*, 59 Ga. App. 533, 1 S.E.2d 613 (1939); *Pierce v. Rush*, 210 Ga.

718, 82 S.E.2d 649 (1954).

Contract for sale of possession and improvements is within statute of frauds because possession is considered an interest in land; it is prima facie evidence of title, and sale of land with improvements thereon is within statute. *McKee v. Cartledge*, 79 Ga. App. 629, 54 S.E.2d 665 (1949).

Contract signed by one of two sellers. — When the written contract contained no condition that the contract must be signed by both sellers nor was there any indication on the contract that the parties contemplated that the other seller would sign, and the contract was initialed throughout by one of the sellers and signed by one as seller, the contract complied with the requirements of O.C.G.A. § 13-5-30. *Johnson v. Sackett*, 256 Ga. 552, 353 S.E.2d 326 (1986).

Contract for improvement of realty not within statute of frauds. *Phoenix Air Conditioning Co. v. Towne House Developers, Inc.*, 124 Ga. App. 782, 186 S.E.2d 429 (1971).

Promise or agreement to pay for improvements made on land is not within paragraph (4) of statute of frauds. *Jenkins v. Brown*, 48 Ga. App. 480, 173 S.E. 257 (1934).

Restrictive covenant to build fence. — Statute of frauds did not preclude imposing liability on successor landowners for breach of a restrictive covenant in a contract to build a fence because, as buyers, they were charged with notice of the covenant in a recorded agreement, which required them to build a fence upon development of the property. *Lesser v. Doughtie*, 300 Ga. App. 805, 686 S.E.2d 416 (2009).

Listing contract with realty broker. — Contract listing real property for sale with broker not subject to same rules as contract for purchase and sale of real property. It does not come within statute of frauds so as to require that the contract be in writing. *Orr v. Smith*, 102 Ga. App. 40, 115 S.E.2d 601 (1960).

Contract between broker and owner of real estate. — Oral contract between broker and owner of real estate sold, upon which suit for commissions is based, is not within paragraph (4) of the statute of frauds. *Lingo v. Blair*, 32 Ga. App. 111, 122 S.E. 802 (1924).

Brokerage contract for sale of lands, containing no power on part of broker to execute conveyance of lands, is contract for services and does not come within statute of

frauds as constituting contract for sale of lands. *Cantrell v. Johnston*, 74 Ga. App. 74, 38 S.E.2d 893 (1946).

Agreement whereby real estate broker shall secure sale upon specified terms. — Agreement, express or implied, for real estate broker to induce owner of realty to sell upon specified terms does not come within provisions of statute of frauds. *Pierce v. Deich*, 81 Ga. App. 717, 59 S.E.2d 755 (1950).

Oral contract for rent, accompanied by change in possession and payment of rent, not within statute of frauds. *Richards v. Plaza Hotel, Inc.*, 171 Ga. 827, 156 S.E. 809 (1931).

Purported oral agreement regarding termination of lease. — Purported oral agreement whereby a commercial lease was to be terminated by the lessee's act of simply vacating the premises was not enforceable under the statute of frauds. *Johnson v. Ashkouti*, 193 Ga. App. 810, 389 S.E.2d 27 (1989); *Digby's, Inc. v. Emory Univ.*, 227 Ga. App. 176, 489 S.E.2d 81 (1997).

Joint venture agreements. — Although partnership or joint venture agreements need not be in writing as a general matter, the fact that promises covered by the statute of frauds are made in the context of a partnership or joint venture agreement does not render O.C.G.A. § 13-5-30 inapplicable. *East Piedmont 120 Assocs. v. Sheppard*, 209 Ga. App. 664, 434 S.E.2d 101 (1993).

Evidentiary and cautionary purpose of O.C.G.A. § 13-5-30 are implicated when a promise to convey an interest in land is made in the context of a partnership or joint venture agreement just as those purposes are when such a promise is made in any other context. *East Piedmont 120 Assocs. v. Sheppard*, 209 Ga. App. 664, 434 S.E.2d 101 (1993).

Agreement to enter joint adventure to deal in lands. — Agreement to enter joint adventure for purpose of dealing in lands into which one is to put property and another one's service, and which does not contemplate transfer of title is not within statute, notwithstanding it may be intended that as incident of enterprise one party may take title to lands for benefit of both. *Manget v. Carlton*, 34 Ga. App. 556, 130 S.E. 604 (1925).

Agreement to take proceeds from sale of realty in satisfaction of debt. — When an

agreement was not a contract for or concerning the sale of real property but was an oral agreement that plaintiff would accept the proceeds of such a sale as full satisfaction of a certain indebtedness, such agreement was not within the statute of frauds. *Slappey Bldrs., Inc. v. FDIC*, 157 Ga. App. 343, 277 S.E.2d 328 (1981).

Widow's election to take real estate. — A widow's election to take a child's share of her husband's real estate in lieu of dower does not have to be written. Her election is not a contract, and the statute of frauds does not apply. *Chapman v. McClelland*, 248 Ga. 725, 286 S.E.2d 290 (1982).

Alleged oral subordination agreements between two mortgagees were not within statute of frauds. *North Ga. Sav. & Loan Ass'n v. Corbeil*, 177 Ga. App. 523, 339 S.E.2d 779 (1986).

Relevant date for reinstating mortgage under bankruptcy law after foreclosure sale. — When debtor argued that because a foreclosure sale of real property was subject to the statute of frauds in subsection (4), the debtor's ability to cure and reinstate a mortgage under bankruptcy law, 11 U.S.C. § 1322(b)(5), did not terminate until the foreclosure sale was completed by delivery of a deed under power of sale, it was held that the relevant date is the date on which the foreclosure sale occurs rather than the date on which the deed of sale under state law is delivered. *Pearson v. Fleet Fin. Ctr., Inc.*, 75 Bankr. 254 (Bankr. N.D. Ga. 1985).

Failure to agree on specifics of payment. — So-called agreement for the sale of a building did not provide for every essential element of the contract, for no agreement was reached on the specifics of payment of that portion of the sale price not paid at closing. *Zappa v. Basden*, 188 Ga. App. 472, 373 S.E.2d 246 (1988).

No breach of promise to pay additional sums for property. — Property seller's claim that the buyers breached their promise to pay additional sums for the property after a closing, a promise allegedly contained within a promissory note failed under the statute of frauds, O.C.G.A. § 13-5-30(4) as the note did not refer to the property or the real estate transaction. *Han v. Han*, 295 Ga. App. 1, 670 S.E.2d 842 (2008).

Alleged oral agreement did not operate as a parol variance or modification of a written

Contracts Transferring Interests in Land (Cont'd)

4. Application (Cont'd)

sales contract since there was a merger clause and the seller elected not to rescind the contract. *Mitchell v. Head*, 195 Ga. App. 427, 394 S.E.2d 114 (1990).

Reliance on oral agreement not established. — Written contract for construction and sale of house barred builder's claim for breach of alleged oral contract where the builder failed to establish detrimental reliance on the oral agreement, the contract contained a merger clause stating that any subsequent agreement had to be in writing, signed by all the parties, and a second written contract, also containing a merger clause, was executed by the parties. *Chip Kassinger, Inc. v. Steimer*, 205 Ga. App. 349, 422 S.E.2d 241 (1992).

Substantial performance and expenditures removed application of statute of frauds to land development. — In a suit brought by a golf course development company against two other members of a limited liability company and a housing authority, the trial court erred by dismissing the golf course development company's oral breach of contract claim for the development of a golf course for a public housing project as, although a writing was required since the alleged contract involved real estate, the golf course development company sufficiently pled substantial performance, expenditures, and reliance to avoid application of the statute of frauds to the claim. *Perry Golf Course Dev., LLC v. Hous. Auth.*, 294 Ga. App. 387, 670 S.E.2d 171 (2008).

Agreements Not to Be Performed Within One Year

Contract to begin in future and continue for one year from commencement must be written unless facts and circumstances are such as to make it an exception. *Norman v. Nash*, 102 Ga. App. 508, 116 S.E.2d 624 (1960).

Contract of employment for period of one year, to begin at future date, is subject to statute of frauds and required to be in writing. *White v. Simplex Radio Co.*, 188 Ga. 412, 3 S.E.2d 890 (1939).

Offer of employment to commence on January 22, 1979, and to run for one year

made on January 14, 1979, and accepted on January 15, was a contract that was not to be performed within one year from making and fell within statute of frauds. *Slater v. Jackson*, 163 Ga. App. 342, 294 S.E.2d 557 (1982); *Ikemiya v. Shibamota Am., Inc.*, 213 Ga. App. 271, 444 S.E.2d 351 (1994).

Insofar as a parol agreement for employment was one to begin at a future date and not in the present, and to continue thereafter for one year, it was not to be performed within one year and thus ran afoul of the statute of frauds. *Gatins v. NCR Corp.*, 180 Ga. App. 595, 349 S.E.2d 818 (1986).

Verbal contract for services, to begin in future and continue for a year, is void under statute of frauds. *Hudgins v. State*, 126 Ga. 639, 55 S.E. 492 (1906); *Bentley v. Smith*, 3 Ga. App. 242, 59 S.E. 720 (1907); *Lewis v. Southern Realty Inv. Corp.*, 42 Ga. App. 171, 155 S.E. 369 (1930); *Katz v. Custom Spray Prods., Inc.*, 168 Ga. App. 451, 309 S.E.2d 663 (1983).

Oral contract of employment unenforceable. — Oral contract of employment to commence at specified date in future and to continue for one year from that date is unenforceable under statute of frauds unless taken out of statute as provided by law. *Morris v. Virginia-Carolina Chem. Corp.*, 48 Ga. App. 702, 173 S.E. 486 (1934).

As a general rule, oral contract of employment at specified monthly salary, to commence at future date and continue for period of a year, is void under statute of frauds, unless taken out of statute as provided by law. *Alexander-Seewald Co. v. Maret*, 53 Ga. App. 314, 185 S.E. 589 (1936), disapproved sub nom. *Hudson v. Venture Indus., Inc.*, 243 Ga. 116, 252 S.E.2d 606 (1979).

Supply contract proposed in a real estate sales contract, whereby the buyer would purchase gasoline from the seller for 10 years was not enforceable because it was not signed by either party or by anyone acting on behalf of either party. *Smith Serv. Oil Co. v. Parker*, 250 Ga. App. 270, 549 S.E.2d 485 (2001).

Contract establishing one-year landlord/tenant relationship, although made before year begins, may be in parol. *Butler v. Godley*, 51 Ga. App. 784, 181 S.E. 494 (1935).

Parol contract creating relation of landlord and tenant for period of a year is valid

although contract does not begin to operate in praesenti. *Roland v. Floyd*, 53 Ga. App. 282, 185 S.E. 580 (1936).

Possibility of performance within one year dispenses with necessity that contract be in writing to be enforced under paragraph (5) of the statute of frauds. *Klag v. Home Ins. Co.*, 116 Ga. App. 678, 158 S.E.2d 444 (1967).

Contract for a writing which might be executed in a year is not within the statute of frauds. *Henderson v. Touchstone*, 22 Ga. 1 (1857).

Paragraph (5) of O.C.G.A. § 13-5-30 is inapplicable when defendant was to repay the loan when defendant was able and there was no evidence that the loan could not have been paid back within one year. *Mills v. Barton*, 205 Ga. App. 413, 422 S.E.2d 269 (1992).

An employment agreement between corporations and a former president which did not state the duration of the agreement did not fall within the statute of frauds. O.C.G.A. § 13-5-30(5) provides that any agreement that is not to be performed within one year from the making thereof has to be in writing and signed by the party to be charged in order to be binding on the promisor, and a contract of employment of indefinite duration does not fall within the statute of frauds because at the contract's inception, a contract of employment for an indefinite duration was an agreement capable of being performed within one year, and the possibility of performance of the contract within one year was sufficient to remove the contract from the statute of frauds. *Parker v. Crider Poultry Inc.*, 275 Ga. 361, 565 S.E.2d 797 (2002).

Performance contingent upon death of party. — Because an agreement could have been fully performed if a party died within the one year period, such possibility was sufficient to remove the agreement from operation of the statute. *Bibb Distrib. Co. v. Stewart*, 238 Ga. App. 650, 519 S.E.2d 455 (1999).

Statute inapplicable to agreement for indefinite period, terminable at will of either party. — Parol agreement to begin in praesenti for indefinite period, terminable at will, is not inhibited by statute of frauds, and when employee suing on contract for amount of compensation due the employee,

based upon services actually performed by the employee up to time of the employee's discharge, and not for damages or for compensation for services not performed or for any breach of contract, it is not necessary that the employee sue in quantum meruit for services actually performed. *Brazzeal v. Commercial Cas. Ins. Co.*, 51 Ga. App. 471, 180 S.E. 853 (1935).

Tenancy at will created. — When an oral lease was for a definite term and the duration of the lease was to exceed one year, the agreement created a tenancy at will by operation of law. *Travel Centre, Ltd. v. Starr-Mathews Agency, Inc.*, 179 Ga. App. 406, 346 S.E.2d 840 (1986).

Statute is inapplicable to agreement for indefinite period terminable at will or when there is a possibility of performance in one year. *Vitner v. Funk*, 182 Ga. App. 39, 354 S.E.2d 666 (1987); *Blum v. Air Ctr. Gwinnett, Inc.*, 201 Ga. App. 313, 411 S.E.2d 88 (1991).

An oral employment contract terminable at will to begin in praesenti is not prohibited by the statute of frauds. *Wood v. Dan P. Holl & Co.*, 169 Ga. App. 839, 315 S.E.2d 51 (1984).

Permanent employment, employment for life, or employment until retirement involve indefinite duration. — In absence of controlling contract, permanent employment, employment for life, or employment until retirement is employment for indefinite period, terminable at will of either party, which gives rise to no cause of action against employer for alleged wrongful termination. *American Std., Inc. v. Jessee*, 150 Ga. App. 663, 258 S.E.2d 240 (1979).

An oral employment contract for a definite term not to be performed within one year was within the statute of frauds. *Morgan v. American Ins. Managers, Inc.*, 239 Ga. App. 635, 521 S.E.2d 676 (1999); *Ford Clinic, Inc. v. Potter*, 246 Ga. App. 320, 540 S.E.2d 275 (2000).

Oral contract to be performed within six to 15 months. — Trial court erred in granting summary judgment to the option holder on the one option grantor's breach of contract counterclaim; the trial court found that the contract at issue, an oral contract, violated O.C.G.A. § 13-5-30(5) because it could not be performed within one year and, thus, had to be in writing, but the evidence showed that was not the case because the

Agreements Not to Be Performed Within One Year (Cont'd)

contract could be performed within six months to 15 months, which meant that the contract did not have to be in writing since the contract could conceivably be performed within one year. *Henry v. Blankenship*, 275 Ga. App. 658, 621 S.E.2d 601 (2005).

Paragraph (5) of statute of frauds applicable where time for performance dependent on contingency that cannot happen in a year. — When time when contract is to be performed depends on some contingency, it is within this provision, provided, contingency cannot happen within a year; but if it may happen, it is not within statute, whether it actually does happen or not. *Burney v. Ball*, 24 Ga. 505 (1858); *Brown v. Little*, 217 Ga. App. 632, 458 S.E.2d 669 (1995).

Oral agreement to continue from year to year until terminated falls within paragraph (5) of statute of frauds. — Oral contract of employment which provides that contract shall continue from year to year unless notice of intention to terminate for any succeeding year be given by either party 90 days prior to December 31 of preceding year is within paragraph (5) of the statute of frauds so that such employee cannot maintain action for breach. *White v. Simplex Radio Co.*, 188 Ga. 412, 3 S.E.2d 890 (1939); *White v. Simplex Radio Co.*, 61 Ga. App. 157, 5 S.E.2d 922 (1939).

Oral agreement providing that plaintiff is to have exclusive sale of defendant's products in designated territory and that contract is to continue from year to year until and unless the contract is terminated by either party on or before July 1st of calendar year next preceding business season for sale of defendant's products, falls within paragraph (5) of the statute of frauds. *Yarborough v. Hi-Flier Mfg. Co.*, 63 Ga. App. 725, 12 S.E.2d 133 (1940).

Letter from employer stating increasing levels of salary and opportunities for bonus for each of three years, but not otherwise addressing duration of term of plaintiff's anticipated employment, was insufficient to satisfy requirement that contract of employment for term beyond one year be in writing, nor did plaintiff's terminating prior employment, moving to another state and

working for the defendant for two years indicate such partial performance as would remove the case from the statute of frauds. *Wheeling v. Ring Radio Co.*, 213 Ga. App. 210, 444 S.E.2d 144 (1994).

Letter from an employer addressed to "Whom It May Concern," not signed or otherwise concurred in by plaintiff, and not indicating the duties to be performed by plaintiff, the place where the duties were to be executed, any benefits in addition to salary and commission, or a basis upon which the agreement could be terminated, was insufficient to constitute a written contract. *Zager v. Brown*, 242 Ga. App. 427, 530 S.E.2d 50 (2000).

Letters as to long-term employment sufficiently specific to comply with statute of frauds. — See *Henson v. American Family Corp.*, 171 Ga. App. 724, 321 S.E.2d 205 (1984).

Documents which merely set forth certain policies and information concerning employment can in no way be interpreted as parts of a written contract governing the length of employment. *Nelson v. M & M Prods. Co.*, 168 Ga. App. 280, 308 S.E.2d 607 (1983).

Employment contract for year, to begin in presenti, is not within paragraph (5) of statute of frauds. *Hudgins v. State*, 126 Ga. 639, 55 S.E. 492 (1906).

Employment contract for more than one year, not signed by either party, violates statute. — When proposed contract of employment was not signed by either party, and cannot be performed within one year, contract's enforcement is barred by statute of frauds. *Southeastern Waste Treatment, Inc. v. Chem-Nuclear Sys.*, 506 F. Supp. 944 (N.D. Ga. 1980).

Presumption as to one-year employment contract which continues after end of year. — When contract of employment is made for year's service, and at end of year nothing is said or done by either party to terminate the contract, but on contrary employee is allowed to continue on without objection, presumption is that both parties have assented to the contract continuing in force for another year, and oral agreement for another year's employment is therefore not within statute. *White v. Simplex Radio Co.*, 61 Ga. App. 157, 5 S.E.2d 922 (1939).

Commencing performance of employment contract within paragraph (5) of stat-

ute of frauds does not remove contract from statute. — Fact that person who has contracted to serve another for one year, to commence at future day, enters upon performance of the person's contract does not take case out of statute of frauds. Servant may quit at any time and recover value of services in quantum meruit, and master may discharge servant at any time without incurring liability therefor. *Norman v. Nash*, 102 Ga. App. 508, 116 S.E.2d 624 (1960).

Mere fact that person who has contracted to serve another for one year, to commence at future day, enters upon performance of the person's contract, does not remove case from statute. *Alexander-Seewald Co. v. Marett*, 53 Ga. App. 314, 185 S.E. 589 (1936), disapproved sub nom. *Hudson v. Venture Indus., Inc.*, 243 Ga. 116, 252 S.E.2d 606 (1979).

Five-year, oral employment contract not removed from statute by performance for four months. — Oral contract for period of five years, whereby plaintiff was employed as insurance agent of the defendant, to solicit policies of insurance and collect premiums thereon, was not removed from operation of statute of frauds merely because person so employed entered on performance of part of contract for period of three or four months. *Dameron v. Liberty Nat'l Life Ins. Co.*, 56 Ga. App. 257, 192 S.E. 446 (1937).

Contracts involving estates for years are within statute and must be in writing to be effective. *Smith v. Top Dollar Stores, Inc.*, 129 Ga. App. 60, 198 S.E.2d 690 (1973).

Automatic renewal provision does not necessarily render lease one for more than a year. — Fact that lease provides that the lease will be automatically renewed from year to year in event tenant does not give notice required to contrary does not necessarily make it a lease for longer than one year. *Butler v. Godley*, 51 Ga. App. 784, 181 S.E. 494 (1935).

Contracts creating relation of landlord and tenant for time exceeding one year must be written. *Butler v. Godley*, 51 Ga. App. 784, 181 S.E. 494 (1935).

Contract purporting to create relation of landlord and tenant for longer time than one year is required by statute of frauds to be in writing. *Cashin v. Markwalter*, 208 Ga. 444, 67 S.E.2d 226 (1951); *Smith v. Helms*, 140 Ga. App. 267, 231 S.E.2d 778 (1976); *White*

v. Orton Indus., Inc., 224 Ga. App. 342, 480 S.E.2d 620 (1997).

Statute inapplicable to contract creating relation of landlord and tenant for less than one year. — Since enactment of former Code 1933, § 61-102 (see O.C.G.A. § 44-7-2) provisions of statute of frauds did not apply to contract creating relation of landlord and tenant, where made not to exceed one year. *Butler v. Godley*, 51 Ga. App. 784, 181 S.E. 494 (1935).

Property management company could not be held liable for breach of a lease for a period of more than one year, under O.C.G.A. § 13-5-30(5), when the company did not sign the lease, and was not a party to the lease. *O'Connell v. Cora Bett Realty, Inc.*, 254 Ga. App. 311, 563 S.E.2d 167 (2002).

Written offer contemplating written acceptance. — Tenant's offer by letter to renew two-year lease, standing alone, was not sufficient writing to satisfy statute of frauds where the offer contemplated a written acceptance by the lessor. *Valiant Steel & Equip., Inc. v. Roadway Express, Inc.*, 205 Ga. App. 237, 421 S.E.2d 773 (1992).

Applicability of custom to supply deficiency in writing as to duration. — Where plaintiff relies upon specific contract of employment for one year and does not rely upon any custom of trade that contracts of this character are made for period of one year, such custom cannot be read into contract so as to supply any deficiency in written memorandum to show period of term of contract. *Morris v. Virginia-Carolina Chem. Corp.*, 48 Ga. App. 702, 173 S.E. 486 (1934).

Verbal warranties by vendor guaranteeing the furnace, vacuum system, and oven for one year are unenforceable under the statute of frauds. *Grant v. Aulicky*, 161 Ga. App. 817, 290 S.E.2d 107 (1982).

Obligation to provide insurance coverage. — Because employer's obligation to provide insurance coverage could have been performed within one year, the statute of frauds did not bar enforcement of the obligation, even though it was not reduced to writing. *Vandiver v. Greensboro Lumber Co.*, 148 Bankr. 973 (Bankr. M.D. Ga. 1992).

Contract for sale of standing timber to be cut without appreciable delay. — Contract for sale of standing timber which is to be cut and sawed into lumber without appreciable delay after sale does not involve interest in

Agreements Not to Be Performed Within One Year (Cont'd)

land within meaning of paragraph (4) of the statute of frauds. *Seabolt v. Christian*, 82 Ga. App. 167, 60 S.E.2d 540 (1950).

Promises to Revive Debts Barred by Statutes of Limitations

New promise or acknowledgment as to debt barred by statute of limitations must identify debt or afford means therefor. *Williams v. American Sur. Co.*, 86 Ga. App. 533, 71 S.E.2d 714 (1952).

Promise containing key by which debt can be identified with aid of extrinsic evidence suffices. — While new promise or acknowledgment must itself identify debt to be revived or afford sufficient means of identification, if it supplies key by which debt may be identified with aid of extrinsic evidence, it is in this respect sufficient compliance with statute of frauds. *National City Bank v. First Nat'l Bank*, 193 Ga. 477, 19 S.E.2d 19 (1942).

Two essentials for written acknowledgment to operate as new promise to pay debt. — While written acknowledgment of existing liability is equivalent to new promise to pay, and, like such promise, will renew right of action already barred by statute of limitations, or create new point of departure for running of statute, such acknowledgment must meet two requirements: that it shall in legal effect have been made by debtor to creditor, and that it shall sufficiently identify debt or afford means of identification with reasonable certainty. *Williams v. American Sur. Co.*, 86 Ga. App. 533, 71 S.E.2d 714 (1952).

Writing designed to toll statute of limitations must connect debt with promise and sufficiently identify debt. *Duke v. Lynch*, 56 Ga. App. 331, 192 S.E. 535 (1937).

Promise within paragraph (6) of statute of frauds may be ascertained from separate writings written over considerable period of time. — When promise is evidenced by letters, all letters relating to debt, although separated by considerable period of time, may be taken into consideration in determining whether new promise was made and whether that promise was unconditional. *Williams v. American Sur. Co.*, 86 Ga. App. 533, 71 S.E.2d 714 (1952).

Nature of writings which will create new promise to pay debt barred by statute of limitations. — When letters acknowledged to have been written by defendant are relied on to create new promise to pay existing open account which on the letters face is barred by statute of limitations, such letters must with reasonable certainty connect debt with promise, and sufficiently identify debt. By the defendant's words, the defendant must acknowledge the particular debt as an existing liability in order to remove bar of statute. *Williams v. American Sur. Co.*, 86 Ga. App. 533, 71 S.E.2d 714 (1952).

Evidence aliunde admissible to prove letters show acknowledgment of debt barred by statute of limitations. *Williams v. American Sur. Co.*, 86 Ga. App. 533, 71 S.E.2d 714 (1952).

Statute of frauds barred oral assumption of debt. — Summary judgment in favor of a psychiatrist in a consultant's breach of an oral contract claim was proper as the oral assumption by the psychiatrist of the debts of the medical practice that the psychiatrist purchased, including the consultant's fees, was barred by the statute of frauds, O.C.G.A. § 13-5-30(2), because the contract was not in writing; further, as it was conceded that the agreement was secondary in nature and not an original undertaking, claims that the contract was established pursuant to O.C.G.A. § 24-4-24 lacked merit. *Grumet v. Bunt*, 279 Ga. App. 728, 632 S.E.2d 486 (2006).

Commitment to Lend Money

Requirement of a signed writing for a "commitment to lend money" includes promises to refinance existing debts. *Stedry v. Summit Nat'l Bank*, 227 Ga. App. 511, 489 S.E.2d 862 (1997).

Document referencing oral commitment. — Documents containing a reference to an oral commitment to make a loan and to the terms of a proposed loan, without any written commitment to make a loan, did not satisfy the requirements of O.C.G.A. § 13-5-30. *Kamat v. Allatoona Fed. Sav. Bank*, 231 Ga. App. 259, 498 S.E.2d 152 (1998).

Additional loan. — Enforcement of alleged oral agreement to extend an additional loan to borrower to complete construction of expanded buildings was barred by paragraph (7) of O.C.G.A. § 13-5-30.

Bridges v. Reliance Trust Co., 205 Ga. App. 400, 422 S.E.2d 277 (1992).

Future operating loans. — Alleged oral agreements concerning future operating loans were barred by paragraph (7) of O.C.G.A. § 13-5-30. *Moore v. Bank of Fitzgerald*, 225 Ga. App. 122, 483 S.E.2d 135 (1997).

Oral discussion to lend money. — Discussion between a lender and a potential debtor as to the possibility of a future loan did not raise a question of any validity or liability under the statute of frauds, O.C.G.A. § 13-5-30. *Northwest Carpets, Inc. v. First Nat'l Bank*, 280 Ga. 535, 630 S.E.2d 407 (2006).

Agreements Involving Insurance

Common-law rule that insurance contracts need not be written, not in force in Georgia.

— Common-law rule that contracts of insurance need not be in writing in order to be valid prevails in most if not all of states of the union except Georgia. *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136, answer conformed to, 47 Ga. App. 665, 171 S.E. 143 (1933).

Suit cannot be maintained upon parol renewal of insurance policy. *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136, answer conformed to, 47 Ga. App. 665, 171 S.E. 143 (1933).

Insurance policies issued on cash basis, as well as on credit basis, must be written. — Rule that policy of insurance shall be in writing and signed by insurer applies to contracts issued upon cash basis as well as to those issued upon credit basis. *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136, answer conformed to, 47 Ga. App. 665, 171 S.E. 143 (1933).

It does not follow from former Civil Code 1910, §§ 2470 and 2499 that a policy of fidelity insurance must be written. *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136, answer conformed to, 47 Ga. App. 665, 171 S.E. 143 (1933).

Policy of fidelity insurance, like contract of indemnity, need not be written. — Policy of fidelity insurance is in effect a contract of indemnity; and as such is not within the statute of frauds and need not be in writing. *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136, answer conformed to, 47 Ga. App. 665, 171 S.E. 143 (1933).

Lack of essential terms. — Merger clause in an umbrella insurance policy containing a non-renewal clause extinguished the insurer's earlier letter stating that the policy would be renewed for three years, and even if the letter was not extinguished, it was unenforceable under the statute of frauds, O.C.G.A. § 13-5-30(5), because, due to the three-year term, it could not be performed within one year, and further, the letter did not contain the essential terms required under O.C.G.A. § 13-5-30(5), as the letter did not specify the consideration paid for the three-year term, which had to be separate and apart from the policy premium. *Werner Enters. v. Markel Am. Ins. Co.*, 448 F. Supp. 2d 1375 (N.D. Ga. 2006).

Insurer's promise to pay claim against insured need not be written. — When insurer agrees to settle the insurer's potential liability as well as potential liability of insured, promise by insurer to settle or pay claim against insured is original undertaking and need not be in writing. *Klag v. Home Ins. Co.*, 116 Ga. App. 678, 158 S.E.2d 444 (1967).

Contract between injured party and insurer, settling alleged claim, need not be written. — Even though it is executory, parol contract between injured party and liability insurance carrier of another settling alleged claim is not contract by insurer to answer for debt, default, or miscarriage of another nor is it a contract not to be performed within one year of making thereof, though no express time limit is stated for contract's consummation, and therefore contract need not be in writing. *Klag v. Home Ins. Co.*, 116 Ga. App. 678, 158 S.E.2d 444 (1967).

Effect of Full or Part Performance

Editor's Note. — Additional annotations regarding part performance as removing agreement from operation of statute of frauds appear under O.C.G.A. § 13-5-31, which section specifically addresses that issue.

Must be certain and definite. — Parol contract sought to be enforced based on part performance must be certain and definite in all respects. *Lemming v. Morgan*, 228 Ga. App. 763, 492 S.E.2d 742 (1997).

Removal of revocable, oral agreement from statute by execution. — Oral agreement or license, revocable on death of licen-

Effect of Full or Part**Performance (Cont'd)**

sor, is taken out of statute of frauds and becomes irrevocable where party executes agreement or license and incurs expense in doing so. *Smith v. Fischer*, 59 Ga. App. 791, 1 S.E.2d 684 (1939).

Full performance under subsequent oral agreement as defense to suit on original written contract. — If parties have abandoned terms of original contract and fully performed oral agreement subsequently entered into, such agreement and performance may be pled and proved in defense to suit on original contract. *Planters Cotton-Oil Co. v. Bell*, 54 Ga. App. 433, 188 S.E. 41 (1936).

Full performance on one side removes oral agreement to deliver deed from statute. — Even though promise to perform certain duties in exchange for delivery of deed is oral, where there has been full performance on one side (payment of purchase price and acceptance of possession and deed), transaction is outside statute of frauds. *Helmer v. Hegidio*, 133 Ga. App. 168, 210 S.E.2d 332 (1974).

Payment in full on oral contract for sale of land. — In a suit for specific performance brought by a plaintiff seeking to enforce an alleged oral contract to sell real property, the trial court erred in granting summary judgment to the defendant based on the statute of frauds preventing recovery to the plaintiff; the plaintiff had presented evidence establishing the existence of an oral contract for the sale of the property and that it was excepted from the statute of frauds based on the plaintiff's performance of paying for the property in full, and thus, issues of fact remained as to whether defendant's decedent had accepted performance through payments received by a sibling and whether, in light of the plaintiff's previous tenancy, the plaintiff's performance was inconsistent with the lack of a contract to sell the property. *Edwards v. Sewell*, 289 Ga. App. 128, 656 S.E.2d 246 (2008).

Performance by one in accordance with contract, accepted by other party, removes contract from statute. *Blanton v. Moseley*, 133 Ga. App. 144, 210 S.E.2d 368 (1974).

In a dispute over installment contract to purchase land, because evidence sufficiently

showed that a buyer partially performed a subsequent oral agreement that was not barred by merger clause contained in the contract, and the seller accepted the benefit of such performance, summary judgment to the seller was erroneous; moreover, given that jury questions as to part performance of the oral agreement remained, order denying the buyer's partial summary judgment motion was upheld. *Hernandez v. Carnes*, 290 Ga. App. 730, 659 S.E.2d 925 (2008).

Acts preparatory or preliminary to performance insufficient as part performance to circumvent paragraph (5) of statute of frauds. — Acts which are merely preparatory or preliminary to performance of contract terminable at will of either party are not sufficient as part performance to circumvent paragraph (5) of statute of frauds. *Utica Tool Co. v. Mitchell*, 135 Ga. App. 635, 218 S.E.2d 650 (1975).

Former employer's claim that a former employee breached an oral nonsolicitation agreement that was part of the employee's promotion was barred by the statute of frauds in O.C.G.A. § 13-5-30 because the nonsolicitation agreement could not be performed within one year from the agreement's making, as the agreement would not become effective until a date after the making of the contract, to wit, the date of the employee's termination, and then would run for one year from that date; further, the employee's actions in accepting the promotion and working in the new position did not constitute such part performance as would remove the oral agreement from the statute of frauds pursuant to O.C.G.A. § 13-5-31(2), (3) because mere entry into employment and performance of services for part of the term was not inconsistent with employment terminable at will without a contract, and thus, the part performance was not consistent with the existence of a contract. *Outsourcing P'ship, LLC v. Vinson*, No. 1:06-CV-0508-MHS, 2006 U.S. Dist. LEXIS 54930 (N.D. Ga. Aug. 8, 2006).

Nature of part performance required to obviate statute. — Part performance is something substantial and essential to contract which results in benefit to one party and detriment to the other. It is not every part performance of oral contract that will take it outside statute of frauds. *Norman v. Nash*, 102 Ga. App. 508, 116 S.E.2d 624 (1960).

Part performance required to obviate statute of frauds must be substantial and essential to contract, which results in benefit to one party and detriment to other. *Utica Tool Co. v. Mitchell*, 135 Ga. App. 635, 218 S.E.2d 650 (1975); *Metzgar v. Reserve Ins. Co.*, 149 Ga. App. 404, 254 S.E.2d 517 (1979).

To constitute part performance in order to remove an agreement from the writing requirement of the statute of frauds, the partial performance must be substantial and essential to the contract. *Richard A. Naso & Assocs. v. Diffusion*, 194 Ga. App. 201, 390 S.E.2d 106 (1990).

Whether part performance is such as to remove contract from statute is question of fact. — When it is contended that petition shows such part performance of contract on part of plaintiff as to render it fraud on part of defendants to refuse compliance with its terms, what amounts to such part performance is question of fact. *Norman v. Nash*, 102 Ga. App. 508, 116 S.E.2d 624 (1960).

Payment of interest insufficient to invoke part performance. — Borrower's payment of interest while waiting for the bank to refinance borrower's debt pursuant to an alleged oral promise did not invoke part performance or promissory estoppel as an exception to O.C.G.A. § 13-5-50. *Stedry v. Summit Nat'l Bank*, 227 Ga. App. 511, 489 S.E.2d 862 (1997).

Part payment of purchase money alone is insufficient part performance to remove agreement from statute. *Rush v. Autry*, 210 Ga. 732, 82 S.E.2d 866 (1954).

Part payment of purchase money, accompanied by possession, removes transaction from statute. — While payment of part of purchase money is not alone such part performance as will take case out of statute of frauds, if accompanied by possession it will amount to such part performance. *Aldridge v. Whaley*, 218 Ga. 611, 130 S.E.2d 124 (1963).

Partial payment of the purchase money accompanied by possession of the property may remove an oral contract from the operation of paragraph (4) of the statute of frauds. *Stephens v. Trotter*, 213 Ga. App. 596, 445 S.E.2d 359 (1994).

When partnership rented property from a partner, made annual payments on a loan secured by the property and paid the loan

off, the evidence was sufficient to raise a jury question as to whether the parol agreement of the parties should have been removed from the statute of frauds and whether there was partial performance accompanied by possession. *Singleton v. Terry*, 262 Ga. App. 151, 584 S.E.2d 613 (2003).

Although there was no purchase money resulting trust created under O.C.G.A. §§ 53-12-90, 53-12-91, and 53-12-92, a decedent's mother was entitled to an equity interest in property of the deceased daughter because a constructive trust was established under former O.C.G.A. § 53-12-93(a). Moreover, there was evidence of a gift of land under O.C.G.A. § 23-2-132, as an exception to the statute of frauds under O.C.G.A. § 13-5-30, in that the mother lived on the property, made valuable improvements, and paid meritorious consideration. *Oliver v. All Persons Unknown*, No. 1:07-cv-2117-ODE, 2009 U.S. Dist. LEXIS 73002 (N.D. Ga. Apr. 21, 2009).

Part performance as will obviate operation of paragraph (3) of statute of frauds. — Part performance relied on to take case out of statute of frauds must have been done strictly with reference to contract; if referable to anything else it is not available. *Taylor v. Boles*, 191 Ga. 591, 13 S.E.2d 352 (1941).

Part performance established. — Buyer orally agreed to build a bridge for the seller in exchange for 10 acres of land, and began working on the bridge before a written contract was prepared, evidence permitted the jury to find that the buyer's part performance was sufficient to avoid the Georgia statute of frauds, O.C.G.A. § 13-5-30. *Investment Props. Co. v. Watson*, 278 Ga. App. 81, 628 S.E.2d 155 (2006).

Part performance not established. — Sellers were properly granted summary judgment in an action filed by a buyer arising out of an oral land sales contract given that: (1) no evidence of the buyer's partial performance existed sufficient to remove the contract from the statute of frauds; (2) a wetlands study and interest rate negotiation were not a part of the contract; and (3) a later negotiated contract was an arm's length transaction, the price of which was negotiated at the time, and hence, did not relate to the original contract. *Payne v. Warren*, 282 Ga. App. 524, 639 S.E.2d 528 (2006).

**Effect of Full or Part
Performance (Cont'd)**

Consummation of marriage insufficient performance to remove contract from paragraph (3) of the statute of frauds. — Contract for adoption of minor child, made in consideration of marriage of father of child, is within statute of frauds, and consummation of marriage is not sufficient performance to take contract outside statute. *Fargason v. Pope*, 197 Ga. 848, 31 S.E.2d 37 (1944).

Marriage not part performance as will avoid paragraph (3) of statute of frauds. — Performance of agreement by subsequent marriage does not remove contract from operation of statute. *Taylor v. Boles*, 191 Ga. 591, 13 S.E.2d 352 (1941).

Marriage is not such part performance of parol agreement, made on consideration of marriage, as will take case out of the statute of frauds. *Guffin v. Kelly*, 191 Ga. 880, 14 S.E.2d 50 (1941).

When oral agreement to adopt child is part of oral agreement of defendant to marry plaintiff, subsequent marriage, relation, and conduct between parties is insufficient to authorize specific performance of alleged contract to adopt. *Maddox v. Maddox*, 224 Ga. 313, 161 S.E.2d 870 (1968).

Oral promise by one party to convey one-half undivided interest in property to another party upon marriage of parties is within statute of frauds and subsequent marriage is not part performance so as to make the promise enforceable. *Hayes v. Hayes*, 238 Ga. 276, 232 S.E.2d 556 (1977).

Part performance as will obviate operation of paragraph (4) of statute of frauds. — When defendant's possession was by virtue of contract of sale, and improvements of property were made with knowledge and approval of plaintiffs and in connection with contract of sale, such possession and improvements were sufficient to remove cause from prohibition of paragraph (4) of statute of frauds, and to bring it within provisions of paragraph (3) of former Code 1933, § 20-402 (see O.C.G.A. § 13-5-31). *Higdon v. Dixon*, 203 Ga. 67, 45 S.E.2d 423 (1947).

While contract involving any interest in land must be in writing to bind parties, paragraph (4) of statute of frauds does not

extend to cases when there has been such part performance of contract as would render it fraud of party refusing to comply, if court did not compel performance. *Kinney v. Youngblood*, 216 Ga. 354, 116 S.E.2d 608 (1960).

Oral contract for sale of land will be recognized and enforced when there has been such part performance of contract as would render it fraud of party refusing to comply, if court did not compel performance. *Osborne v. Martin*, 136 Ga. App. 86, 220 S.E.2d 19 (1975).

When a party orally stated to a landlord that the party had assumed a lease for the remainder of the lease's renewal term and had accepted condemnation proceeds awarded to the leasehold interest, the party's performance was sufficient to remove the contract from the statute of frauds and the resulting implied contract was sufficient to support an action on a distress warrant. *Powell v. Estate of Austin*, 218 Ga. App. 446, 462 S.E.2d 378 (1995).

Part performance as will obviate operation of paragraph (5) of statute of frauds. — Performance of services under oral contract of employment for part of term is not such part performance as renders it a fraud upon party performing for employer to refuse to comply, by discharge of that party before expiration of term. This is true, notwithstanding person performing services, after person executed contract, and began to render services under the contract, refused offer of employment elsewhere. *Morris v. Virginia-Carolina Chem. Corp.*, 48 Ga. App. 702, 173 S.E. 486 (1934).

Performance of services under oral employment contract within statute for part of term is not such part performance as renders it fraud upon party performing for employer to refuse to comply, by discharge of that party before expiration of term. *Utica Tool Co. v. Mitchell*, 135 Ga. App. 635, 218 S.E.2d 650 (1975).

When alleged agreement is oral, with no set termination date agreed upon, in order for agreement to become enforceable there must be such part performance of agreement as would render it fraud of party refusing to comply. *Moorman Ingram Tractors, Inc. v. Harrington Mfg. Co.*, 146 Ga. App. 398, 247 S.E.2d 159 (1978).

Because there was some evidence of either

full or part performance sufficient to take the oral contract out of the statute of frauds, the trial court did not err in denying defendant's motion to dismiss on basis of paragraph (5) of O.C.G.A. § 13-5-30. *Haehn v. Alheit*, 212 Ga. App. 252, 441 S.E.2d 529 (1994).

Consistency with presence of contract required. — Insurer's pre-policy letter stating that an insured's umbrella policy would be renewed for three years was unenforceable under the statute of frauds, O.C.G.A. § 13-5-30(5), because, due to the three-year term, the policy could not be performed within one year, and the part performance exception of O.C.G.A. § 13-5-31(3) did not apply because the insured's purchase of another policy from the insurer, following the insurer's cancellation at the end of the first year, with a different premium and rate than stated in the letter, was inconsistent with the existence of a contract for a three-year rate guarantee. *Werner Enters. v. Markel Am. Ins. Co.*, 448 F. Supp. 2d 1375 (N.D. Ga. 2006).

Pleadings and Practice

Statute of frauds is an affirmative defense that must be specially pleaded. *Funding Sys. Leasing Corp. v. Pugh*, 530 F.2d 91 (5th Cir. 1976).

Defense of statute must be pled. *Hotel Candler, Inc. v. Candler*, 198 Ga. 339, 31 S.E.2d 693 (1944).

Specific pleading required. — As a general rule, for defendant to avail oneself of statute of frauds defendant must specially plead the statute. *Bentley v. Johns*, 19 Ga. App. 657, 91 S.E. 999 (1917).

Statute must be pled. *Smith v. Marbut-Williams Lumber Co.*, 37 Ga. App. 239, 139 S.E. 590 (1927).

Defense of statute of frauds must be specifically raised, and cannot be insisted upon in an appellate court, unless record shows that it was raised in trial court. *Pope v. Lovett*, 188 Ga. 524, 4 S.E.2d 152 (1939).

Statute of frauds has no application in case where it is not specially pled. *Carroll v. Witter*, 75 Ga. App. 632, 44 S.E.2d 165 (1947).

O.C.G.A. § 9-11-8(c) specifically lists the statute of frauds as an affirmative defense that must be raised by pleading or be waived. *Brantley Co. v. Simmons*, 196 Ga. App. 233, 395 S.E.2d 656 (1990).

Defense of statute of frauds is waived unless specially pled. *Powell Paving Co. v. Scott*, 47 Ga. App. 401, 170 S.E. 529 (1933); *Southern Intermodal Logistics, Inc. v. Smith & Kelly Co.*, 190 Ga. App. 584, 379 S.E.2d 612 (1989).

Failure to plead statute is to waive the defense, since it is a plea in the nature of personal privilege, of which one can avail oneself or not as one wishes. *Piedmont Life Ins. Co. v. Bell*, 103 Ga. App. 225, 119 S.E.2d 63 (1961).

Compliance with statute of frauds must be raised in trial court. — Unless defense that contract relied on by opposite party is unenforceable for lack of compliance with statute of frauds is raised in trial court, right to raise the defense will be deemed to have been waived. *Miller v. Smith*, 6 Ga. App. 447, 65 S.E. 292 (1909).

Defense under statute of frauds must be raised in trial court or the defense will be deemed to have been waived. *Bland v. Davison-Paxon Co.*, 83 Ga. App. 468, 64 S.E.2d 350 (1951), overruled on other grounds, *Almon v. R.H. Macy & Co.*, 106 Ga. App. 123, 126 S.E.2d 641 (1962).

Defendant may avail oneself of statute by motion to nonsuit. — Absent plea of statute of frauds, defendant can avail oneself of this defense by timely motion to nonsuit case. *Bentley v. Johns*, 19 Ga. App. 657, 91 S.E. 999 (1917).

Issue in pretrial order. — Although there is no statutory requirement for it, statute of frauds must be raised by affirmative plea, which must set forth section of statute relied upon, or there must be a timely motion for nonsuit, or objection to testimony must be made so as to invoke ruling in trial court on statute. *Piedmont Life Ins. Co. v. Bell*, 103 Ga. App. 225, 119 S.E.2d 63 (1961).

In an action alleging breach of lease agreement, even if the defense of the statute of frauds was omitted from the pretrial order, the trial court should have found it was implicitly added where evidence of an alleged oral guarantee was admitted and the issue was actually litigated. *Hathaway v. Bishop*, 214 Ga. App. 870, 449 S.E.2d 318 (1994).

Plea in bar, of which statute of frauds is one, may be contained in answer. *Piedmont Life Ins. Co. v. Bell*, 103 Ga. App. 225, 119 S.E.2d 63 (1961).

Pleadings and Practice (Cont'd)

Defense of statute is personal, and cannot be interposed by strangers to agreement. *Gilbert Hotel No. 22, Inc. v. Black*, 67 Ga. App. 221, 19 S.E.2d 796 (1942).

Defense is personal privilege. — Defense of statute of frauds, like that of plea of usury, is in nature of a personal privilege, of which defendant may avail oneself or not, as defendant sees fit. *Draper v. Macon Dry Goods Co.*, 103 Ga. 661, 30 S.E. 566, 68 Am. St. R. 136 (1898); *Tift v. Wight & Wesloskey Co.*, 113 Ga. 681, 39 S.E. 503 (1901).

Plea or contention based on statute of frauds is personal to parties to agreement claimed to be within statute. *Blanton v. Moseley*, 133 Ga. App. 144, 210 S.E.2d 368 (1974).

Lessor cannot complain that lease was transferred by lessee in violation of statute. *Gilbert Hotel No. 22, Inc. v. Black*, 67 Ga. App. 221, 19 S.E.2d 796 (1942).

One invoking protection of statute must affirmatively show contract not written. — In suit for specific performance of contract for sale of land required to be in writing by the statute of frauds when allegations of petition do not affirmatively show that contract rested merely in parol, it will be presumed, upon demurrer (now motion to dismiss), that contract was in writing. *Crovatt v. Baker*, 130 Ga. 507, 61 S.E. 127 (1908).

When defendant in suit upon contract invokes protection of statute of frauds, burden is upon the defendant to affirmatively show that contract is not in writing; failure of evidence to show that contract is in writing is not sufficient to bring contract within statute. *Arrington v. Horton*, 48 Ga. App. 272, 172 S.E. 677 (1934).

Failure to allege contract is written raises no presumption that contract is parol. *Freeman v. Matthews*, 6 Ga. App. 164, 64 S.E. 716 (1909).

Contract within statute of frauds presumed to meet requirement of statute that contract be written. *Arrington v. Horton*, 48 Ga. App. 272, 172 S.E. 677 (1934).

If contract is of kind required by statute of frauds to be in writing, presumption is that it

was in writing. *Butler v. Godley*, 51 Ga. App. 784, 181 S.E. 494 (1935).

It is not to be presumed that contract was not in writing. *Long v. Lewis*, 16 Ga. 154 (1854).

Court required to submit statute of frauds defense to jury. — See *National Indep. Theatre Exhibitors, Inc. v. Charter Fin. Group, Inc.*, 747 F.2d 1396 (11th Cir. 1984), cert. denied, 471 U.S. 1056, 105 S. Ct. 2120, 85 L. Ed. 2d 484 (1985).

Improper refusal to charge on the statute of frauds was compounded by charging that an oral contract of guarantee is as valid as a written guarantee and constituted harmful error. *Hathaway v. Bishop*, 214 Ga. App. 870, 449 S.E.2d 318 (1994).

Solemn admission in judicio. — Trial court properly granted a seller's motion for partial summary judgment, and denied the escrow agent's motion to dismiss, in the seller's suit to recover the earnest money deposited by the buyers as the buyers admitted in their answer that the buyers knew the identity and location of the property, and although the buyers later amended the buyers answer to raise a Georgia statute of frauds, O.C.G.A. § 13-5-30, defense, the buyers never withdrew the buyers admission, and the buyers and the escrow agent were bound by the admission; the admission constituted a solemn admission in judicio under O.C.G.A. § 24-4-24(b)(7), and created a conclusive presumption of law under § 24-4-24(a). *Nhan v. Wellington Square, LLC*, 263 Ga. App. 717, 589 S.E.2d 285 (2003).

Preliminary injunction not granted as legal determination of statute of frauds required. — Because a legal determination had to be made as to whether the common law statute of frauds or O.C.G.A. § 13-5-30 applied prior to a determination of whether there existed an enforceable contract between a buyer and seller of carbon dioxide, the buyer failed to meet the buyer's burden to show a substantial likelihood of success on the merits for entitlement to a preliminary injunction. *Air Liquide Indus. United States LP v. First United Ethanol, LLC*, No. 1:08-CV-49 (WLS), 2008 U.S. Dist. LEXIS 42937 (M.D. Ga. May 30, 2008).

OPINIONS OF THE ATTORNEY GENERAL

Distinction between easements and licenses. — There is a distinction between a privilege or easement, carrying interest in land, which requires writing within statute of frauds to support the privilege of easement, and license which gives authority to do par-

ticular act or series of acts upon land of another for purpose of improvement only, without possessing any estate therein; such license is not within statute. 1958-59 Op. Att'y Gen. p. 285.

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Executors and Administrators, §§ 194, 216, 319. 67 Am. Jur. 2d, Sales, § 97 et seq. 72 Am. Jur. 2d, Statute of Frauds, §§ 4, 10 et seq., 49 et seq., 113, 124 et seq. 73 Am. Jur. 2d, Statute of Frauds, §§ 459, 463. 77 Am. Jur. 2d, Vendor and Purchaser, §§ 3, 4.

Am. Jur. Pleading and Practice Forms. — 23 Am. Jur. Pleading and Practice Forms, Statute of Frauds, § 2.

Am. Jur. Proof of Facts. — Damages for Breach of Contract to Lend Money, 41 POF2d 337.

C.J.S. — 17 C.J.S., Contracts, §§ 4, 71. 17A C.J.S., Contracts, § 331.

ALR. — Validity and effect of oral agreement in alternative, one of the alternatives being within the statute of frauds, 13 ALR 271.

Contracts relating to corporate stock as within provisions of statute of frauds dealing with sales of goods, etc., 14 ALR 394; 59 ALR 597.

Oral contracts of insurance, 15 ALR 995; 69 ALR 559; 92 ALR 232.

Applicability of statute of frauds to joint adventure or partnership to deal in real estate, 18 ALR 484; 95 ALR 1242; 128 ALR 1520.

Check or note as memorandum satisfying statute of frauds, 20 ALR 363; 153 ALR 1112.

Signing of contract by agent of undisclosed principal as satisfying statute of frauds, 23 ALR 932; 138 ALR 330.

Re-exchange: rate or date at which exchange is to be computed, 27 ALR 1189.

Name of principal or of authorized agent, in body of instrument, as satisfying statute of frauds where transaction was not conducted by him, 28 ALR 1114.

Effect of statute of frauds upon the right to modify by subsequent parol agreement, a written contract required by the statute to be in writing, 29 ALR 1095; 80 ALR 539; 118 ALR 1511.

Trade custom or usage to explain or supply essential terms in writing required by statute of frauds (or Sales Act) in sale of goods, 29 ALR 1218.

Necessity of statement in writing of consideration or price for sale of goods or choses in action in order to satisfy statute of frauds, 30 ALR 1163; 59 ALR 1422.

Agreement to release, discharge, or assign real estate mortgage as within statute of frauds, 32 ALR 874.

Character and extent of improvements necessary to constitute part performance, 33 ALR 1489.

Acceptance which will satisfy statute of frauds where purchaser of goods is in possession at time of sale, 36 ALR 649; 111 ALR 1312.

Statute of frauds as affecting agreement with subpurchaser of realty, 38 ALR 1348.

Accepting paid employment or remaining in such employment as part performance which will take oral contract to convey or devise real property out of statute of frauds, 40 ALR 223.

Sale or contract for sale of standing timber as within provisions of statute of frauds respecting sale of contract of sale of real property, 7 ALR2d 517.

Sufficiency of memorandum of lease agreement to satisfy the statute of frauds, as regards terms and conditions of lease, 16 ALR2d 621.

Sufficiency of description or designation of land in contract or memorandum of sale, under statute of frauds, 23 ALR2d 6.

Necessity and sufficiency of statement of consideration in contract or memorandum of sale of land, under statute of frauds, 23 ALR2d 164.

Construction and effect of exception making the statute of frauds provision inapplicable where goods are manufactured by seller for buyer, 25 ALR2d 672.

Rights of parties under oral agreement to buy or bid in land for another, 27 ALR2d 1285.

Oral contract for personal services so long as employee is able to continue in work, to do satisfactory work, or the like, as within statute of frauds relating to contracts not to be performed within year, 28 ALR2d 878.

Validity of oral promise or agreement not to revoke will, 29 ALR2d 1229.

Effect of attempted cancelation or erasure in memorandum otherwise sufficient to satisfy statute of frauds, 31 ALR2d 1112.

Statute of frauds: promise by stockholder, officer, or director to pay debt of corporation, 35 ALR2d 906.

Agreement between brokers as within statute requiring agreements for commissions for the sale of real estate to be in writing, 44 ALR2d 741.

Sufficiency, under the statute of frauds, of description or designation of land in contract or memorandum of sale which gives right to select the tract to be conveyed, 46 ALR2d 894.

Joint adventure agreement for acquisition, development, or sale of land as within provision of statute of frauds governing broker's agreement for commission on real-estate sale, 48 ALR2d 1042.

Contract to support, maintain, or educate a child as within provision of statute of frauds relating to contracts not to be performed within a year, 49 ALR2d 1293.

Employee's rights with respect to compensation or bonus where he continues in employer's service after expiration of contract for definite term, 53 ALR2d 384.

Applicability of statute of frauds to promise to pay for medical, dental, or hospital services furnished to another, 64 ALR2d 1071.

What constitutes promise made in or upon consideration of marriage within statute of frauds, 75 ALR2d 633.

Enforceability, under statute of frauds provision as to contracts not to be performed within a year, or oral employment contract for more than one year but specifically made terminable upon death of either party, 88 ALR2d 701.

Statute of frauds: will or instrument in form of will as sufficient memorandum of contract to devise or bequeath, 94 ALR2d 921.

Applicability of parol evidence rule in favor of or against one not a party to contract of release, 13 ALR3d 313.

Landlord's liability for damage to tenant's property caused by water, 35 ALR3d 143.

Applicability of statute of frauds to agreement to rescind contract for sale of land, 42 ALR3d 242.

Statute of frauds: validity of lease or sublease subscribed by one of the parties only, 46 ALR3d 619.

Enforcement of antenuptial contract or settlement conditioned upon marriage, where marriage was subsequently declared void, 46 ALR3d 1403.

Action by employee in reliance on employment contract which violates statute of frauds as rendering contract enforceable, 54 ALR3d 715.

Right of owner to recover for work or material expended on his own real property in reliance upon a void or unenforceable contract for its rental or sale, 64 ALR3d 1191.

Spouse's secret intention not to abide by written antenuptial agreement relating to financial matters as ground for annulment, 66 ALR3d 1282.

Application of parol evidence rule in action on contract for architect's services, 69 ALR3d 1353.

Construction and application of UCC § 2-201(3)(c) rendering contract of sale enforceable notwithstanding statute of frauds with respect to goods for which payment has been made and accepted or which have been received and accepted, 97 ALR3d 908.

Check given in land transaction as sufficient writing to satisfy statute of frauds, 9 ALR4th 1009.

Promise by one other than principal to indemnify one agreeing to become surety or guarantor as within statute of frauds, 13 ALR4th 1153.

Oil and gas royalty as real or personal property, 56 ALR4th 539.

Separation agreements: enforceability of provision affecting property rights upon death of one party prior to final judgment of divorce, 67 ALR4th 237.

Applicability of statute of frauds to promise to pay for legal services furnished to another, 84 ALR4th 994.

Promissory estoppel of lending institution based on promise to lend money, 18 ALR5th 307.

Satisfaction of statute of frauds by e-mail,
110 ALR5th 277.

Sufficiency of description of terms and

conditions of lease, or lease provision, so as
to comply with statute of frauds, 12 ALR6th
123.

13-5-31. Agreements enforceable without writing.

The provisions of Code Section 13-5-30 do not extend to the following cases:

- (1) When the contract has been fully executed;
- (2) Where there has been performance on one side, accepted by the other in accordance with the contract;
- (3) Where there has been such part performance of the contract as would render it a fraud of the party refusing to comply if the court did not compel a performance. (29 Car. II, c. 3, Cobb's 1851 Digest, p. 1127; Ga. L. 1853-54, p. 58, § 1; Code 1863, § 1953; Code 1868, § 1941; Code 1873, § 1951; Code 1882, § 1951; Civil Code 1895, § 2694; Civil Code 1910, § 3223; Code 1933, § 20-402.)

Cross references. — Parol contract between employer and overseer, § 10-6-121.

Law reviews. — For article discussing the anachronistic nature of the Georgia contracts Code as dramatized by comparing the doctrine of consideration as it is formulated in the Restatements of Contracts and in Code 1933, Title 20 (now this title), and the interpretative approach Georgia courts have

taken in dealing with such Code, see 13 Ga. L. Rev. 499 (1979). (But see amendments by Ga. L. 1981, p. 876.) For article, "Promissory Estoppel and the Georgia Statute of Frauds," see 15 Ga. L. Rev. 204 (1980).

For comment on Baxley Hdwe. Co. v. Morris, 165 Ga. 359, 140 S.E. 869 (1927), see 1 Ga. L. Rev. No. 3 P. 51 (1927).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

FULLY EXECUTED CONTRACTS

FULL PERFORMANCE ACCEPTED ON ONE SIDE

PART PERFORMANCE

1. IN GENERAL
2. SALES OF LAND
3. LEASES
4. CONTRACTS OF EMPLOYMENT

General Consideration

Section applicable only where performance expressly or impliedly accepted. — Estoppel to deny existence of valid contract under former Code 1933, § 20-401 (see O.C.G.A. § 13-5-30) provided for in former Code 1933, § 20-402 (see O.C.G.A. § 13-5-31) was available only where performance made by one side had been expressly or impliedly accepted by the other. Nowell v.

Mayor of Monroe, 177 Ga. 648, 171 S.E. 136, answer conformed to, 47 Ga. App. 665, 171 S.E. 143 (1933).

Exceptions do not supply oral promise. — Statutory exceptions to the statute of frauds provide for limited circumstances in which the law will enforce an alleged oral promise against the promisor, notwithstanding the legal requirement that such a promise be in writing, but those exceptions do not supply

General Consideration (Cont'd)

the missing element of an underlying oral promise on the part of the alleged promisor. *Tidwell v. Emory Univ.*, 180 Ga. App. 357, 349 S.E.2d 245 (1986).

Oral agreement unenforceable absent statutory exceptions. — Purported oral agreement between a corporate provider of extended vehicle service contracts and an independent contractor concerning the independent contractor's administration of recreational-vehicle accounts was not enforceable because it was not memorialized in writing, and no exceptions to the statute of frauds set forth in O.C.G.A. § 13-5-31 applied. *Auto. Prot. Corp. v. Jones*, No. 08-10519, 2008 U.S. App. LEXIS 7937 (11th Cir. Apr. 9, 2008) (Unpublished).

Relief granted is allowed upon principle of estoppel, and it is incumbent upon complainant to show not only that the complainant's act was performed in pursuance of and on faith of contract, but that the action was accepted by other party in accordance therewith, mutuality of action or action's equitable equivalent being an essential ingredient of cause of action. *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136, answer conformed to, 47 Ga. App. 665, 171 S.E. 143 (1933).

There must be a conjoint action of parties in order to avoid statute of frauds. *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136, answer conformed to, 47 Ga. App. 665, 171 S.E. 143 (1933).

Mere non-action is not performance, either partial or complete, and will not, therefore, take parol contract out of statute of frauds. *Augusta S.R.R. v. Smith & Kilby Co.*, 106 Ga. 864, 33 S.E. 28 (1899); *Hesterlee v. Hesterlee*, 27 Ga. App. 169, 107 S.E. 889 (1921); *Kennington v. Small*, 36 Ga. App. 176, 136 S.E. 326 (1926); *Armstrong v. Reynolds*, 36 Ga. App. 594, 137 S.E. 637 (1927); *Gragg v. Hall*, 164 Ga. 628, 139 S.E. 339 (1927); *Baxley Hdwe. Co. v. Morris*, 165 Ga. 359, 140 S.E. 869 (1927); *Home Mixture Guano Co. v. McKoone*, 168 Ga. 317, 147 S.E. 711 (1929); *Neely v. Sheppard*, 185 Ga. 771, 196 S.E. 452 (1938); *Alodex Corp. v. Brawner*, 134 Ga. App. 630, 215 S.E.2d 527 (1975).

Doing of contemplated act furnishes consideration for original agreement, even

though such agreement at the agreement's inception was nudum pactum. *Wilson v. Whitmire*, 212 Ga. 287, 92 S.E.2d 20 (1956).

Contract of guaranty is subject to provisions of this statute. *Sikes v. Mallonee*, 11 Ga. App. 632, 75 S.E. 988 (1912) (see O.C.G.A. § 13-5-31).

If one party has not signed contract, that party's acceptance is inferred from performance under the contract, in part or in full, and that party becomes bound. *Cooper v. G.E. Constr. Co.*, 116 Ga. App. 690, 158 S.E.2d 305 (1967).

Contract partly executed by corporation, though ultra vires, will be enforced when corporation has received benefits thereunder in its corporate capacity. *Cooper v. G.E. Constr. Co.*, 116 Ga. App. 690, 158 S.E.2d 305 (1967).

Parol agreement establishing disputed or unascertained boundary, if executed, controls deeds. — When dividing line between coterminous owners is indefinite, unascertained, or disputed, owners may by parol agreement, duly executed, establish line which will control the owners' deeds, notwithstanding statute of frauds. *Holland v. Shackelford*, 220 Ga. 104, 137 S.E.2d 298 (1964). But see *Smith v. Lanier*, 199 Ga. 255, 34 S.E.2d 91 (1945); *Callaway v. Armour*, 207 Ga. 229, 60 S.E.2d 367 (1950).

Performance sufficient to remove agreement to adopt and devise from statute of frauds see *Savannah Bank & Trust Co. v. Wolff*, 191 Ga. 111, 11 S.E.2d 766 (1940).

Testimony relating to oral agreement to purchase land, inadmissible unless it fell within exception to former Code 1933, § 20-401 (see O.C.G.A. § 13-5-30). *Walters v. Missouri State Life Ins. Co.*, 53 Ga. App. 347, 185 S.E. 572 (1936).

Cited in *Knight v. Knight*, 28 Ga. 165 (1859); *Rawson v. Bell*, 46 Ga. 19 (1872); *Petty v. Kennon*, 49 Ga. 468 (1873); *Barnett Line of Steamers v. Blackmar & Chandler*, 53 Ga. 98 (1874); *Goolsby v. Bush*, 53 Ga. 353 (1874); *Wimberly v. Bryan*, 55 Ga. 198 (1875); *Steininger v. Williams*, 63 Ga. 475 (1879); *Storey v. Weaver*, 66 Ga. 296 (1881); *Wooten v. Wilcox, Stilson & Co.*, 87 Ga. 474, 13 S.E. 595 (1891); *Ambrose v. Ambrose*, 94 Ga. 655, 19 S.E. 980 (1894); *English v. S.P. Richards Co.*, 109 Ga. 635, 34 S.E. 1002 (1900); *Bluthenthal & Bickart v. Moore*, 111 Ga. 297, 36 S.E. 689 (1900); *McLeod v.*

Hendry, 126 Ga. 167, 54 S.E. 949 (1906); Wholesale Mercantile Co. v. Jackson, 2 Ga. App. 776, 59 S.E. 106 (1907); Empire Cotton Oil Co. v. Sellars, 18 Ga. App. 377, 89 S.E. 454 (1916); Stone Mt. Granite Corp. v. Patrick, 19 Ga. App. 269, 91 S.E. 286 (1917); Edwards v. Trustees of Baptist Church, 147 Ga. 15, 92 S.E. 531 (1917); Clemons v. Estes, 24 Ga. App. 480, 101 S.E. 312 (1919); Terrell Land Co. v. Newberry, 29 Ga. App. 77, 113 S.E. 817 (1922); Sherman v. Stephens, 30 Ga. App. 509, 118 S.E. 567 (1923); Varnell v. Varnell, 156 Ga. 853, 120 S.E. 319 (1923); In re Stone-Moore-West Co., 292 F. 1004 (N.D. Ga. 1923); Mendel v. C.L. Barrett & Son, 32 Ga. App. 581, 124 S.E. 107 (1924); F.E. Nellis & Co. v. Houser, 33 Ga. App. 266, 125 S.E. 790 (1924); Hall v. Wingate, 159 Ga. 630, 126 S.E. 796 (1924); Norman & Griffin v. Shealey, 33 Ga. App. 534, 126 S.E. 887 (1925); Marshall v. Hicks, 159 Ga. 871, 127 S.E. 273 (1925); Peoples Bank v. Harry L. Winter, Inc., 161 Ga. 898, 132 S.E. 422 (1926); Schadmann v. Durrence, 37 Ga. App. 640, 141 S.E. 331 (1928); M.C. Kiser Co. v. Rosenbloom, 41 Ga. App. 183, 152 S.E. 273 (1930); Powell v. Clements, 172 Ga. 381, 157 S.E. 699 (1931); Mallory v. Clay County, 173 Ga. 59, 159 S.E. 578 (1931); First Nat'l Bank v. Rountree, 173 Ga. 117, 159 S.E. 658 (1931); Wright v. Harber, 175 Ga. 696, 165 S.E. 616 (1932); Dunn & McCarthy, Inc. v. Pinkston, 47 Ga. App. 514, 170 S.E. 922 (1933); Evans v. Sawilowsky, 179 Ga. 547, 176 S.E. 625 (1934); Pope v. Barnett, 50 Ga. App. 199, 177 S.E. 358 (1934); Tanner v. Campbell, 182 Ga. 121, 184 S.E. 705 (1936); Stonecypher v. Georgia Power Co., 183 Ga. 498, 189 S.E. 13 (1936); Parham v. Kennedy, 60 Ga. App. 52, 2 S.E.2d 765 (1939); Pope v. Lovett, 188 Ga. 524, 4 S.E.2d 152 (1939); Poole v. Atlanta Joint Stock Land Bank, 189 Ga. 59, 5 S.E.2d 368 (1939); Feagin v. Georgia-Carolina Inv. Co., 63 Ga. App. 815, 11 S.E.2d 813 (1940); Duggar v. Quarterman, 191 Ga. 314, 12 S.E.2d 302 (1940); West v. Vandiviere, 192 Ga. 90, 14 S.E.2d 711 (1941); Milton v. Milton, 192 Ga. 778, 16 S.E.2d 573 (1941); Kutash v. Gluckman, 193 Ga. 805, 20 S.E.2d 128 (1942); Carl v. Hansbury, 67 Ga. App. 830, 21 S.E.2d 302 (1942); Myers v. Adcock, 198 Ga. 180, 31 S.E.2d 160 (1944); Cantrell v. Johnston, 74 Ga. App. 74, 38 S.E.2d 893 (1946); Clarke v. Phillips, 204 Ga. 772, 51

S.E.2d 848 (1949); Larkins v. Boyd, 205 Ga. 69, 52 S.E.2d 307 (1949); Barron v. Anderson, 205 Ga. 487, 53 S.E.2d 682 (1949); Garner v. Mayor of Athens, 206 Ga. 815, 58 S.E.2d 844 (1950); Seabolt v. Christian, 82 Ga. App. 167, 60 S.E.2d 540 (1950); Harris v. Underwood, 208 Ga. 247, 66 S.E.2d 332 (1951); Fimian v. Guy F. Atkinson Co., 209 Ga. 113, 70 S.E.2d 762 (1952); McCullough v. Patterson, 86 Ga. App. 147, 70 S.E.2d 873 (1952); United States v. Ridley, 120 F. Supp. 530 (N.D. Ga. 1954); Dealers Disct. & Inv. Co. v. Mitchell Motors, Inc., 101 Ga. App. 900, 115 S.E.2d 420 (1960); Samford v. Citizens & S. Nat'l Bank, 216 Ga. 215, 115 S.E.2d 517 (1960); Piedmont Life Ins. Co. v. Bell, 103 Ga. App. 225, 119 S.E.2d 63 (1961); Dawn Mem. Park v. Southern Cemetery Consultants, 115 Ga. App. 180, 154 S.E.2d 258 (1967); Sanders v. Vaughn, 223 Ga. 274, 154 S.E.2d 616 (1967); American Fed'n of State, County & Mun. Employees v. Rowe, 121 Ga. App. 99, 172 S.E.2d 866 (1970); Paradies & Co. v. Southeastern Personnel, Inc., 124 Ga. App. 825, 186 S.E.2d 304 (1971); Thompson v. Frost, 125 Ga. App. 753, 188 S.E.2d 905 (1972); Roberts v. Harrell, 230 Ga. 454, 197 S.E.2d 704 (1973); Smith v. Top Dollar Stores, Inc., 129 Ga. App. 60, 198 S.E.2d 690 (1973); Pickett v. Paine, 230 Ga. 786, 199 S.E.2d 223 (1973); Willis v. Kemp, 130 Ga. App. 758, 204 S.E.2d 486 (1974); Smith v. Moeller, 132 Ga. App. 184, 207 S.E.2d 669 (1974); Blanton v. Moseley, 133 Ga. App. 144, 210 S.E.2d 368 (1974); Osborne v. Martin, 136 Ga. App. 86, 220 S.E.2d 19 (1975); Nicholelli v. Connell, 137 Ga. App. 563, 224 S.E.2d 511 (1976); Smith v. Hornbuckle, 140 Ga. App. 871, 232 S.E.2d 149 (1977); B-Lee's Sales Co. v. Shelton, 141 Ga. App. 870, 234 S.E.2d 702 (1977); Williams v. Southland Corp., 143 Ga. App. 111, 237 S.E.2d 639 (1977); Grace v. Roan, 145 Ga. App. 776, 245 S.E.2d 17 (1978); Crosby v. Jones, 241 Ga. 558, 246 S.E.2d 677 (1978); Moorman Ingram Tractors, Inc. v. Harrington Mfg. Co., 146 Ga. App. 398, 247 S.E.2d 159 (1978); Garden of Eden, Inc. v. Eastern Sav. Bank, 244 Ga. 63, 257 S.E.2d 897 (1979); Knight v. Munday, 152 Ga. App. 406, 263 S.E.2d 188 (1979); Sams v. Duncan & Copeland, Inc., 153 Ga. App. 765, 266 S.E.2d 546 (1980); Wheeler v. Aiken, 154 Ga. App. 280, 267 S.E.2d 883 (1980); Wiggins v. White, 157 Ga. App. 49, 276 S.E.2d 104

General Consideration (Cont'd)

(1981); Robinson v. Johns, 157 Ga. App. 639, 278 S.E.2d 181 (1981); Fritts v. Mid-Coast Trading Corp., 166 Ga. App. 31, 303 S.E.2d 148 (1983); Sierra Assocs., Ltd. v. Continental Ill. Nat'l Bank & Trust Co., 169 Ga. App. 784, 315 S.E.2d 250 (1984); Atlanta Dairies Coop. v. Grindle, 182 Ga. App. 409, 356 S.E.2d 42 (1987); South Atl. Prod. Credit Ass'n v. Gibbs, 257 Ga. 521, 361 S.E.2d 167 (1987); Rose v. O'Brien, 191 Ga. App. 36, 380 S.E.2d 730 (1989); Stolz v. Shulman, 191 Ga. App. 864, 383 S.E.2d 559 (1989); Derbyshire v. United Bldrs. Supplies, Inc., 194 Ga. App. 840, 392 S.E.2d 37 (1990); Baxley Veneer & Clete Co. v. Maddox, 198 Ga. App. 235, 401 S.E.2d 282 (1990); Liniado v. Alexander, 199 Ga. App. 256, 404 S.E.2d 602 (1991); Daniell v. Clein, 206 Ga. App. 377, 425 S.E.2d 344 (1992); Yates v. Trust Co. Bank, 212 Ga. App. 438, 443 S.E.2d 293 (1994); Brown v. Little, 217 Ga. App. 632, 458 S.E.2d 669 (1995); Acuff v. Proctor, 267 Ga. 85, 475 S.E.2d 616 (1996); Whiten v. Murray, 267 Ga. App. 417, 599 S.E.2d 346 (2004).

Fully Executed Contracts

Full execution and acceptance thereof removes agreement from statute of frauds. — Contract to pay rent in advance to enable lessor to complete apartment by agreed date, when fully executed by lessees, and accepted by lessor, is taken out of statute of frauds. Carroll v. Witter, 75 Ga. App. 632, 44 S.E.2d 165 (1947).

When a company sued the company's accountants regarding the accountants participation in a sale of the company's assets, summary judgment should have been granted in favor of the accountants because the company ratified the actions of the company's employee who had apparent authority to conduct the sale when the company retained the proceeds of the sale and accepted a return of the assets sold, in settlement of another lawsuit; the "equal dignity" rule in O.C.G.A. § 13-5-31(1) did not require the ratification to be in writing because the contract between the company and the purchaser of the company's assets was fully executed, and the company was estopped to deny the apparent authority of the employee because the company retained

the fruits of the sale. R.W. Holdco, Inc. v. Johnson, 267 Ga. App. 859, 601 S.E.2d 177 (2004).

Statute of frauds inapplicable to contract which has been fully performed on both sides. Steining v. Williams, 63 Ga. 475 (1879).

Oral contract for sale of land, when fully executed, is removed from statute of frauds. Hale v. Lipham, 64 Ga. App. 796, 14 S.E.2d 236 (1941).

Parol modification of agreement within statute of frauds, if fully executed, is valid. Strickland v. Jelks, 18 Ga. App. 86, 88 S.E. 906 (1916), later appeal, 20 Ga. App. 604, 93 S.E. 260 (1917).

Full Performance Accepted on One Side

Full performance on one side removes agreement from statute of frauds. — When agreement is entered into, upon sufficient consideration to sell real and personal property and divide proceeds, and agreement has been fully performed on one side, other party will be decreed to execute the agreement in full, notwithstanding agreement is by parol, and relates to land as well as personalty. Watkins v. Watkins, 24 Ga. 402 (1858).

Full performance, accepted, of oral agreement to enter written contract, satisfies paragraph (2) of O.C.G.A. § 13-5-31. — Oral agreement to enter into written contract, promptly and fully performed by party and such performance accepted by other party, meets requirements of the law. Langenback v. Mays, 205 Ga. 706, 54 S.E.2d 401 (1949).

Given evidence that the father sufficiently performed that part of an oral agreement at issue with a child for the latter to transfer title to a house, specifically by selling the father's house and paying the child the proceeds in exchange for the child's promise to convey, when the child failed to convey the house the trial court properly granted the father a constructive trust based on fraud, denied the child a directed verdict, and sustained the jury's verdict. Perry v. Perry, 285 Ga. App. 892, 648 S.E.2d 193 (2007).

Payment in full on oral contract for sale of land. — In a suit for specific performance brought by a plaintiff seeking to enforce an alleged oral contract to sell real property, the trial court erred in granting summary judg-

ment to the defendant based on the statute of frauds preventing recovery to the plaintiff; the plaintiff had presented evidence establishing the existence of an oral contract for the sale of the property and that it was excepted from the statute of frauds based on the plaintiff's performance of paying for the property in full, and thus, issues of fact remained as to whether defendant's decedent had accepted performance through payments received by a sibling and whether, in light of the plaintiff's previous tenancy, the plaintiff's performance was inconsistent with the lack of a contract to sell the property. *Edwards v. Sewell*, 289 Ga. App. 128, 656 S.E.2d 246 (2008).

Full payment for land, accepted by vendor, is sufficient performance. *Rawlins v. Shropshire*, 45 Ga. 182 (1872).

Execution, delivery, and acceptance of deed as removing agreement from statute of frauds. — When, in consideration of parol promise, a deed to land is executed and delivered, maker of promise is not relieved from performing deed by statute of frauds, there having been full performance by maker of deed and acceptance, together with possession thereunder, by other party. *Stringer v. Stringer*, 93 Ga. 320, 20 S.E. 242 (1894); *Gaskins v. Moore*, 50 Ga. App. 529, 179 S.E. 422 (1935).

Execution of deed, upon payment of purchase price, brings transaction within paragraph (2) of O.C.G.A. § 13-5-31. — When owner of land, on payment of entire purchase price, at request of one of vendees, executes deeds, oral contract falls within this exception to statute of frauds. *Flagg v. Hitchcock*, 143 Ga. 379, 85 S.E. 125 (1915).

Payment of purchase money and delivery of deed and possession removes transaction from statute of frauds. — When purchase money for land has been paid, and deed to and possession of land delivered, such allegations take transaction out of statute of frauds. *McKee v. Cartledge*, 79 Ga. App. 629, 54 S.E.2d 665 (1949).

Tender of deed alone, without acceptance or possession under parol agreement not within exceptions. — Parole contract for sale of land is not brought within exceptions to statute of frauds by vendor's making out and tendering to vendee a deed to land, unless vendee accepts the deed. *Graham v. Theis*, 47 Ga. 479 (1873).

Parol contract for sale of land is not brought within exceptions to statute by vendor's making out and tendering to vendee a deed, unless vendee accepts the deed, and merely going into possession of land by vendee under parol contract is not sufficient, unless the vendee's additional acts are such as would render it impossible to restore vendor to the vendor's former status, and thus make it fraudulent and inequitable not to enforce contract either in equity or in action at law for damages. *Gaskins v. Moore*, 50 Ga. App. 529, 179 S.E. 422 (1935).

Remaining on job until contract of sale signed sufficient performance. — When evidence showed that company officials had promised to give plaintiff severance pay in return for plaintiff's remaining on the job until the sale of the company had been consummated, and plaintiff did not resign until after plaintiff had been advised by an official that the sale had taken place, nor finalize plaintiff's resignation until the plaintiff had discussed with an official of the new owner the possibilities of the plaintiff remaining with the company under the new regime, the evidence did not demand the conclusion that the agreement required plaintiff to continue on the job until the stock was transferred, and the jury was clearly authorized to conclude that the plaintiff fulfilled the plaintiff's part of the bargain by remaining until the contract of sale was executed. *Amax, Inc. v. Fletcher*, 166 Ga. App. 789, 305 S.E.2d 601 (1983).

Loan advances not full performance. — A lender's decision to make advances under written loans for construction of buildings not contemplated under the loans did not establish the lender's intent to waive requirements of the written loans and proceed under a different oral agreement; the original loans specified that advances made did not have the effect of waiving the lender's right to demand payment and, thus, a performance argument fails. *Bridges v. Reliance Trust Co.*, 205 Ga. App. 400, 422 S.E.2d 277 (1992).

Part Performance

1. In General

O.C.G.A. § 13-5-30(4) inapplicable where there has been part performance under paragraph (3) of O.C.G.A. § 13-5-31. —

Part Performance (Cont'd)**1. In General (Cont'd)**

While contract involving any interest in land must be in writing to bind the parties, § 13-5-30(4) does not extend to cases where there has been such part performance of contract as would render it fraud of party refusing to comply, if court did not compel performance. *Kinney v. Youngblood*, 216 Ga. 354, 116 S.E.2d 608 (1960).

O.C.G.A. § 23-2-131 controls in equity and O.C.G.A. § 13-5-31(3) controls at law as to oral land sales. — Former Code 1933, § 37-802 (see O.C.G.A. § 23-2-131) applied only to actions for specific performance or damages in lieu thereof, in equity. In law cases, former Code 1933, § 20-402 (see O.C.G.A. § 13-5-31) controlled. *Moore v. Deal*, 75 Ga. App. 823, 44 S.E.2d 571 (1947).

Must be certain and definite. — A parol contract sought to be enforced based on part performance must be certain and definite in all respects. *Lemming v. Morgan*, 228 Ga. App. 763, 492 S.E.2d 742 (1997).

It was error not to direct a verdict pursuant to O.C.G.A. § 9-11-50(a) to a putative property owner in an action by various family members, seeking to impose a constructive trust on real property under former O.C.G.A. § 53-12-93(a), as it was inequitable to grant the family members an interest in the property because the putative owner had worked on the farm for over 18 years and had spent significant sums on the property compared to the very minimal amounts contributed by the family members over the years; the doctrine of part performance as an exception to the statute of frauds under O.C.G.A. § 13-5-31(3) was inapplicable because the oral agreement was not sufficiently certain or definite for purposes of enforcement. *Troutman v. Troutman*, 297 Ga. App. 62, 676 S.E.2d 787 (2009).

Part performance required to obviate statute of frauds must be substantial and essential to contract. — See *Norman v. Nash*, 102 Ga. App. 508, 116 S.E.2d 624 (1960); *Forest Servs., Inc. v. Fidelity & Cas. Co.*, 120 Ga. App. 600, 171 S.E.2d 743 (1969); *Hudson v. Venture Indus., Inc.*, 147 Ga. App. 31, 248 S.E.2d 9 (1978); *Metzgar v. Reserve Ins. Co.*, 149 Ga. App. 404, 254 S.E.2d 517 (1979); *Zager v. Brown*, 242 Ga. App. 427, 530 S.E.2d 50 (2000).

Part performance which will take contract out of operation of statute of frauds is such as is, within terms of agreement, an essential part of the contract, and as such is essential to performance of contract. *Bentley v. Smith*, 3 Ga. App. 242, 59 S.E. 720 (1907); *Lewis v. Southern Realty Inv. Corp.*, 42 Ga. App. 171, 155 S.E. 369 (1930); *Alexander-Seewald Co. v. Marett*, 53 Ga. App. 314, 185 S.E. 589 (1936); disapproved on other grounds sub nom. *Hudson v. Venture Indus., Inc.*, 243 Ga. 116, 252 S.E.2d 606 (1979); *Dameron v. Liberty Nat'l Life Ins. Co.*, 56 Ga. App. 257, 192 S.E. 446 (1937).

Part performance is something substantial, and is generally essential to performance of contract. *Hotel Candler, Inc. v. Candler*, 198 Ga. 339, 31 S.E.2d 693 (1944).

Acts which are merely preparatory or preliminary to the performance of a contract are not enough, but performance which is substantial and essential to the contract and results in benefit to one party and detriment to the other obviates the statute of frauds. *Vitner v. Funk*, 182 Ga. App. 39, 354 S.E.2d 666 (1987).

Part performance refers to performance of contract provisions, not acts in reliance on contract. — Act of part performance done must be in performance of and in pursuance of parol contract. The contract is void at law, and is only enforced because courts of equity have, for prevention of fraud, set up certain defined exceptions to the statute. *Simonton, Jones & Hatcher v. Liverpool, London & Globe Ins. Co.*, 51 Ga. 76 (1874).

Part performance referred to in paragraph (3) must be part performance of contract; and doing by either party of some independent act, not part of the contract, does not become part performance because doer of act was led so to act by belief or understanding that parol contract would be performed by other party. *Giradot v. Giradot*, 172 Ga. 230, 157 S.E. 282 (1931); *Hotel Candler, Inc. v. Candler*, 198 Ga. 339, 31 S.E.2d 693 (1944).

Act done to constitute performance, must be in performance of and pursuant to parol contract. *Alexander-Seewald Co. v. Marett*, 53 Ga. App. 314, 185 S.E. 589 (1936), disapproved sub nom. *Hudson v. Venture Indus., Inc.*, 243 Ga. 116, 252 S.E.2d 606 (1979).

Part performance to contractor for parol sale of lands to relief must be part perfor-

mance of terms of contract. Doing of independent thing, even though act would not have been done but for contract, is not sufficient. *Neely v. Sheppard*, 185 Ga. 771, 196 S.E. 452 (1938).

Part performance with which paragraph (3) deals is part performance of contract. Doing of an independent thing, even though act would not have been but for the contract, is not sufficient. *Smith v. Davidson*, 198 Ga. 231, 31 S.E.2d 477 (1944).

Part performance which will take contract out of statute of fraud is performance of essential part of the contract; doing of an independent act, even though it would not have been done but for the contract, is insufficient. *Wells v. H.W. Lay & Co.*, 78 Ga. App. 364, 50 S.E.2d 755 (1948).

Part performance which will remove contract from statute of frauds refers to performance of provisions of contract and not to acts done by one because of one's belief in and reliance on agreement. *Spiegel v. Hays*, 103 Ga. App. 293, 119 S.E.2d 123 (1961).

Performance of acts independent of and not required by terms of contract will not be sufficient to constitute part performance so as to bring it within exception of paragraph (3). *Moon v. Stone Mt. Mem. Ass'n*, 223 Ga. 696, 157 S.E.2d 461 (1967).

Part performance of parol contract for sale of land which constitutes valid exception to statute of frauds must be part performance of the contract, and doing by either party of some independent act, not part of the contract, does not become part performance, because doer of act was led so to act by belief that parol contract would be performed by other party. *Ellis v. Savannah Bank & Trust Co.*, 237 Ga. 612, 229 S.E.2d 417 (1976).

Part performance must be of contract sued upon, not of another materially different contract. — Part performance by seller of another contract, materially different from contract sued upon, is not part performance of contract sued upon and therefore will not operate to remove contract sued from statute of frauds. *Curry Grocery Co. v. Brown*, 30 Ga. App. 711, 119 S.E. 217 (1923).

Part performance, to obviate statute of frauds, must benefit one party and be detrimental to the other. See *Norman v. Nash*, 102 Ga. App. 508, 116 S.E.2d 624 (1960); *Forest Servs., Inc. v. Fidelity & Cas. Co.*, 120

Ga. App. 600, 171 S.E.2d 743 (1969); *Hudson v. Venture Indus., Inc.*, 147 Ga. App. 31, 248 S.E.2d 9 (1978); *Metzgar v. Reserve Ins. Co.*, 149 Ga. App. 404, 254 S.E.2d 517 (1979); *Smith Serv. Oil Co. v. Parker*, 250 Ga. App. 270, 549 S.E.2d 485 (2001).

Part performance relied upon must have not only resulted in benefit to promisor, but in loss or injury to promisee. In such case, uncertainty of parol evidence is to be endured rather than allow promisor to take unjust and inequitable advantage of promisee. *Dameron v. Liberty Nat'l Life Ins. Co.*, 56 Ga. App. 257, 192 S.E. 446 (1937).

Part performance of oral contract of employment which is void under statute of frauds, which has resulted in benefit to employer and injury to employee will operate to exempt contract from requirements of statute. *White v. Simplex Radio Co.*, 61 Ga. App. 157, 5 S.E.2d 922 (1939).

When loss may have been voluntarily incurred by party in preparing to perform parol contract, but there was no evidence showing that such acts were of any benefit to other party so as to estop that party from asserting statute of frauds, acts were not in part performance of obligations arising under such contract or of an essential part thereof, such as would take contract out of statute of frauds. *Cofor v. Wofford Oil Co.*, 85 Ga. App. 444, 69 S.E.2d 674 (1952).

Mere circumstance that verbal agreement has been in part performed without benefit or detriment to parties can afford no reason, such as to control action of any court, whether of law or equity, for holding parties bound to perform what remains executory. *Tompkins v. Tompkins*, 88 Ga. App. 563, 76 S.E.2d 819 (1953).

While oral contract within statute of frauds may be taken out by part performance thereof where one party to contract performs some act essential to performance of the contract which results in loss to that party and benefit to other party thereto, mere fact that one party enters upon performance of agreement which shows no loss to that party or benefit to the other party, is not sufficient to take contract out of operation of statute. *Forest Servs., Inc. v. Fidelity & Cas. Co.*, 120 Ga. App. 600, 171 S.E.2d 743 (1969); *Freeman v. Baker*, 147 Ga. App. 168, 248 S.E.2d 298 (1978).

Fraud refers to injury or loss sustained in performing for benefit of other. — Fraud

Part Performance (Cont'd)**1. In General (Cont'd)**

means some injury or loss sustained in performing in part for benefit of party against whom injured one complains. *Neuhoff v. Swift & Co.*, 54 Ga. App. 651, 188 S.E. 831 (1936).

Attempted performance, resulting in neither loss nor benefits, insufficient to avoid statute of frauds. — Mere fact that one party attempts performance which results in no loss to one or benefit to other is not sufficient to take contract out of statute of frauds. *Alodex Corp. v. Brawner*, 134 Ga. App. 630, 215 S.E.2d 527 (1975).

Part performance shown. — Because there was some evidence of either full or part performance sufficient to take the oral contract out of the statute of frauds, the trial court did not err in denying defendant's motion to dismiss on the basis of O.C.G.A. § 13-5-30(5). *Haehn v. Alheit*, 212 Ga. App. 252, 441 S.E.2d 529 (1994).

Trial court's grant of summary judgment to an employer and the employer's officer in a breach of contract claim by a former employee was error as the employer and an officer acknowledged that the employee was entitled to an ownership interest in an office building, but it was disputed how much of an interest the employee was entitled to; the terms of the oral agreement regarding the interest were sufficiently definite to be enforced, and the matter was not barred by O.C.G.A. § 13-5-31(3) because the employer and the officer offered a certain ownership percentage and a buyback value, which constituted part performance, and an issue remained as to whether their actions were inconsistent with the absence of a contract. *Fay v. Custom One Homes, LLC*, 276 Ga. App. 188, 622 S.E.2d 870 (2005).

Forbearance to bring action, pursuant to oral agreement, until action is barred constitutes part performance. — When plaintiff, pursuant to oral settlement agreement, forbore to bring action against defendant's insured and thereby allowed statute of limitations to run, there had been such part performance on the plaintiff's part as would render it fraud upon plaintiff for company to refuse to comply, since plaintiff had thereby suffered detriment by losing plaintiff's right to legally prosecute action.

Langford v. Milwaukee Ins. Co., 101 Ga. App. 92, 113 S.E.2d 165 (1960).

There has been part performance where status quo cannot be restored or damages adequately compensated. — Whole performance is necessary to prevent fraud in case where parties have proceeded so far on faith of agreement, that the parties cannot be restored to their status quo nor adequately compensated in damages, by avoiding agreement and leaving the parties to parties' action for damages. *Chastain v. Smith*, 30 Ga. 96 (1860); *Hotel Candler, Inc. v. Candler*, 198 Ga. 339, 31 S.E. 693 (1944).

Part performance will not render contract enforceable against county board of education. — Since a county board of education is a political body, and has no power other than that conferred by statutory authority, no contract made by the board which is illegal and invalid because the contract is not in writing as required by statute is enforceable against board, notwithstanding part performance by opposite party thereto. *Dodd v. Board of Educ.*, 46 Ga. App. 235, 167 S.E. 319 (1933).

Petitioner proceeding under paragraph (3) of O.C.G.A. § 13-5-31 must show injury. — When allegations of petition, construed adversely to pleader, are not sufficient to show that petitioner has suffered any injury, part performance will not remove contract from statute of frauds. *Tompkins v. Tompkins*, 88 Ga. App. 563, 76 S.E.2d 819 (1953).

Jury to determine whether there was part performance when evidence tends to prove such performance. *Allen & Bean, Inc. v. American Bankers Ins. Co.*, 153 Ga. App. 617, 266 S.E.2d 295 (1980); *Smith v. Cox*, 247 Ga. 563, 277 S.E.2d 512 (1981).

Jury should decide when part performance of parol contract. — When evidence tends to prove part performance of parol contract, the court should permit case to go to jury, and instruct the jury as to legal principles applicable to facts proved. *Bryan v. South-Western R.R.*, 37 Ga. 26 (1867).

Role of jury. — Since the buyer of the goods had already contracted to sell the goods to another party and the seller incurred costs associated with production, pursuant to an agreement with the buyer, the issue of part performance is a question for the jury. *White House, Inc. v. Winkler*, 202 Ga. App. 603, 415 S.E.2d 185 (1992).

In an action for damages based on the defendants' repudiation of an oral agreement for a three-party like-kind exchange of real estate combined with a sale of corporate stock, evidence of partial performance was sufficient to create a jury question whether, pursuant to paragraph (3) of O.C.G.A. § 13-5-31, the oral agreement to transfer an interest in land was enforceable. *R.T. Patterson Funeral Home v. Head*, 215 Ga. App. 578, 451 S.E.2d 812 (1994).

Existence of contract required. — In order for lessor to rely upon tenant's part performance of an alleged two-year lease as obviating compliance with the statute of frauds, the lessor must first show the existence of a contract to rent the premises; tenant's mere offer to relet the premises certainly showed no contract to lease the premises. *Valiant Steel & Equip., Inc. v. Roadway Express, Inc.*, 205 Ga. App. 237, 421 S.E.2d 773 (1992).

Insurer's pre-policy letter stating that an insured's umbrella policy would be renewed for three years was unenforceable under the statute of frauds, O.C.G.A. § 13-5-30(5), because, due to the three-year term, it could not be performed within one year, and the part performance exception of O.C.G.A. § 13-5-31(3) did not apply because the insured's purchase of another policy from the insurer, following the insurer's cancellation at the end of the first year, with a different premium and rate than stated in the letter, was inconsistent with the existence of a contract for a three-year rate guarantee. *Werner Enters. v. Markel Am. Ins. Co.*, 448 F. Supp. 2d 1375 (N.D. Ga. 2006).

2. Sales of Land

Part payment, unaccompanied by possession or valuable improvements, does not validate oral contract to sell land. *Kenimer v. Thompson*, 128 Ga. App. 253, 196 S.E.2d 363 (1973).

Part payment insufficient. — Even in oral contract of purchase and sale, part payment of purchase money, without more, will not entitle purchaser to specific performance. *Neely v. Sheppard*, 185 Ga. 771, 196 S.E. 452 (1938).

Part payment and possession may be sufficient. — While payment of part of purchase money is not alone such part performance as will take case out of statute of

frauds, if accompanied by possession it will amount to such part performance as to take contract out of statute. *Wimberly v. Bryan*, 55 Ga. 198 (1875); *Corbin v. Durden*, 126 Ga. 429, 55 S.E. 30 (1906); *Harris v. Underwood*, 208 Ga. 247, 66 S.E.2d 332 (1951); *Sikes v. Sims*, 212 Ga. 391, 93 S.E.2d 6 (1956).

Receipt of part of purchase money is not such part performance as will take case out of statute; it is only in cases where part payment of purchase money is accompanied by possession that it will amount to part performance as will take contract out of statute. *Pierce v. Rush*, 210 Ga. 718, 82 S.E.2d 649 (1954); *Sellers v. Hall*, 153 Ga. App. 189, 265 S.E.2d 81 (1980).

Part payment of purchase money alone, unaccompanied by possession of property, is not such part performance of contract as will render it fraud of party refusing to comply, if court did not compel performance. *Powell v. Adderholdt*, 230 Ga. 211, 196 S.E.2d 420 (1973).

While payment of a part of the purchase-money is not alone such part performance as will take the case out of the statute of frauds, partial payment of the purchase-money accompanied with possession will amount to such part performance as to take the contract out of the statute and to authorize the specific performance of a parol contract. *Smith v. Cox*, 247 Ga. 563, 277 S.E.2d 512 (1981).

Partial payment of the purchase price, unaccompanied by possession or valuable improvements, does not meet the test of part performance. Thus, when the owner of a welding shop, after receiving a down payment, sold the owner's supplies, which were not wanted by the prospective purchaser, to third parties, this was not such a partial performance of the oral agreement as would remove the agreement from the statute of frauds. *Zappa v. Basden*, 188 Ga. App. 472, 373 S.E.2d 246, cert. denied, 188 Ga. App. 913, 373 S.E.2d 246 (1988).

Evidence of oral agreement to pay a sum representing equitable holding in property was not inadmissible under O.C.G.A. § 13-5-30 as it was specifically exempted by both subsection (2) as an agreement upon which conveyance of the property had been based and by subsection (3) as a conveyance constituting part performance. *Kolb v.*

Part Performance (Cont'd)
2. Sales of Land (Cont'd)

Holmes, 207 Ga. App. 184, 427 S.E.2d 562 (1993).

Part performance of an otherwise unenforceable contract does not entitle party to specific performance. — Trial court erred in finding that a lease-purchase agreement was enforceable because, though the agreement satisfied the statute of frauds, the agreement was invalid for failure of consideration in that the lessee/proposed purchaser never paid the rent owed nor any of the property taxes, which not only invalidated the agreement but voided the purchase option under O.C.G.A. § 13-1-8(a). Further, the trial court erred in holding that the lessee/proposed purchaser was entitled to specific performance of the agreement based on repairs made since there was no legal authority to support the trial court's proposition that part performance of an otherwise unenforceable written agreement, as modified by subsequent oral agreements between the parties, transformed the agreement into an enforceable parol contract. *Estate of Ryan v. Shuman*, 288 Ga. App. 868, 655 S.E.2d 644 (2007), cert. denied, 2008 Ga. LEXIS 482 (Ga. 2008).

Part performance as will allow specific performance of parol contract to sell land. — Specific performance of executory parol contract for sale of land will be decreed in only two instances. One is where defendant admits contract. The other is where it is so far executed by party seeking relief that if contract be abandoned the party cannot be restored to the party's former position. Full payment alone, accepted by vendor, or partial payment accompanied with possession, or possession alone with valuable improvements, if clearly proved in each case to be done with reference to parol contract, will be sufficient part performance to justify decree. *Neely v. Sheppard*, 185 Ga. 771, 196 S.E. 452 (1938).

Because a contractor's performance and an owner's acceptance of that performance satisfied the requirements of the statute of frauds, O.C.G.A. § 13-5-31, and the plats and deeds established the requisite description of the properties to be exchanged, the contractor was entitled to specific performance under O.C.G.A. § 23-2-131(a). *Masters v.*

Redwine, 279 Ga. 432, 615 S.E.2d 118 (2005).

Simply bidding at auction insufficient performance. — When the defendant simply made a bid for the property at a nonjudicial foreclosure sale, which was accepted by the seller, no partial performance of the contract occurred and the transaction, therefore, stayed within the confines of the statute of frauds. *James v. Safari Enters., Inc.*, 244 Ga. App. 813, 537 S.E.2d 103 (2000).

Performance by one in accordance with contract, accepted by other party, removes contract from statute. — In a dispute over installment contract to purchase land, because evidence sufficiently showed that a buyer partially performed a subsequent oral agreement that was not barred by merger clause contained in the contract, and the seller accepted the benefit of such performance, summary judgment to the seller was erroneous; moreover, given that jury questions as to part performance of the oral agreement remained, order denying the buyer's partial summary judgment motion was upheld. *Hernandez v. Carnes*, 290 Ga. App. 730, 659 S.E.2d 925 (2008).

Possession, to constitute element of part performance must be actual, definite, exclusive and with vendor's consent. — When partial payment, accompanied by possession, is relied upon to take parol contract for sale of land out of operation of statute of frauds, possession of vendee must be actual, definite, and exclusive of the vendor, and with express or implied consent of the vendor. *Kinderland v. Kirk*, 131 Ga. 454, 62 S.E. 582 (1908).

Defendant's possession and improvements pursuant to contract, with plaintiff's approval, constitute part performance. — When defendant's possession is by virtue of contract of sale, and improvements of property are made with knowledge and approval of plaintiffs and in connection with contract of sale, such possession and improvements are sufficient to remove cause from prohibition of former Code 1933, § 20-401 (see O.C.G.A. § 13-5-30), and to bring it within provisions of paragraph (3) of former Code 1933, § 20-402 (see O.C.G.A. § 13-5-31). *Higdon v. Dixon*, 203 Ga. 67, 45 S.E.2d 423 (1947).

Substantial performance and expenditures removed application of statute of

frauds from contract involving real estate development. — In a suit brought by a golf course development company against two other members of a limited liability company and a housing authority, the trial court erred by dismissing the golf course development company's oral breach of contract claim for the development of a golf course for a public housing project as, although a writing was required since the alleged contract involved real estate, the golf course development company sufficiently pled substantial performance, expenditures, and reliance to avoid application of the statute of frauds to the claim. *Perry Golf Course Dev., LLC v. Hous. Auth.*, 294 Ga. App. 387, 670 S.E.2d 171 (2008).

Possession with improvements must be shown to arise by virtue of oral contract. — When a party seeking specific performance of an oral contract to sell realty relies on the principle of possession with improvements, it must be shown that the possession and improvement arose by virtue of and in the faith of the oral contract or promise, so as to take the case out of the statute of frauds and constitute the equivalent of a writing by showing acts unequivocally referring to the alleged contract or promise. Thus, where a party takes possession under an oral contract to rent, and also alleged an oral option to purchase, the possession is under the tenancy and cannot also be shown to be in reliance on the option. *Smith v. Cox*, 247 Ga. 563, 277 S.E.2d 512 (1981).

Payment, possession, and improvements removes parol agreement from statute of frauds. — Purchase of land, payment of consideration, taking possession, and making valuable improvement is sufficient to relieve parol agreement for purchase from operation of statute of frauds. *Scott v. Newsom*, 27 Ga. 125 (1859).

Payment of purchase money unaccompanied by possession and improvements pursuant to contract, not part performance. — Payment of purchase money, in case of parol contract concerning lands, is not, per se, such performance, or part performance, as will take case out of statute of frauds. But such payment, taken in connection with other acts, as taking of possession and putting improvements on land, will constitute such performance. These other acts, however, must unequivocally refer to, and result

from agreement. *Black v. Black*, 15 Ga. 445 (1854).

What are valuable improvements as will obviate statute of frauds. — Valuable improvements, as related to specific performance, mean improvements of such character as add permanent value to freehold, and such as would not likely be made by one not claiming right to possession and enjoyment of freehold estate. Improvements of temporary and unsubstantial character will not amount to such part performance as, when accompanied by possession alone, will take contract out of operation of statute of frauds. *Neely v. Sheppard*, 185 Ga. 771, 196 S.E. 452 (1938).

Creation of parol license to use land did not interfere with existing right of first refusal. — In a suit brought by a property owner seeking to specifically perform an oral agreement to purchase a strip of real estate, the trial court properly denied the property owner's request for an interlocutory judgment based on a violation of the statute of frauds and because another held a first right of refusal over the sale/purchase of the property. However, the trial court erred by concluding that the property owner had not obtained a parol license to use the strip since the property owner had made expenditures to improve the land and, as to the right of first refusal held by another, the grant of a parol license was not the equivalent to a sale of the property to have in anyway interfered with that right. *Meinhardt v. Christianson*, 289 Ga. App. 238, 656 S.E.2d 568 (2008).

Part performance not established. — Sellers were properly granted summary judgment in an action filed by a buyer arising out of an oral land sales contract, given that: (1) no evidence of the buyer's partial performance existed sufficient to remove the contract from the statute of frauds; (2) a wetlands study and interest rate negotiation were not a part of the contract; and (3) a later negotiated contract was an arm's length transaction, the price of which was negotiated at the time, and hence, did not relate to the original contract. *Payne v. Warren*, 282 Ga. App. 524, 639 S.E.2d 528 (2006).

3. Leases

Even if the lessee did not sign the lease, the lease would still be enforceable if the

Part Performance (Cont'd)
3. Leases (Cont'd)

444, 620 S.E.2d 641 (2005).

lessee took possession and partially performed under the terms of the lease. *Cardin v. Outdoor East*, 220 Ga. App. 664, 468 S.E.2d 31 (1996).

Change of possession and payment of rent removes oral lease from statutes of frauds.

— Parol contract establishing relation of landlord and tenant if within statute of frauds, possession thereunder and payment of rent for two months removes contract from operation of statute. *Steininger v. Williams*, 63 Ga. 475 (1879).

Oral contract for rent, accompanied by change in possession and payment of rent, is not within statute of frauds, but will be enforced as made, as not to do so would be a fraud. *Richards v. Plaza Hotel, Inc.*, 171 Ga. 827, 156 S.E. 809 (1931).

Tenant's vacating property and ceasing payment of rent, combined with landlord's occupation of the property and failure to demand payment of remaining rent due under a written lease, was not sufficient evidence of part performance of an alleged oral agreement modifying the lease. *White v. Orton Indus., Inc.*, 224 Ga. App. 342, 480 S.E.2d 620 (1997).

Tenant's erection of improvements not part performance unless done pursuant to agreement. — Erection of improvements on rented premises by tenant will not amount to part performance when not made in pursuance of rental agreement that tenant should make the improvements. *Moon v. Stone Mt. Mem. Ass'n*, 223 Ga. 696, 157 S.E.2d 461 (1967).

Money expended by tenant preparatory to moving into a mall did not constitute a part performance taking the case out of the statute of frauds. 20/20 Vision Ctr., Inc. v. Hudgens, 256 Ga. 129, 345 S.E.2d 330 (1986).

Payments under unenforceable lease. — Although a handwritten lease was deemed unenforceable under the statute of frauds due to an indefiniteness of terms, a question as to whether partial performance by the parties removed the lease required a remand to the trial court as payments had been made by the tenant and accepted by the landlord under the lease. *Nacoochee Corp. v. Suwanee Inv. Partners, LLC*, 275 Ga. App.

4. Contracts of Employment

Commencing performance under oral agreement O.C.G.A. § 13-5-30(5) will not obviate statute of frauds. — Fact that person who has contracted to serve another one year, to commence at future day, enters upon performance of contract does not take case out of statute of frauds. *Bentley v. Smith*, 3 Ga. App. 242, 59 S.E. 720 (1907); *Lewis v. Southern Realty Inv. Corp.*, 42 Ga. App. 171, 155 S.E. 369 (1930); *Alexander-Seewald Co. v. Marett*, 53 Ga. 314, 185 S.E. 589 (1936), disapproved on other grounds sub nom. *Hudson v. Venture Indus., Inc.*, 243 Ga. 116, 252 S.E.2d 606 (1979); *Norman v. Nash*, 102 Ga. App. 508, 116 S.E.2d 624 (1960).

Performance of services under contract not to be performed within a year for part of term is not such part performance as renders it fraud upon party performing for employer to refuse to comply, by discharge of that party before expiration of term. *Dameron v. Liberty Nat'l Life Ins. Co.*, 56 Ga. App. 257, 192 S.E. 446 (1937).

Oral contract for period of five years, whereby plaintiff was employed as insurance agent of defendant to solicit policies of insurance and collect premiums thereon, was not removed from operation of statute of frauds merely because person so employed entered on performance of that person's part of contract for period of three or four months. *Dameron v. Liberty Nat'l Life Ins. Co.*, 56 Ga. App. 257, 192 S.E. 446 (1937).

Mere fact that party to oral agreement entered upon employment and served will not avail as part performance. *Hudson v. Venture Indus., Inc.*, 147 Ga. App. 31, 248 S.E.2d 9 (1978), aff'd, 243 Ga. 116, 252 S.E.2d 606 (1979).

Performance of services under contract for part of term is not such part performance as renders it a fraud upon party performing for employer to refuse to comply, by discharge of that party before expiration of term. *Hudson v. Venture Indus., Inc.*, 243 Ga. 116, 252 S.E.2d 606 (1979); *Metzgar v. Reserve Ins. Co.*, 149 Ga. App. 404, 254 S.E.2d 517 (1979).

Fact that plaintiff entered upon employment and served would not avail as part

performance of oral contract of employment not to be performed within one year from making, nor would the plaintiff's refusal of another offer, coupled with the entry upon employment with defendant's organization, suffice as part performance. *Slater v. Jackson*, 163 Ga. App. 342, 294 S.E.2d 557 (1982); *Ikemiya v. Shibamota Am., Inc.*, 213 Ga. App. 271, 444 S.E.2d 351 (1994); *Goldstein v. Kellwood Co.*, 933 F. Supp. 1082 (N.D. Ga. 1996).

Entry into employment under an oral agreement and the performance of services for a part of the term was insufficient part performance to remove the contract from the statute of frauds. *Gatins v. NCR Corp.*, 180 Ga. App. 595, 349 S.E.2d 818 (1986).

Leaving one job to begin another has never been held to be sufficient part performance to remove an oral employment contract from the operation of the statute of frauds. *Baxley Veneer & Clete Co. v. Maddox*, 261 Ga. 309, 404 S.E.2d 554 (1991).

In such case, either party may terminate relationship and servant may recover in quantum meruit. — In such case, servant may quit at any time and recover value of servant's services in quantum meruit, and master may discharge servant at any time without incurring liability therefor. *Norman v. Nash*, 102 Ga. App. 508, 116 S.E.2d 624 (1960).

Acts preparatory or preliminary to performance do not constitute part performance. — Entry on employment, moving, and refusal of another offer, do not amount to sufficient part performance to remove oral contract from statute of frauds but are merely preparatory or preliminary to performance of contract terminable at will of either party, rather than a substantial act essential to an oral contract. These acts do not verify the probable existence of a contract. *Hudson v. Venture Indus., Inc.*, 243 Ga. 116, 252 S.E.2d 606 (1979).

Former employer's claim that a former employee breached an oral nonsolicitation agreement that was part of the employee's promotion was barred by the statute of frauds in O.C.G.A. § 13-5-30; the employee's actions in accepting the promotion and working in the new position did not constitute such part performance as would remove the oral agreement from the statute of

frauds pursuant to O.C.G.A. § 13-5-31(2), (3) because mere entry into employment and performance of services for part of the term was not inconsistent with employment terminable at will without a contract, and thus, the part performance was not consistent with the existence of a contract. *Outsourcing P'ship, LLC v. Vinson*, No. 1:06-CV-0508-MHS, 2006 U.S. Dist. LEXIS 54930 (N.D. Ga. Aug. 8, 2006).

Money expended in preparation for performance not part performance. — Although funds were expended in order for appellant to incorporate and obtain a beer license, this was preparation for performance, and not part of contract itself, and was not sufficient to remove the case from the statute of frauds. *El Diablo, Inc. v. Conway*, 247 Ga. 159, 274 S.E.2d 557 (1981).

Acts necessary under oral contract of employment to constitute part performance see *Hudson v. Venture Indus., Inc.*, 243 Ga. 116, 252 S.E.2d 606 (1979).

In order to remove the alleged oral contract from the statute of frauds, the part performance shown must be consistent with the presence of a contract and inconsistent with the lack of a contract. *Katz v. Custom Spray Prods., Inc.*, 168 Ga. App. 451, 309 S.E.2d 663 (1983).

Merely showing up for work on a daily basis did not support plaintiff's contentions regarding the terms of an oral employment contract since plaintiff's activities were not inconsistent with employment terminable at will without an express contract. *Morgan v. American Ins. Managers, Inc.*, 239 Ga. App. 635, 521 S.E.2d 676 (1999); *Ford Clinic, Inc. v. Potter*, 246 Ga. App. 320, 540 S.E.2d 275 (2000).

Discussion of sufficiency of entering service under oral employment contract as performance. — See *Marston v. Downing Co.*, 73 F.2d 94 (5th Cir. 1934).

An oral employment contract terminable at will to begin in praesenti is not prohibited by the statute of frauds. *Wood v. Dan P. Holl & Co.*, 169 Ga. App. 839, 315 S.E.2d 51 (1984).

Moving to another city and opening business pursuant to agreement, removed agreement from statute of frauds. *Fontaine v. Baxley, Boles & Co.*, 90 Ga. 416, 17 S.E. 1015 (1892).

Leaving lucrative employment for a higher paying job does not constitute part perfor-

Part Performance (Cont'd)**4. Contracts of Employment (Cont'd)**

mance of oral contract subject to statute of frauds such as will take contract out of statute of frauds. *Hudson v. Venture Indus., Inc.*, 243 Ga. 116, 252 S.E.2d 606 (1979).

Giving up job in another state pursuant to oral employment contract as constituting part performance. — See

Alexander-Seewald Co. v. Maret, 53 Ga. App. 314, 185 S.E. 589 (1935), disapproved sub nom. *Hudson v. Venture Indus., Inc.*, 243 Ga. 116, 252 S.E.2d 606 (1979).

Alleged oral contract was unenforceable under the statute of frauds, and not within the part performance exception to the statute of frauds, where fire chief stepped down from the chief's position to become a consultant to the city, which did not confer upon the city any uncompensated benefit. *Godwin v. City of Bainbridge*, 172 Ga. App. 290, 322 S.E.2d 733 (1984).

Trial court did not err in granting partial summary judgment to the former business partners on the separate entity partners' counterclaim; the claim that the former

business partners were liable for breach of an oral compensation agreement, regarding the one separate entity partner's claim for wages for operating the business was barred by the statute of frauds, as it involved a promise to answer for the debt of another, which was required to be in writing pursuant to O.C.G.A. § 15-5-30(2) and since nothing in the one separate entity partner's conduct was consistent with the lack of an employment agreement, the part performance doctrine could not be invoked as an exception to render the writing requirement unenforceable. *Carter v. Parish*, 274 Ga. App. 97, 616 S.E.2d 877 (2005).

Noncompete agreement. — As employee could not produce evidence of an enforceable noncompete agreement which was consideration for a three-year employment agreement, and which was enforced or sought to be enforced by employer so as to constitute "part performance" of the employment agreement, the employee could not avoid summary judgment on that ground. *Golden v. National Serv. Indus.*, 210 Ga. App. 53, 435 S.E.2d 270 (1993).

RESEARCH REFERENCES

ALR. — Installation of fixtures as part performance which will take parol lease out of statute of frauds, 10 ALR 1495.

Validity and effect of oral agreement in alternative, one of the alternatives being within the statute of frauds, 13 ALR 271.

Applicability of statute of frauds to joint adventure or partnership to deal in real estate, 18 ALR 484; 95 ALR 1242; 128 ALR 1520.

Discharge of existing debt (or crediting indebtedness) as part payment which will take contract out of statute of frauds, 23 ALR 473.

Name of principal or of authorized agent, in body of instrument, as satisfying statute of frauds where transaction was not conducted by him, 28 ALR 1114.

Statute of frauds: doctrine of part performance as applied to advance of money on oral agreement for mortgage on real estate, 30 ALR 1403.

Character and extent of improvements necessary to constitute part performance, 33 ALR 1489.

Accepting paid employment or remaining in such employment as part performance which will take oral contract to convey or devise real property out of statute of frauds, 40 ALR 223.

Rights of parties under oral agreement to buy land or bid it in at judicial sale for another, 42 ALR 10; 135 ALR 232; 27 ALR 1285.

Promise of landlord or tenant to pay for supplies furnished to tenant or subtenant as within statute of frauds in relation to contracts to answer for the debt, default, or miscarriage of another, 59 ALR 179.

Doctrine of part performance as sustaining action at law based on contract within statute of frauds, 59 ALR 1305.

Necessity and sufficiency of statement in writing of consideration or price for sale of goods or choses in action in order to satisfy statute of frauds, 59 ALR 1422.

Oral agreement between joint obligors as to extent of liability inter se, 65 ALR 822.

Failure to comply with statute of frauds as to a part of a contract within the statute as

affecting the enforceability of another part not covered by the statute, 71 ALR 479.

Extrinsic writing referred to in written agreement as part thereof for purposes of statute of frauds, 73 ALR 1383.

Relation between doctrines of estoppel and part performance as basis of enforcement of contract not conforming to statute of frauds, 75 ALR 650; 117 ALR 939.

Effect of statute of frauds upon the right to modify by subsequent parol agreement, a written contract required by the statute to be in writing, 80 ALR 539; 118 ALR 1511.

Sufficiency of writing under statutes requiring agreements for the payment of commission, or authorizing or employing a broker for the sale or purchase of real estate for compensation or commission, or a memorandum thereof, to be in writing, 80 ALR 1456.

Statute of frauds as affecting right to reformation of deed or mortgage so as to enlarge or restrict the land or interest covered, 86 ALR 448.

Agreement for sale of buildings or material therein as one for sale of interest in real property within statute of frauds, 91 ALR 1280.

Alterations or improvements by lessor as part performance taking lease out of statute of frauds, 101 ALR 185.

Statute of frauds as applied to agreements of repurchase or repayment on sale of corporate stock or other personal property, 121 ALR 312.

Money or other property in possession of seller, before contract was made, as satisfying condition of part payment which will take oral contract for sale of goods out of statute of frauds, 131 ALR 1252; 170 ALR 245.

Right to recover upon note, check, or other executory obligation representing consideration for a contract which the plaintiff is willing and able to perform, but which because of the statute of frauds would not have been enforceable against him, 132 ALR 1486.

Statute of frauds as applicable to a contract to be responsible for another's funeral expenses, 134 ALR 633.

Part performance predicated upon mortgagor's or judgment debtor's continuance of possession as taking out of the statute of frauds oral contracts between mortgagor and mortgagee subsequent to foreclosure or

expiration of period of redemption, or between judgment debtor and execution purchaser subsequent to execution sale, 136 ALR 262.

Retrospective applicability of statute of frauds, 148 ALR 1325.

Oral contract of employment terminable by one, but not both, of the parties within one year as within provision of statute of frauds relating to contracts not to be performed within one year, 161 ALR 290.

Vendor's willingness and ability to perform contract which does not satisfy statute of frauds as precluding purchaser's recovery back of payments made thereon, 169 ALR 187.

Money or other property in possession of seller, before contract was made, as satisfying condition of part payment which will take oral contract for sale of goods out of statute of frauds, 170 ALR 245.

Validity, construction, and application of guaranty of corporate stock, or dividends thereon, by one other than corporation, 170 ALR 1171.

Applicability of statute of frauds to contracts to surrender, rescind, or abandon trusts, 173 ALR 281.

Performance as taking contract not to be performed within a year out of the statute of frauds, 6 ALR2d 1053.

Sale or contract for sale of standing timber as within provisions of statute of frauds respecting sale of contract of sale of real property, 7 ALR2d 517.

What constitutes part performance sufficient to take agreement in consideration of marriage out of statute of frauds, 30 ALR2d 1419.

Statute of frauds: promise by stockholder, officer, or director to pay debt of corporation, 35 ALR2d 906.

Applicability of statute of frauds to promise to pay for medical, dental, or hospital services furnished to another, 64 ALR2d 1071.

Doctrine of part performance with respect to renewal option in lease not complying with statute of frauds, 80 ALR2d 425.

Recovery, on theory of quasi contract, unjust enrichment, or restitution, of money paid in reliance upon unenforceable promise to accept a bill of exchange or draft, 81 ALR2d 587.

Buyer's note as payment within contemplation of statute of frauds, 81 ALR2d 1355.

Statute of frauds: will or instrument in form of will as sufficient memorandum of contract to devise or bequeath, 94 ALR2d 921.

Applicability of statute of frauds to agreement to rescind contract for sale of land, 42 ALR3d 242.

Action by employee in reliance on employment contract which violates statute of frauds as rendering contract enforceable, 54 ALR3d 715.

Promissory estoppel as basis for avoidance of statute of frauds, 56 ALR3d 1037.

Right of owner to recover for work or material expended on his own real property in reliance upon a void or unenforceable

contract for its rental or sale, 64 ALR3d 1191.

Application of parol evidence rule in action on contract for architect's services, 69 ALR3d 1353.

Construction and application of UCC § 2-201(3)(c) rendering contract of sale enforceable notwithstanding statute of frauds with respect to goods for which payment has been made and accepted or which have been received and accepted, 97 ALR3d 908.

Promise by one other than principal to indemnify one agreeing to become surety or guarantor as within statute of frauds, 13 ALR4th 1153.

CHAPTER 6

DAMAGES AND COSTS GENERALLY

Sec.		Sec.	
13-6-1.	Purpose of damages.	13-6-9.	Damages and expenses recoverable — Expenses necessary for compliance with contract.
13-6-2.	Measure of damages — Generally.	13-6-10.	Damages and expenses recoverable — Exemplary damages.
13-6-3.	Measure of damages — Breach of bond.	13-6-11.	Recovery of expenses of litigation generally.
13-6-4.	Determination of damages generally.	13-6-12.	Effect of tender or deposit in court before trial upon recovery of costs.
13-6-5.	Duty of injured party to lessen damages resulting from breach.	13-6-13.	Recovery of interest upon damages.
13-6-6.	Damages and expenses recoverable — Nominal damages.	13-6-14.	Number of actions for breach of contract.
13-6-7.	Damages and expenses recoverable — Liquidated damages generally.	13-6-15.	Damages for writing bad checks.
13-6-8.	Damages and expenses recoverable — Remote or consequential damages.		

Cross references. — Parties who may bring action on a contract, § 9-2-20. Remedies for breach of contracts for sales of goods, § 11-2-701 et seq. Specific performance, § 23-2-130 et seq.

Law reviews. — For article, “Georgia Annotations, Restatement of the Law of Con-

tracts,” see 5 Ga. B.J. 15 (1942). For article surveying Georgia cases in the area of tort law from June 1, 1977, through May 1978, see 30 Mercer L. Rev. 215 (1978). For annual survey on law of contracts, see 42 Mercer L. Rev. 125 (1990).

JUDICIAL DECISIONS

Breach of one contract does not provide grounds for rescission of separate and distinct contract. — There is no rule of law which allows breach of one contract to suffice as grounds for rescission of another

separate and distinct contract; indeed, the well established rule is to the contrary. CEE Fed. Credit Union v. Chesser, 150 Ga. App. 328, 258 S.E.2d 2 (1979).

RESEARCH REFERENCES

ALR. — Measure of damages for breach of contract preventing operation of nonindustrial business in contemplation, but not established or in actual operation, 1 ALR 156; 99 ALR 938.

Liability of one contracting to make repairs for damages from improper performance of the work, 1 ALR 1654; 44 ALR 824.

Measure of damages for defective performance of contract to bore or case well, 5 ALR 240.

Rights of parties to a timber contract upon failure of purchaser to remove the timber within the time fixed or within a reasonable time, 15 ALR 41; 31 ALR 944; 42 ALR 641; 71 ALR 143; 164 ALR 423.

Right to damages because of abandonment or relocation of railway line, station, or sidetrack, 23 ALR 555.

Dismissal of suit as affecting election of remedies as between damages and specific performance, 26 ALR 111.

Liability of labor organization for inducing breach of contract to furnish or accept material, 29 ALR 562.

Rights and remedies of purchaser under seller's agreement to assist him in reselling the goods, 29 ALR 666.

Power of equity to grant damages on enjoining breach of contract by seller of business not to engage in competing business, 31 ALR 1174.

Time as of which damages are to be determined where broker, before expiration of credit period, repudiates contract to purchase stock for customer on partial payment plan, 31 ALR 1179.

Rate of exchange to be taken into account in assessing damages for breach of contract, 33 ALR 1285; 43 ALR 520; 50 ALR 1273; 105 ALR 640.

Anticipatory repudiation of contract for sale of goods by buyer as affecting time as of which damages are to be computed, 34 ALR 114.

Measure of damages for breach of a contract to pay a specific sum in stock, notes, bonds, or other securities, 34 ALR 931.

Right to amount stipulated in contract for breach where it appears there were no actual damages, or there was no proof of such damages, 34 ALR 1336.

Recovery by one who has breached contract for services providing for share in proceeds or profits as compensation, 40 ALR 34.

Measure of damages for buyer's breach of contract to purchase shares of stock, 44 ALR 358.

Measure of recovery by vendee under executory contract for purchase of real property where vendor is unable or refuses to convey, 48 ALR 12; 68 ALR 137; 17 ALR2d 1300.

Stipulation in land contract for payment of specified sum by vendor in case of default as provision for liquidated damages or penalty, 48 ALR 899.

Right to recover as for breach of original building or construction contract where one party, upon refusal of other party to abide by the terms, proceeds under new or changed terms, 61 ALR 212.

Measure of damages for broker's breach of contract with customer as to sales and purchases of stocks on the exchange, 63 ALR 305.

Measure of recovery by building contrac-

tor where contract is substantially but not exactly performed, 65 ALR 1297.

Measure of recovery by vendee under executory contract for purchase of real property where a vendor is unable or refuses to convey, 68 ALR 137; 17 ALR2d 1300; 17 ALR2d 1300.

Remedies for breach of decedent's agreement to devise, bequeath, or leave property as compensation for services, 69 ALR 14; 106 ALR 742.

Right of one party to treat repudiation of contract by other as a breach, as affected by former's subsequent demand of, or expression of a willingness to receive, performance, 69 ALR 1303.

Right as against corporation of stockholder who surrenders part of his stock in reliance upon agreement by other stockholders to do the same which they fail to carry out, 74 ALR 1377.

Distinction between uncertainty as to whether substantial damages resulted and uncertainty as to amount, 78 ALR 858.

Time and place with reference to which damages for conversion of chattel are to be determined as against one not a party to the original conversion, 80 ALR 613.

Right to maintain action for damages as for breach of contract upon lease defectively executed, 82 ALR 1318.

Sale by vendor of all or substantial part of property to a third person before time fixed for performance of contract of sale as breach, or ground of rescission by vendee, or as affecting rights to specific performance, 90 ALR 337.

Rule requiring reduction of future payments to present worth as applicable to determination of damages for breach of contract of employment, 90 ALR 1318.

Power of court to reduce or increase verdict without giving party affected the option to submit to a new trial, 95 ALR 1163.

Remedy by mandatory injunction or specific performance for breach of contract to furnish one the requirements of his business, 98 ALR 421.

Measure of damages for breach of contract preventing operation of nonindustrial business in contemplation, but not established or in actual operation, 99 ALR 938.

Right of vendee under executory land contract to treat contract as breached and maintain action for damages upon vendor's

declaration prior to time for performance that he will not perform, 102 ALR 1082.

Construction and effect of bond or other agreement to protect mortgagee against prior tax or other liens, or failure to make or complete improvements or repairs, and measure of damages for breach thereof, 103 ALR 1395.

Right of building or construction contractor to recover damages resulting from delay caused by default of contractee, 115 ALR 65.

Presumption and burden of proof regarding mitigation of damages, 134 ALR 242.

Failure of complaint to state cause of action for unliquidated damages as ground for dismissal of action at hearing to determine amount of damages following defendant's default, 163 ALR 496.

Cancellation of lease or contract pursuant to provision in that regard as affecting liability accruing before cancellation, 166 ALR 391.

Vendor's willingness and ability to perform contract which does not satisfy statute of frauds as precluding purchaser's recovery back of payments made thereon, 169 ALR 187.

Buyer's acceptance of part of goods as affecting right to damages for failure to complete delivery, 169 ALR 595.

Specific performance or injunctive relief against breach of contract, other than lease or agreement therefor, or contract for services, terminable by one party but not the other, 8 ALR2d 1208.

Validity and construction of provision for liquidated damages in contract with cooperative marketing association, 12 ALR2d 130.

Right to recover, in action for breach of contract, expenditures incurred in preparation for performance, 17 ALR2d 1300.

Measure of damages for fraudulently procuring services at lowered rate or gratuitously, 24 ALR2d 742.

Measure of damages for buyer's breach of contract to purchase article from dealer or manufacturer's agent, 24 ALR2d 1008.

Measure and items of compensation of contractor under cost-plus contract which is terminated, without breach, before contemplation, 28 ALR2d 867.

Purchaser's use or attempted use of articles known to be defective as affecting damages recoverable for breach of warranty, 33 ALR2d 511.

Conflict of laws as to elements and measure of damages recoverable for breach of contract, 50 ALR2d 227.

Measure and elements of damages recoverable for breach of contract to support person, 50 ALR2d 613.

Measure or basis of attorney's recovery on express contract fixing noncontingent fees, where he is discharged without cause or fault on his part, 54 ALR2d 604.

Employer's damages for breach of employment contract by employee's terminating employment, 61 ALR2d 1008.

Measure and elements of damages for breach of contract to marry, 73 ALR2d 553.

Measure of vendee's recovery in action for damages for vendor's delay in conveying real property, 74 ALR2d 578.

Liability of labor union or its officers or members for wrongful suspension or expulsion of member, 74 ALR2d 783.

Measure of damages, to advertiser, for radio or television station's breach or wrongful termination of contract, 90 ALR2d 1199.

Water well-drilling contracts, 90 ALR2d 1346.

Measure and elements of damages recoverable against union for breach of no-strike provision in collective bargaining agreement, 92 ALR2d 1232.

Liability of garageman to one ordering repair of motor vehicle, for defective work, 92 ALR2d 1408; 1 ALR4th 347; 23 ALR4th 274.

Duty of construction contractor to indemnify contractee held liable for injury to third person, in absence of express contract for indemnity, 97 ALR2d 616.

Contractor's liability for alleged breach of contract for construction of swimming pool, 1 ALR3d 870.

Construction contractor's liability to contractee for defects or insufficiency of work attributable to the latter's plans and specifications, 6 ALR3d 1394.

Venue of damage action for breach of real-estate sales contract, 8 ALR3d 489.

Liability for accident occurring in motor transportation of house or similar structure on public streets or highways, 9 ALR3d 1436.

Awarding damages for delay, in addition to specific performance, of contract for sale of corporate stock, 28 ALR3d 1401.

Seller's liability for fraud in connection with contract for the sale of long-term dancing lessons, 28 ALR3d 1412.

Breach or repudiation of contract as affecting right to enforce arbitration clause therein, 32 ALR3d 377.

Validity and construction of "no damage" clause with respect to delay in building or construction contract, 74 ALR3d 187.

Telephone company's right to change subscriber's telephone number, 75 ALR3d 700.

Liability of bank in connection with night depository service, 77 ALR3d 597.

Tax preparer's liability to taxpayer in connection with preparation of tax return, 81 ALR3d 1119.

Liability of lessee who refuses to take possession under executed lease or executory agreement to lease, 85 ALR3d 514.

Limitation to quantum meruit recovery, where attorney employed under contingent fee contract is discharged without cause, 92 ALR3d 690.

Measure and elements of damages in action against physician for breach of contract to achieve particular result or cure, 99 ALR3d 303.

Wrongful cancellation of medical malpractice insurance, 99 ALR3d 469.

Increase in tuition as actionable in suit by student against college or university, 99 ALR3d 885.

Measure and elements of damages in action against garageman based on failure to properly perform repair or service on motor vehicle, 1 ALR4th 347.

Liability of insurer for damages resulting from delay in passing upon an application for life insurance, 1 ALR4th 1202.

Recovery of damages for breach of contract to convey homestead where only one spouse signed contract, 5 ALR4th 1310.

Amount of appropriation as limitation on damages for breach of contract recoverable by one contracting with government agency, 40 ALR4th 998.

Modern status of rule as to whether cost of correction or difference in value of structures is proper measure of damages for breach of construction contract, 41 ALR4th 131.

Damages for breach of contract as affected by income tax considerations, 50 ALR4th 452.

Equipment leasing expense as element of construction contractor's damages, 52 ALR4th 712.

Recoverability of compensatory damages for mental anguish or emotional distress for breach of contract to lend money, 52 ALR4th 826.

Credit card issuer's liability, under state laws, for wrongful billing, cancellation, dishonor or disclosure, 53 ALR4th 231.

Recoverability of compensatory damages for mental anguish or emotional distress for breach of service contract, 54 ALR4th 901.

Recovery of anticipated lost profits of new business: post-1965 cases, 55 ALR4th 507.

Duty and liability of subcontractor to employee of another contractor using equipment or apparatus of former, 55 ALR4th 725.

Bank's liability for breach of implied contract of good faith and fair dealing, 55 ALR4th 1026.

13-6-1. Purpose of damages.

Damages are given as compensation for the injury sustained as a result of the breach of a contract. (Orig. Code 1863, § 2881; Code 1868, § 2889; Code 1873, § 2940; Code 1882, § 2940; Civil Code 1895, § 3794; Civil Code 1910, § 4390; Code 1933, § 20-1402.)

JUDICIAL DECISIONS

Absent provision for liquidated damages, damages accruing by reason of breach shall serve as compensation. — When no agreement fixing amount of damages in case of breach of contract is embraced in contract itself, damages accruing to either party by reason of breach are such as will compensate

the party for injury sustained. *Spalding Constr. Co. v. Simon*, 36 Ga. App. 723, 137 S.E. 901 (1927).

Injured party to be placed in position party would have held had breach not occurred. — Law always seeks to give a remedy commensurate with injury. Injured party is

to be placed, as near as may be, in situation the injured party would have occupied if wrong had not been committed. *Georgia Power & Light Co. v. Fruit Growers Express Co.*, 55 Ga. App. 520, 190 S.E. 669 (1937).

Plaintiff was entitled only to be placed in the position plaintiff would have been had defendant performed defendant's part of the contract. *Gainesville Glass Co. v. Don Hammond, Inc.*, 157 Ga. App. 640, 278 S.E.2d 182 (1981).

Injured party cannot be placed in better position than injured party would have held had breach not occurred. *Lastinger v. City of Adel*, 69 Ga. App. 535, 26 S.E.2d 158 (1943); *Gainesville Glass Co. v. Don Hammond, Inc.*, 157 Ga. App. 640, 278 S.E.2d 182 (1981).

Evidence of reasonable cost to correct fraudulently concealed defects will authorize award of damages. *SCM Corp. v. Thermo Structural Prods., Inc.*, 153 Ga. App. 372, 265 S.E.2d 598 (1980).

When damage claimed is solely to building or structure, measure of damages is cost of restoration. *Georgia-Carolina Brick & Tile Co. v. Brown*, 153 Ga. App. 747, 266 S.E.2d 531 (1980).

Discussion of proof of damage and evidentiary issues. — See *McDow v. Dixon*, 138 Ga. App. 338, 226 S.E.2d 145 (1976).

Damage award for a breach of a covenant not to compete cannot be supported by a contractual provision allocating \$10,000.00 of the total purchase price to the covenant since there is nothing in the contract to indicate that this was intended to be a liquidated damages provision. *Webster v. Purdy*, 166 Ga. App. 183, 303 S.E.2d 521 (1983).

No error in instructions. — There was no error in giving instructions as to general principles regarding the recovery of damages in a contract case when there was no contention that the proper measure of those damages was not also given. *Canal Ins. Co. v. Bryant*, 173 Ga. App. 173, 325 S.E.2d 839 (1984); *Kent v. Brown*, 238 Ga. App. 607, 518 S.E.2d 737 (1999).

Liquidated delay damages provision ineffective where conflicting with recovery available at law. — See *Centex-Rodgers Constr. Co. v. McCann Steel Co.*, 206 Ga. App. 827, 426 S.E.2d 596 (1992).

Lost profit damages not recoverable for breach of lease. — Trial court erred in

denying a lessee's motion for directed verdict in an action by an assignee for damages relating to the expiration of a lease between the lessee and the lessors because the assignee had no entitlement to recover the assignee's lost profits, based on allegations that the assignee could not operate the assignee's own convenience store due to the lessee's failure to timely vacate the premises, since it was limited through the assignment to recover only the remedies available to the lessors, i.e., failure to timely deliver possession and property damages. *Golden Pantry Food Stores, Inc. v. Lay Bros., Inc.*, 266 Ga. App. 645, 597 S.E.2d 659 (2004).

Cited in *Martin v. Lott*, 144 Ga. 660, 87 S.E. 902 (1916); *Travers v. Macon Ry. & Light Co.*, 19 Ga. App. 15, 90 S.E. 732 (1916); *Williams v. Hines*, 26 Ga. App. 381, 107 S.E. 265 (1921); *Colt Co. v. Hiland*, 35 Ga. App. 550, 134 S.E. 142 (1926); *Endsley v. Georgia Ry. & Power Co.*, 37 Ga. App. 439, 140 S.E. 386 (1927); *Bankers' Health & Life Ins. Co. v. James*, 177 Ga. 520, 170 S.E. 357 (1933); *McLendon v. Floyd*, 59 Ga. App. 506, 1 S.E.2d 466 (1939); *Speed Oil Co. v. Griffin*, 73 Ga. App. 242, 36 S.E.2d 205 (1945); *Irvindale Farms, Inc. v. W.O. Pierce Dairy, Inc.*, 78 Ga. App. 670, 51 S.E.2d 712 (1949); *Farlow v. Jeffcoat*, 78 Ga. App. 653, 52 S.E.2d 30 (1949); *Fox Motor Co. v. Dillard*, 80 Ga. App. 885, 57 S.E.2d 824 (1950); *Brown v. Hilton Hotels Corp.*, 133 Ga. App. 286, 211 S.E.2d 125 (1974); *Hood v. Hallman*, 143 Ga. App. 507, 239 S.E.2d 194 (1977); *Graham Bros. Constr. Co. v. C.W. Matthews Contracting Co.*, 159 Ga. App. 546, 284 S.E.2d 282 (1981); *Hardin v. Macon Mall*, 169 Ga. App. 793, 315 S.E.2d 4 (1984); *Leader Nat'l Ins. Co. v. Smith*, 177 Ga. App. 267, 339 S.E.2d 321 (1985); *Fleetwood v. Wieuca N. Condominium Ass'n*, 182 Ga. App. 15, 354 S.E.2d 623 (1987); *Fields v. Smith*, 190 Ga. App. 369, 378 S.E.2d 741 (1989); *Eastgate Assocs. v. Piggly Wiggly S., Inc.*, 200 Ga. App. 872, 410 S.E.2d 129 (1991); *Separk v. Caswell Bldrs., Inc.*, 209 Ga. App. 713, 434 S.E.2d 502 (1993); *Camp v. Eichelkraut*, 246 Ga. App. 275, 539 S.E.2d 588 (2000); *Baldwin Rental Ctrs. Inc. v. Case Credit Corp.*, 277 Bankr. 152 (Bankr. S.D. Ga. 2000); *Operations Mgmt. Int'l v. City of Forsyth*, 288 Ga. App. 469, 654 S.E.2d 438 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, § 178.

C.J.S. — 17A C.J.S., Contracts, §§ 439, 459, 506, 546, 548, 549.

ALR. — Power of equity to grant damages on enjoining breach of contract by seller of business not to engage in competing business, 31 ALR 1174.

Loss of profits as damages for breach of contract in relation to advertising, 41 ALR 198.

Valuation clause in carrier's contract as limit, or as ratio, of recovery in case of partial loss, 41 ALR 450.

Rate of exchange to be taken into account in assessing damages for breach of contract, 43 ALR 520; 50 ALR 1273; 105 ALR 640.

Value of contractor's own services not rendered because of breach, as deductible item in computing damages for breach of contract, 50 ALR 1397.

Remedies for breach of decedent's agreement to devise, bequeath, or leave property as compensation for services, 69 ALR 14; 106 ALR 742.

Loss of or damage to crop as element of damages for breach of contract of sale or warranty of agricultural machinery or fertilizer, 69 ALR 748.

Employer's offer to take back employee wrongfully discharged as affecting former's liability, 72 ALR 1049.

Measure of damages for breach of contract for sale or purchase of equipment, supplies of gasoline, etc., used in operation of gasoline filling station, 81 ALR 99.

Remedy and measure of recovery where insurer breaches its contract to pay indemnity periodically, 81 ALR 379; 99 ALR 1171.

Rate of exchange to be taken into account in assessing damages for breach of contract or nonpayment of money obligation payable in foreign currency, 105 ALR 640.

Remedies during promisor's lifetime on

contract to convey or will property at death in consideration of support or services, 7 ALR2d 1166.

Burden of proving value of relief from performing contract in suit based on defendant's breach preventing or excusing full performance, 17 ALR2d 968.

Right to recover, in action for breach of contract, expenditures incurred in preparation for performance, 17 ALR2d 1300.

Measure or basis of attorney's recovery on express contract fixing noncontingent fees, where he is discharged without cause or fault on his part, 54 ALR2d 604.

"Exclusive right to sell" and other terms in real-estate broker's contract as excluding owner's right of sale, 88 ALR2d 936.

Measure of damages for lessor's breach of contract to lease or to put lessee in possession, 88 ALR2d 1024.

Mental anguish as element of damages in action for breach of contract to furnish goods, 88 ALR2d 1367.

Damages to franchisee for failure of franchisor of national brand or service to provide the services or facilities contracted for, 41 ALR3d 1436.

Recovery for mental anguish or emotional distress, absent independent physical injury, consequent upon breach of contract in connection with sale of real property, 61 ALR3d 922.

Measure of damages where vendor, after execution of contract of sale but before conveyance of property, removes part of property contracted for, 97 ALR3d 1220.

Measure and elements of damages in action against physician for breach of contract to achieve particular result or cure, 99 ALR3d 303.

Measure and elements of damages for breach of contract to lend money, 4 ALR4th 682.

Recovery of anticipated lost profits of new business: post-1965 cases, 55 ALR4th 507.

13-6-2. Measure of damages — Generally.

Damages recoverable for a breach of contract are such as arise naturally and according to the usual course of things from such breach and such as the parties contemplated, when the contract was made, as the probable result of its breach. (Civil Code 1895, § 3799; Civil Code 1910, § 4395; Code 1933, § 20-1407.)

History of Code section. — This Code section is derived from the decision in *Georgia R.R. v. Hayden*, 71 Ga. 518, 51 Am. R. 274 (1883).

Law reviews. — For article discussing recovery of anticipatory damages in breach of

contract actions, see 11 Ga. B.J. 18 (1948). For annual survey of law of contracts, see 38 Mercer L. Rev. 107 (1986). For article, "Recent Developments in Construction Law," see 5 Ga. St. B.J. 24 (1999).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

NATURE OF DAMAGES RECOVERABLE

MEASURE OF DAMAGES RECOVERABLE

General Consideration

Section applies only to suits on contract and not to suits on tort. *Postal Telegraph-Cable Co. v. Kaler*, 65 Ga. App. 641, 16 S.E.2d 77 (1941).

Tortious acts not necessary for recovery. — Even though the statutory definitions of general and special damages, O.C.G.A. § 51-12-2, refer to tortious acts, general and special damages also may be recovered in contract actions if the damages are not remote or consequential and arose naturally and according to the usual course of things from the breach. *Bill Parker & Assocs. v. Rahr*, 216 Ga. App. 838, 456 S.E.2d 221 (1995).

Rule against recovery of vague damages applies more to causation than uncertainty as to measure. — Rule against the recovery of vague, speculative, or uncertain damages relates more especially to the uncertainty as to cause, rather than uncertainty as to the measure or extent of the damages. Mere difficulty in fixing their exact amount, when proximately flowing from the alleged injury, does not constitute a legal obstacle in the way of their allowance, when the amount of the recovery comes within that authorized with reasonable certainty by the legal evidence submitted. *Kuhlke Constr. Co. v. Mobley, Inc.*, 159 Ga. App. 777, 285 S.E.2d 236 (1981).

Punitive damages are not recoverable for mere breach of contract. *Bennett v. Associated Food Stores, Inc.*, 118 Ga. App. 711, 165 S.E.2d 581 (1968).

Injured party to be placed in position injured party would have held had breach not occurred. — Law always seeks to give a remedy commensurate with injury. Injured

party is to be placed, as near as may be, in situation the injured party would have occupied if wrong had not been committed. *Georgia Power & Light Co. v. Fruit Growers Express Co.*, 55 Ga. App. 520, 190 S.E. 669 (1937).

Measure of damages in case of breach of contract is amount which will compensate injured person for loss which fulfillment of contract would have prevented or breach of contract entailed; the person injured, is, so far as it is possible to do so by monetary award, to be placed in position the injured person would have been in had contract been performed. *Darlington Corp. v. Evans*, 88 Ga. App. 84, 76 S.E.2d 72 (1953); *Bennett v. Associated Food Stores, Inc.*, 118 Ga. App. 711, 165 S.E.2d 581 (1968).

Injured party cannot be placed in better position than injured party would have held had breach not occurred. *Lastinger v. City of Adel*, 69 Ga. App. 535, 26 S.E.2d 158 (1943).

Damages, to be recoverable, must result from act on part of other party. *Darlington Corp. v. Evans*, 88 Ga. App. 84, 76 S.E.2d 72 (1953).

Distinction between proximate cause concept in torts and breach of contract. — Proximate cause concept in law of torts and in breach of contract seems to differ only in that probable and natural consequences of breach must have been foreseeable at time contract was entered into. *National Hills Shopping Ctr., Inc. v. Insurance Co. of N. Am.*, 308 F. Supp. 248 (S.D. Ga. 1970).

No apportionment of degree of responsibility in warranty cases as in negligence cases. — As between a negligent plaintiff and a negligent defendant their respective fault may be compared and reflected in amount of jury award, but Georgia law

General Consideration (Cont'd)

makes no provision for apportioning degree of responsibility in warranty cases. *National Hills Shopping Ctr., Inc. v. Insurance Co. of N. Am.*, 308 F. Supp. 248 (S.D. Ga. 1970).

Recovery restricted to nominal damages where evidence insufficient for jury to ascertain actual damages. — If plaintiff fails to furnish sufficient data to enable jury, with reasonable degree of certainty and exactness, to estimate actual damages sustained by purchaser, then the plaintiff's recovery will be restricted to nominal damages. *Crawford & Assocs. v. Groves-Keen, Inc.*, 127 Ga. App. 646, 194 S.E.2d 499 (1972).

Burden of proof. — Burden is on the plaintiff to show both the breach and the damage. This must be done by evidence which will furnish the jury with data sufficient to enable the jury to estimate the amount of damages with reasonable certainty. *Hospital Auth. v. Bryant*, 157 Ga. App. 330, 277 S.E.2d 322 (1981).

Exact computation of damages not requirement. — When a contract contemplated both fixed and variable costs, it was not necessary to prove to an "exact computation" the profit element of the contractual damages. *Kemire, Inc. v. Williams Investigative & Sec. Servs., Inc.*, 215 Ga. App. 194, 450 S.E.2d 427 (1994).

Damage award for a breach of a covenant not to compete cannot be supported by a contractual provision allocating \$10,000.00 of the total purchase price to the covenant since there is nothing in the contract to indicate that this was intended to be a liquidated damages provision. *Webster v. Purdy*, 166 Ga. App. 183, 303 S.E.2d 521 (1983).

Sufficient evidence to defeat summary judgment. — Plaintiff, a surety, asserted (1) that the damages plaintiff sought to recover were a result of the alleged negligent performance by defendant, a construction program manager (CPM), of its contractual duties, including the duty to certify a subsequently defaulting construction company's payment applications; and (2) that plaintiff's damages included the cost of remediating nonconforming work performed by the construction company and certified by the CPM; the surety also presented evidence with regard to which pay applications and which specific items on the

pay applications they contended should not have been certified by the CPM and the cost to remediate the nonconforming work. Accordingly, the surety presented sufficient evidence to create an issue of fact regarding damages for the surety's breach of contract claims and preclude summary judgment. *Carolina Cas. Ins. Co. v. R.L. Brown & Assocs.*, No. 1:04-cv-3537-GET, 2006 U.S. Dist. LEXIS 71056 (N.D. Ga. Sept. 29, 2006).

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(1941); *Liberty Mut. Ins. Co. v. Atlantic C.L.R.R.*, 66 Ga. App. 826, 19 S.E.2d 377 (1942); *Aircraft Apts., Inc. v. Haverty Furn. Co.*, 71 Ga. App. 560, 31 S.E.2d 419 (1944); *Hall Bros. Hatchery, Inc. v. Hendrix*, 72 Ga. App. 137, 33 S.E.2d 370 (1945); *Samford v. Patent Scaffolding Co.*, 199 Ga. 41, 33 S.E.2d 422 (1945); *Weathers Bros. Transf. Co. v. Jarrell*, 72 Ga. App. 317, 33 S.E.2d 805 (1945); *Speed Oil Co. v. Griffin*, 73 Ga. App. 242, 36 S.E.2d 205 (1945); *Chadwick v. Dolinoff*, 207 Ga. 702, 64 S.E.2d 76 (1951); *ABC Sch. Supply, Inc. v. Brunswick-Balke-Collender Co.*, 97 Ga. App. 84, 102 S.E.2d 199 (1958); *Bigelow-Sanford Carpet Co. v. Goodroe*, 98 Ga. App. 394, 106 S.E.2d 45 (1958); *Tyson v. Nimick*, 99 Ga. App. 722, 109 S.E.2d 627 (1959); *Smith v. A.A. Wood & Son Co.*, 103 Ga. App. 802, 120 S.E.2d 800 (1961); *New Amsterdam Cas. Co. v. Mitchell*, 325 F.2d 474 (5th Cir. 1963); *State Hwy. Dep't v. Knox-Rivers Constr. Co.*, 117 Ga. App. 453, 160 S.E.2d 641 (1968); *Brown v. Royal Wood, Inc.*, 119 Ga. App. 564, 168 S.E.2d 211 (1969); *Eastern Fed. Corp. v. Avco-Embassy Pictures, Inc.*, 326 F. Supp. 1280 (N.D. Ga. 1970); *Buford-Clairmont, Inc. v. Jacobs Pharmacy Co.*, 131 Ga. App. 643, 206 S.E.2d 674 (1974); *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518 (5th Cir. 1974); *Lurlee, Inc. v. Pernoshal-39 Co.*, 135 Ga. App. 724, 218 S.E.2d 701 (1975); *Lindgren v. Dowis*, 236 Ga. 278, 223 S.E.2d 682 (1976); *Video Entertainment, Inc. v. Cartridge Rental Network*, 138 Ga. App. 540, 226 S.E.2d 794 (1976); *Lawyers Title Ins. Corp. v. Noland Co.*, 140 Ga. App. 114, 230 S.E.2d 102 (1976); *Cagle v. Southern Bell Tel. & Tel. Co.*, 143 Ga. App. 603, 239 S.E.2d 182 (1977); *Prudential Timber & Farm Co. v. Collins*, 144 Ga. App. 849, 243 S.E.2d 80 (1978); *Holder v. J.F. Kearley, Inc.*, 153 Ga. App. 843, 267 S.E.2d 266 (1980); *Graham Bros. Constr. Co. v. C.W. Matthews Contracting Co.*, 159 Ga. App. 546, 284 S.E.2d 282 (1981); *Tuten v. Beckham*, 162 Ga. App. 101, 290 S.E.2d 205 (1982); *Glennville Hatchery, Inc. v. Thompson*, 164 Ga. App. 819, 298 S.E.2d 512 (1982); *All-Georgia Dev., Inc. v. Kadis*, 178 Ga. App. 37, 341 S.E.2d 885 (1986); *Southern Dist. Co. v. Kirkland*, 181 Ga. App. 263, 351 S.E.2d 685 (1986); *Brooks v. Forest Farms, Inc.*, 182 Ga. App. 901, 357 S.E.2d 604 (1987); *Puett v. McCannon*, 183

Ga. App. 152, 358 S.E.2d 300 (1987); *Hinesville Bank v. Pony Express Courier Corp.*, 868 F.2d 1532 (11th Cir. 1989); *Walter v. Orkin Exterminating Co.*, 192 Ga. App. 621, 385 S.E.2d 725 (1989); *Paul Davis Sys. v. Peth*, 201 Ga. App. 734, 412 S.E.2d 279 (1991); *Gray v. Higgins*, 205 Ga. App. 52, 421 S.E.2d 341 (1992); *Traina Enters., Inc. v. Racetrac Petro., Inc.*, 241 Ga. App. 18, 525 S.E.2d 712 (1999); *Camp v. Eichelkraut*, 246 Ga. App. 275, 539 S.E.2d 588 (2000); *Freightliner Chattanooga, LLC v. Whitmire*, 262 Ga. App. 157, 584 S.E.2d 724 (2003); *Operations Mgmt. Int'l v. City of Forsyth*, 288 Ga. App. 469, 654 S.E.2d 438 (2007); *Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 3:07-CV-084 (CDL), 2008 U.S. Dist. LEXIS 32116 (M.D. Ga. App. 18, 2008).

Nature of Damages Recoverable

Nature of loss or injury recoverable as damages for breach of contract. — Damages growing out of breach of contract, in order to form basis of recovery, must be such as could be traced solely to breach, be capable of exact computation, must have arisen according to usual course of things, and be such as parties contemplated as probable result of such breach. *Crawford & Assocs. v. Groves-Keen, Inc.*, 127 Ga. App. 646, 194 S.E.2d 499 (1972); *Simmons v. Boros*, 176 Ga. App. 346, 335 S.E.2d 662 (1985), *aff'd*, 255 Ga. 524, 341 S.E.2d 2 (1986); *Leader Nat'l Ins. Co. v. Smith*, 177 Ga. App. 267, 339 S.E.2d 321 (1985).

Damages arising naturally from a breach of contract. — Even though a side contract between a medical utilization review provider and an employee benefit plan sponsor provided that the review provider had no responsibility for payment of medical claims, a plan participant could assert a claim for such damages as arisen naturally from any alleged breach of the contract by the review provider; and, if proven and established, such damages could potentially be in an amount equivalent to denied medical benefits. *Monroe v. Bd. of Regents of the Univ. Sys.*, 268 Ga. App. 659, 602 S.E.2d 219 (2004).

When anticipated profits are recoverable. — While anticipated profits of unestablished future business are generally too speculative for recovery, when business has been long

Nature of Damages Recoverable (Cont'd)

established, has uniformly made profits, and there are definite, certain, and reasonable data for the profit's ascertainment, and such profits reasonably must have been in contemplation of parties at time of contract, those profits may be recovered at least for a limited reasonable future time, even though those profits cannot be computed with exact mathematical certainty. *B.H. Levy Bro. & Co. v. Allen*, 53 Ga. App. 246, 185 S.E. 369 (1936).

Lost profits recoverable, although to some extent contingent, when legally and naturally resulting from breach. — Loss of profits which would have been earned directly under contract except for alleged breach were recoverable when the profits were within contemplation of parties at time of entering into contract and if the profits were the legal and natural result of breach, such damages not necessarily being too remote or speculative merely because the profits were to some extent contingent. *Hoffman v. Louis L. Battey Post No. 4 of Am. Legion*, 74 Ga. App. 403, 39 S.E.2d 889 (1946).

Lost profit not recoverable for breach of lease. — Trial court erred in denying a lessee's motion for directed verdict in an action by an assignee for damages relating to the expiration of a lease between the lessee and the lessors because the assignee had no entitlement to recover assignee's lost profits, based on allegations that the assignee could not operate assignee's own convenience store due to the lessee's failure to timely vacate the premises, when it was limited through the assignment to recover only the remedies available to the lessors, i.e., failure to timely deliver possession and property damages. *Golden Pantry Food Stores, Inc. v. Lay Bros., Inc.*, 266 Ga. App. 645, 597 S.E.2d 659 (2004).

Lost profits not shown. — A contractor was not entitled to recover lost profits pursuant to O.C.G.A. § 13-6-8 in its claim for breach of contract against a defaulting supplier, because the contractor failed to demonstrate a history of profitability and failed to provide definite, certain, and reasonable data to ascertain the amount of lost profits on the job at issue. *Triad Drywall, LLC v. Bldg. Materials Wholesale, Inc.*, 300 Ga. App. 745, 686 S.E.2d 364 (2009).

Punitive damages. — Employee benefit plan participant was not entitled to recover extra-contractual and punitive damages against the plan's claims administrator and an independent medical utilization review provider after the trial court properly dismissed the participant's breach of fiduciary duty claims as only the participant's breach of contract claims then remained and the participant could only recover compensatory damages on those claims. *Monroe v. Bd. of Regents of the Univ. Sys.*, 268 Ga. App. 659, 602 S.E.2d 219 (2004).

Punitive damages not recoverable. — Trial court erred in denying a doctor's motion for judgment notwithstanding the verdict on the issue of punitive damages awarded to a hospital on the hospital's breach of contract claim as punitive damages are not available for breach of contract claims. *Whitaker v. Houston County Hosp. Auth.*, 272 Ga. App. 870, 613 S.E.2d 664 (2005).

Application anticipatory breach of contract see *Redman Dev. Corp. v. Piedmont Heating & Air Conditioning, Inc.*, 128 Ga. App. 447, 197 S.E.2d 167 (1973).

Net profit in permanent improvements received by landlord was proper award for constructive eviction. *Hathaway v. Gorfine*, 134 Ga. App. 748, 216 S.E.2d 338 (1975).

Profits of contract of resale, known to vendor when making original contract, may be recovered when vendor fails to perform agreement. *Ladd Lime & Stone Co. v. MacDougald Constr. Co.*, 29 Ga. App. 116, 114 S.E. 75 (1922); *Carolina Portland Cement Co. v. Roper-Strauss-Ferst Co.*, 33 Ga. App. 511, 126 S.E. 860 (1925).

Refusal of loan applications, contrary to contract terms, results in damages that are not remote. *Haas & Haas v. Marks*, 158 Ga. 267, 123 S.E. 109 (1924).

Breach of real estate sales contract. — In an action by a seller against a buyer for breach of a real estate sales contract, there can be no recovery for continued insurance coverage, utility bills, maintenance costs, ad valorem taxes, and loss of use of proceeds of sale, in the absence of a clause in the parties' contract expressly authorizing such recovery. *Quigley v. Jones*, 255 Ga. 33, 334 S.E.2d 664 (1985).

Jury's damage award was not error since: (1) it was based on evidence in the record as to the value lost to the sellers due to their

detrimental reliance on the purchasers' valid and enforceable promise to purchase the property; and (2) the damages were equitable and necessary to prevent injustice. *Rental Equip. Group, LLC v. Maci, LLC*, 263 Ga. App. 155, 587 S.E.2d 364 (2003).

Evidence of breach of contract damages improperly excluded as speculative. — Georgia Department of Transportation (DOT) was permitted to present evidence of the department's breach of contract damages under O.C.G.A. § 13-6-2 because an asphalt company's argument that the damages calculations were too speculative was asserting an insufficiency in the evidence that was not appropriately resolved on the company's motion in limine. *DOT v. Douglas Asphalt Co.*, 297 Ga. App. 470, 677 S.E.2d 699 (2009), appeal dismissed, 297 Ga. App. 511, 677 S.E.2d 728 (2009).

Insurer may be held liable in contract for attorney fees which insured contends insured was forced to expend as a direct and natural consequence of insurer's refusal to pay the insured's claim. *Travillian v. Georgia Farm Bureau Mut. Ins. Co.*, 182 Ga. App. 241, 355 S.E.2d 677 (1987).

Damages for failure to give concert at stipulated time are not recoverable. *Alkahest Lyceum Sys. v. Curry*, 6 Ga. App. 625, 65 S.E. 580 (1909).

Action for damage to a corpse. — In an action regarding the alleged removal of eye tissue from a corpse without permission, even if the corneal tissue held pecuniary value, plaintiff could not sue for the tissue's recovery on the basis of contract. *Bauer v. North Fulton Medical Ctr., Inc.*, 241 Ga. App. 568, 527 S.E.2d 240 (1999).

Measure of Damages Recoverable

Damage is loss suffered by failure of other party, rather than by plaintiff's performance. — When party seeks damages for violation of contract by other party, measure of damages is not what plaintiff has suffered by performing plaintiff's part, but what plaintiff has suffered by failure of other party. *Darlington Corp. v. Evans*, 88 Ga. App. 84, 76 S.E.2d 72 (1953); *Gainesville Glass Co. v. Don Hammond, Inc.*, 157 Ga. App. 640, 278 S.E.2d 182 (1981).

Measure of damages for breach of construction contract by owner is usually profits; that is, price less what it would have cost

contractor to perform. *Crosswell v. Arten Constr. Co.*, 152 Ga. App. 162, 262 S.E.2d 522 (1979).

When breach occurs after part performance, expenses so incurred are also recoverable. — If contract is not broken until after contractor has gone to expense toward contract's performance, this net loss should also be added to figure for profit. *Murray v. Americare-Medical Designs, Inc.*, 123 Ga. App. 557, 181 S.E.2d 871 (1971).

Offsetting benefits received against damages. — When defendant's breach of contract causes damages but also operates directly to confer some benefit upon the plaintiff, the plaintiff's claim for damages may be diminished by the amount of the benefit received. *Macon-Bibb County Water & Sewerage Auth. v. Tuttle/White Constructors, Inc.*, 530 F. Supp. 1048 (M.D. Ga. 1981).

The offset theory can only be utilized when the benefits accruing to the plaintiff are sufficiently proximate to the contract to warrant reducing the plaintiff's damages and the failure to do so would permit the plaintiff to obtain unreasonable damages. *Macon-Bibb County Water & Sewerage Auth. v. Tuttle/White Constructors, Inc.*, 530 F. Supp. 1048 (M.D. Ga. 1981).

Damages limited by terms of contract. — Record contained sufficient evidence to create a genuine issue of material fact as to a corporation's claim for breach of contract by an accounting firm by the firm's failure to follow generally accepted accounting standards, but damages were potentially limited by the contract's indemnity and exculpatory clauses. *TSG Water Res., Inc. v. D'Alba & Donovan Certified Pub. Accountants, P.C.*, 366 F. Supp. 2d 1212 (S.D. Ga. 2004), aff'd in part, rev'd in part, 260 Fed. Appx. 191 (11th Cir. Ga. 2007).

Measure of damages for breach of contract to lend money. — In ordinary engagements to borrow money, if purpose for which money is to be used is not disclosed to lender, recovery of damages is limited to difference between amount of interest at a lawful rate upon amount necessary to be procured elsewhere and amount of interest at the lawful rate contracted for. *Albany Fed. Sav. & Loan Ass'n v. Henderson*, 198 Ga. 116, 31 S.E.2d 20 (1944).

No damages where borrower, after breach, obtains necessary amount elsewhere

Measure of Damages**Recoverable (Cont'd)**

at same interest. — If borrower after breach of contract to lend money is able to obtain necessary amount elsewhere at same rate of interest as contracted for originally, so as to complete the project, no special damage can be said to have been permanently sustained by reason of breach. *Albany Fed. Sav. & Loan Ass'n v. Henderson*, 198 Ga. 116, 31 S.E.2d 20 (1944).

Measure of damages for breach of share-cropping contract by landlord. — Value of croppers' part of crops is appropriate measure of damage in action for alleged breach of share-cropping contract where trial is had after expiration of term of contract alleged to have been breached. *Wideman v. Selph*, 71 Ga. App. 343, 30 S.E.2d 797 (1944).

Measure of damages for breach of contract to fill in excavations on land is difference between market value of land with excavations unfilled and value it would have had if contract had not been breached. *Lastinger v. City of Adel*, 69 Ga. App. 535, 26 S.E.2d 158 (1943).

Measure of damages for breach of territorial covenant in a franchise agreement was the franchisee's net expenses in attempting to comply with the contract—i.e., the expenses borne by the franchisee in the franchisee's effort to meet the franchisee's obligations under the franchise agreement less the income the franchisee derived from the contract. *Re/Max of Ga., Inc. v. Real Estate Group on Peachtree, Inc.*, 201 Ga. App. 787, 412 S.E.2d 543 (1991), cert. denied, 201 Ga. App. 904, 412 S.E.2d 543 (1992).

Breach of sales representative agreement. — In an action alleging that defendant company breached a sales representative agreement by removing areas from the representative's territory and by repeatedly reducing the commission rate below that provided in the agreement, evidence of actual commissions earned in the representative's territory was relevant to prove the representative's claim for damages. *Douglas & Lomason Co. v. Hall*, 212 Ga. App. 475, 441 S.E.2d 870 (1994).

Breach of contract by college. — Under O.C.G.A. § 13-6-5, a student had to mitigate the damages sustained due to a college's

failure to follow procedure before expelling the student; thus, the student's damages for breach of contract under O.C.G.A. § 13-6-2 were limited to the lost wages for the additional time needed to obtain a degree, the tuition costs of classes the student had to repeat, and a refund of one semester's tuition. *Morehouse College, Inc. v. McGaha*, 277 Ga. App. 529, 627 S.E.2d 39 (2005).

Evidence that a college had removed credit hours from a student's transcript was relevant to the student's claim for breach of contract damages, as the student could recover the cost of tuition for classes the student was forced to repeat due to the college's actions. *Morehouse College, Inc. v. McGaha*, 277 Ga. App. 529, 627 S.E.2d 39 (2005).

Bad faith rescission of insurance policy. — When an insurer improperly rescinded a directors and officers insurance policy with an insured, the insured was entitled to compensatory damages in an amount equal to the coverage limits of the policy because the insured established that the insured had incurred reasonable and necessary settlement costs, attorney fees, and expenses in excess of the limits as a result of lawsuits asserting claims covered under the policy. *Exec. Risk Indem. v. AFC Enters.*, 510 F. Supp. 2d 1308 (N.D. Ga. 2007), aff'd, 279 Fed. Appx. 793 (11th Cir. 2008).

If contracting party abandons completion of obligations, measure of damages is ordinarily reasonable cost of completion. *Whitlock v. PKW Supply Co.*, 154 Ga. App. 573, 269 S.E.2d 36 (1980).

When damage claimed is solely to building or structure, measure of damages is cost of restoration. *Georgia-Carolina Brick & Tile Co. v. Brown*, 153 Ga. App. 747, 266 S.E.2d 531 (1980).

Purchaser's measure of damages for breach of contract of sale of standing timber is the difference between cost of converting standing timber into merchantable lumber under terms of contract and the market value of the finished product, less percentage of such difference contracted to be paid to owner. *Norman & Griffin v. Shealey*, 33 Ga. App. 534, 126 S.E. 887, cert. denied, 33 Ga. App. 829 (1925).

Damages in contracts involving vehicles. — In an action to recover damages to a vehicle, the measure is the difference be-

tween the value of the property immediately before the damage and immediately afterwards. *Letteer v. Archer*, 160 Ga. App. 373, 287 S.E.2d 89 (1981).

Generally, the proper measure of damages for defective workmanship would be the cost of repair of the defect. *Adamson Co. v. Owens-Illinois Dev. Corp.*, 168 Ga. App. 654, 309 S.E.2d 913 (1983).

Interest accrued from date contract breached. — When an insurer improperly rescinded a directors and officers insurance policy with an insured, the insured was entitled to prejudgment interest at the statutory rate of seven percent, calculated from the filing date of the action and the date the contract was breached. *Exec. Risk Indem. v. AFC Enters.*, 510 F. Supp. 2d 1308 (N.D. Ga. 2007), *aff'd*, 279 Fed. Appx. 793 (11th Cir. 2008).

Correct measure of damages in suit for breach of contract to repair automobile would be the cost of repair of the defect. *Simmons v. Boros*, 255 Ga. 524, 341 S.E.2d 2 (1986).

Proper measure of damages for breach of contract to sell land is the difference between the contract price and the fair market value at the time of the breach. *Quigley v. Jones*, 174 Ga. App. 787, 332 S.E.2d 7, *aff'd*, 255 Ga. 33, 334 S.E.2d 664 (1985).

Instruction should include specific method to calculate damages. — In an action for breach of a construction contract, since there was evidence which would allow a proper calculation of damages, the trial

court's charge to the jury should have included the specific method to calculate damages; however, the testimony at trial did not influence the jury to calculate damages pursuant to an improper standard. *Pool Markets S., Inc. v. Coggins*, 195 Ga. App. 50, 392 S.E.2d 552 (1990).

No error in instructions. — There was no error in giving instructions as to general principles regarding the recovery of damages in a contract case since there was no contention that the proper measure of those damages was not also given. *Canal Ins. Co. v. Bryant*, 173 Ga. App. 173, 325 S.E.2d 839 (1984).

Payment of points when housing construction delayed. — Evidence authorized award of damages for increased interest costs when appellant's failure to construct a house within six months as provided by the contract resulted in appellee having to pay one-half percentage point higher on loan than appellee would have paid had the house been finished within the time frame contemplated by the contract. *Executive Constr., Inc. v. Geduldig*, 170 Ga. App. 560, 317 S.E.2d 564 (1984).

Shopping center lease. — Since a shopping center lease allowed the anchor tenant to use the space for any lawful purpose, and allowed the tenant to freely assign the lease, the correct measure of damages for anticipatory breach of the lease was those damages flowing directly from the contract based on the agreed minimum rent. *Piggly Wiggly S., Inc. v. Eastgate Assocs.*, 195 Ga. App. 10, 392 S.E.2d 337 (1990).

RESEARCH REFERENCES

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Am. Jur. Proof of Facts. — Value of Growing Crop, 20 POF2d 115.

C.J.S. — 25 C.J.S., Damages, § 30, et seq.

ALR. — Loss of profits as damages for breach of contract in relation to advertising, 41 ALR 198.

Valuation clause in carrier's contract as limit, or as ratio, of recovery in case of partial loss, 41 ALR 450.

Rate of exchange to be taken into account in assessing damages for breach of contract, 50 ALR 1273; 105 ALR 640.

Value of contractor's own services not rendered because of breach, as deductible

item in computing damages for breach of contract, 50 ALR 1397.

Measure of damages for purchaser's breach of contract to buy real property, 52 ALR 1511.

Injury to prestige or reputation as element of damages for employer's breach of contract for services, 56 ALR 901.

Right of construction contractor to complete performance and claim contract price, notwithstanding unjustifiable repudiation of contract by other party, 66 ALR 745.

Loss of or damage to crop as element of damages for breach of contract of sale or warranty of agricultural machinery or fertilizer, 69 ALR 748.

Measure of recovery for breach of correspondence school agreement, 78 ALR 334.

Damages for breach of telegraph company's agreement to transmit money, 80 ALR 298.

Measure of damages for breach of contract for sale or purchase of equipment, supplies of gasoline, etc., used in operation of gasoline filling station, 81 ALR 99.

Remedy and measure of recovery where insurer breaches its contract to pay indemnity periodically, 81 ALR 379; 99 ALR 1171.

Measure of damages for breach of contract preventing operation of nonindustrial business in contemplation, but not established or in actual operation, 99 ALR 938.

Vendee's right to recover amount paid under executory contract for sale of land, 102 ALR 852; 134 ALR 1064.

Measure of damages for breach by lessor of contract to lease or to put lessee into possession, 104 ALR 132; 88 ALR2d 1024.

Right of building or construction contractor to recover damages resulting from delay caused by default of contractee, 115 ALR 65.

Measure of owner's damages for delay of contractor, or breach resulting in delay, where performance of other contract or work was necessary to complete project, 125 ALR 1242.

Cancellation of lease or contract pursuant to provision in that regard as affecting liability accruing before cancellation, 166 ALR 391.

Validity of contractual provision by one other than carrier or employer for exemption from liability, or indemnification, for consequences of own negligence, 175 ALR 8.

Burden of proving value of relief from performing contract in suit based on defendant's breach preventing or excusing full performance, 17 ALR2d 968.

Right to recover, in action for breach of contract, expenditures incurred in preparation for performance, 17 ALR2d 1300.

Consequences of liability insurer's refusal to assume defense of action against insured upon ground that claim upon which action is based is not within coverage of policy, 49 ALR2d 694; 68 ALR4th 389.

Liability of one cutting and removing timber under deed or contract for failure to remove or dispose of debris, trimmings, or tops, 56 ALR2d 400.

Measure and items of damages for lessee's breach of agreement to erect building, 63 ALR2d 1110.

Measure and elements of damages for breach of contract to marry, 73 ALR2d 553.

Measure of damages for lessor's breach of contract to lease or to put lessee in possession, 88 ALR2d 1024.

Mental anguish as element of damages in action for breach of contract to furnish goods, 88 ALR2d 1367.

Recovery of damages by employee wrongfully discharged before expiration of time period fixed in employment contract as embracing entire term of contract or as limited to those damages sustained up to time of trial, 91 ALR2d 682.

Measure and elements of sublessee's damages recoverable from sublessor for latter's failure to exercise option to renew his lease, 94 ALR2d 1345.

Right and measure of recovery for breach of obligation to drill exploratory oil or gas wells, 4 ALR3d 284.

Building and construction contracts: prime contractor's liability to subcontractor for delay in performance, 16 ALR3d 1252.

Damages to franchisee for failure of franchisor of national brand or service to provide the services or facilities contracted for, 41 ALR3d 1436.

Civil liability of undertaker in connection with embalming or preparation of body for burial, 48 ALR3d 261.

Recovery for mental anguish or emotional distress, absent independent physical injury, consequent upon breach of contract in connection with sale of real property, 61 ALR3d 922.

Measure of damages for breach of contract to will property, 65 ALR3d 632.

Recovery of expected profits lost by lessor's breach of lease preventing or delaying operation of new business, 92 ALR3d 1286.

Recovery by writer, artist, or entertainer for loss of publicity or reputation resulting from breach of contract, 96 ALR3d 437.

Measure of damages where vendor, after execution of contract of sale but before conveyance of property, removes part of property contracted for, 97 ALR3d 1220.

Measure and elements of damages for breach of contract to lend money, 4 ALR4th 682.

Liability insurer's postloss conduct as

waiver of, or estoppel to assert, "no-action" clause, 68 ALR4th 389.

Liability of contractor who abandons

building project before completion for liquidated damages for delay, 15 ALR5th 376.

13-6-3. Measure of damages — Breach of bond.

(a) Provisions in bonds stipulating the damages to be paid in the event of breach shall be deemed penalties and shall not be enforceable unless the amount stipulated is reasonably related to the amount of the loss resulting from the breach and the damages resulting from the breach are uncertain in nature or amount or are difficult of ascertainment.

(b) Where provisions in bonds stipulating damages to be paid in the event of breach do not comply with the requirements prescribed in subsection (a) of this Code section, only actual damages shall be recoverable in the event of a breach. (Orig. Code 1863, § 2882; Code 1868, § 2890; Code 1873, § 2941; Code 1882, § 2941; Civil Code 1895, § 3795; Civil Code 1910, § 4391; Code 1933, § 20-1403.)

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Law specifically refers to penalties in bonds and is not applicable to rental contracts. *Fulton County v. Atlanta Envelope Co.*, 90 Ga. App. 623, 83 S.E.2d 866 (1954).

In doubtful cases, courts favor construction which holds stipulated sum to be a penalty, and limits recovery for breach to amount of damages actually shown, rather than a liquidation of damages. *Southeastern Land Fund, Inc. v. Real Estate World, Inc.*, 237 Ga. 227, 227 S.E.2d 340 (1976).

Test as to whether provision enforceable as liquidated damages. — In deciding whether a contract provision is enforceable as liquidated damages, the court makes a tripartite inquiry to determine if the following factors are present: first, the injury caused by the breach must be difficult or impossible of accurate estimation; second, the parties must intend to provide for damages rather than for a penalty; and third, the sum stipulated must be a reasonable preestimate of the probable loss. *Thorne v. Lee Timber Prods., Inc.*, 158 Ga. App. 226, 279 S.E.2d 521 (1981).

Distinction between penalty and liquidated damages. — See *Sanders & Ables v. Carter*, 91 Ga. 450, 17 S.E. 345 (1893); *Heard v. Dooly County*, 101 Ga. 619, 28 S.E. 986 (1897).

When bond sets penalty below actual damages, surety not liable for more than amount

stipulated. — When penalty in bond is for certain sum, less than actual amount of damages, surety is not liable for more than that sum with interest. *Westbrook v. Moore*, 59 Ga. 204 (1877); *Scarrat v. Cook Brewing Co.*, 117 Ga. 181, 43 S.E. 413 (1903).

Award of damages by arbitrator equal to actual damages will be upheld although contract provided for penalty. *Georgia Land & Cotton Co. v. Flint*, 35 Ga. 226 (1866).

Damages accurately expressed in monetary terms to be distinguished from those which are not. — In determining the validity of a liquidated damages provision in a contract, it is important to distinguish damages which are difficult to accurately determine in monetary terms from those damages which can be accurately established, albeit via a complicated procedure. *Thorne v. Lee Timber Prods., Inc.*, 158 Ga. App. 226, 279 S.E.2d 521 (1981).

Cited in *Butler v. Moore*, 68 Ga. 780, 45 Am. R. 508 (1882); *Lytle v. Scottish Am. Mtg. Co.*, 122 Ga. 458, 50 S.E. 402 (1905); *Martin v. Lott*, 144 Ga. 660, 87 S.E. 902 (1916); *Caldwell Lumber Co. v. Wright*, 22 Ga. App. 411, 96 S.E. 391 (1918); *Standard Motors Fin. Co. v. O'Neal*, 35 Ga. App. 727, 134 S.E. 843 (1926); *Martin v. Citizen's Bank*, 177 Ga. 871, 171 S.E. 711 (1933); *National Manufacture & Stores Corp. v. Dekle*, 48 Ga. App. 515, 173 S.E. 408 (1934); *Miazza v. Western*

Union Tel. Co., 50 Ga. App. 521, 178 S.E. 764 (1935); Sizemore v. Beeler, 94 Ga. App. 414, 94 S.E.2d 773 (1956); Sanders v. Carney, 118 Ga. App. 576, 164 S.E.2d 856 (1968); Concrete Materials of Ga., Inc. v. Smith & Plaster Co., 127 Ga. App. 817, 195 S.E.2d 219

(1973); Military Armament Corp. v. ITT Terryphone Corp., 134 Ga. App. 694, 215 S.E.2d 724 (1975); Hughes Motor Co. v. First Nat'l Bank, 136 Ga. App. 295, 220 S.E.2d 782 (1975); Gibson v. Sheriff, 155 Ga. App. 578, 271 S.E.2d 710 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 499, 500.

C.J.S. — 25 C.J.S., Damages, § 195.

ALR. — A provision in land contract for pecuniary forfeiture or penalty by a party in default as affecting the right of the other party to specific performance, 32 ALR 584; 98 ALR 877.

Provision in land contract for pecuniary forfeiture or penalty upon default of the purchaser as affecting the vendor's right to maintain an action for the purchase price, 32 ALR 617.

Valuation clause in carrier's contract as limit, or as ratio, of recovery in case of partial loss, 41 ALR 450.

Measure of damages for purchaser's breach of contract to buy real property, 52 ALR 1511.

Stipulation as to amount recoverable for breach of contract against entering certain business or employment as a provision for liquidated damages or for a penalty, 59 ALR 1135.

Stipulation as to damages in case of breach of contract for purchase of goods to be manufactured by other party, as penalty or liquidated damages, 79 ALR 188.

Measure of damages for breach of contract for sale or purchase of equipment, supplies of gasoline, etc., used in operation of gasoline filling station, 81 ALR 99.

Provisions by which upon breach of contract the entire amount remaining unpaid thereof shall become immediately due as

one for penalty or for liquidated damages, 104 ALR 223.

Provision in lease for pecuniary forfeiture where lease is prematurely terminated as one for liquidated damages, 106 ALR 292.

Liability of building or construction contractor for liquidated damages for breach of time limit where work is delayed by contractee or third person, 152 ALR 1349.

Provision in land contract for forfeiture of payments as one for liquidated damages or penalty, 6 ALR2d 1401; 4 ALR4th 993.

Validity and construction of provision for liquidated damages in contract with cooperative marketing association, 12 ALR2d 130.

Allowance of attorneys' fees over and above penal sum stated in private contractor's bond, 59 ALR2d 469.

Validity and construction of "no damage" clause with respect to delay in building or construction contract, 74 ALR3d 187.

Contractual liquidated damages provisions under UCC Article 2, 98 ALR3d 586.

Measure and elements of damages for breach of contract to lend money, 4 ALR4th 682.

Modern status of defaulting vendee's right to recover contractual payments withheld by vendor as forfeited, 4 ALR4th 993.

Recovery based on tortfeasor's profits in action for procuring breach of contract, 5 ALR4th 1276.

Contractual provision for per diem payments for delay in performance as one for liquidated damages or penalty, 12 ALR4th 891.

13-6-4. Determination of damages generally.

The question of damages being one for the jury, a reviewing court should not interfere unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias. (Orig. Code 1863, § 2888; Code 1868, § 2896; Code 1873, § 2947; Code 1882, § 2947; Civil Code 1895, § 3803; Civil Code 1910, § 4399; Code 1933, § 20-1411.)

History of Code section. — This Code section is derived from the decision in *Lang v. Hopkins*, 10 Ga. 37 (1851).

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Excessive damages are such as shock the moral sense to such an extent as to lead to belief that jury was actuated by undue or improper motives or influences. *Central R.R. v. DeBray*, 71 Ga. 406 (1883); *Candler v. Smith*, 50 Ga. App. 667, 179 S.E. 395 (1935).

Generous verdict will not be set aside. *Bullard v. Rolader*, 26 Ga. App. 742, 107 S.E. 548, aff'd, 152 Ga. 369, 110 S.E. 16 (1921); *City of East Point v. Hendrix*, 27 Ga. App. 485, 108 S.E. 623 (1921).

When both parties are at fault, but defendant slightly more so, small damage award is proper. — When evidence authorizes jury to find that both parties are at fault, but defendant slightly more so, so as to give plaintiff a cause of action, a verdict for a small amount of damages is proper and should not be disturbed. *Hunt v. Western & A.R.R.*, 49 Ga. App. 33, 174 S.E. 222 (1934).

Damages for breach of contract of marriage were governed by former Civil Code 1895, §§ 3803, 3905, and 3907 (see O.C.G.A. §§ 13-6-4, 51-12-4, and 51-1-26). *Parker v. Forehand*, 99 Ga. 743, 28 S.E. 400 (1896).

Humiliation and wounded feelings are not elements of damage in action for breach of contract. *Harris v. Cleghorn*, 121 Ga. 314, 48 S.E. 959 (1904).

When the amount awarded is less than that shown by the evidence, it cannot be said to be palpably unreasonable or excessive. *Thompson Enters., Inc. v. Coskrey*, 168 Ga. App. 181, 308 S.E.2d 399 (1983).

Variance between \$118.00 allowed and \$130.00 warranted by evidence is insufficient to set verdict aside. *Louisville & N.R.R. v. Lovelace*, 26 Ga. App. 286, 106 S.E. 6 (1921).

Sufficient evidence to calculate damages and interest. — Sufficient evidence was adduced to permit calculation of the amount of the damages, and hence the amount of interest, should the jury find in the jury's discretion that an award of interest was appropriate. *Wheels & Brakes, Inc. v. Capital Ford Truck Sales, Inc.*, 167 Ga. App. 532, 307 S.E.2d 13 (1983).

Award held proper. — As the testimony established a possible range of damages up

to \$30,000, the \$13,750 damages were within the authorized range for purchaser's breach of a contract to purchase house and lot. *Seapark v. Caswell Bldrs., Inc.*, 209 Ga. App. 713, 434 S.E.2d 502 (1993).

Jury's verdict for a vehicle lessee against a dealer in the amount of \$10,700 was proper because the evidence showed that the lessee was unable to get a tag decal for the vehicle due to problems caused by the dealer's error in listing the information for a different vehicle in the lease; there was testimony on damages from which the jury could have determined such with reasonable certainty, including, inter alia, loss of use of the vehicle, higher payments on the lease, a higher residual value to buy the vehicle at the end of the lease, and ownership of a less expensive vehicle than what the lessee actually paid. *Cent. Auto Sales, Inc. v. Poore*, 272 Ga. App. 221, 612 S.E.2d 59 (2005).

In a trespassing case, damages awarded under O.C.G.A. § 51-12-6 did not show undue bias on the part of jurors because an owner did not seek the replacement value of trees that were improperly cut. *Bullard v. Boulter*, 272 Ga. App. 397, 612 S.E.2d 513 (2005).

Award not excessive. — In an action for breach of a construction contract, since the award was less than the contract price and was not extremely in excess of the actual costs spent to complete the construction project, it was not so excessive as to warrant interference under O.C.G.A. § 13-6-4. *Pool Markets S., Inc. v. Coggins*, 195 Ga. App. 50, 392 S.E.2d 552 (1990).

Jury's award of \$200,000 in damages was upheld because the award was not so excessive as to justify an inference of gross mistake or bias. *Green v. Proffitt*, 248 Ga. App. 477, 545 S.E.2d 623 (2001).

Appellate court declined to set aside the amount of the verdict for pain and suffering and wrongful death after a juvenile in a child care institution was accidentally electrocuted because \$1,000,000 for pain and suffering and \$2,000,000 for wrongful death were not excessive as a matter of law. *Ga. Dep't of*

Human Res. v. Johnson, 264 Ga. App. 730, 592 S.E.2d 124 (2003).

Cited in Durden v. Carhart & Bro., 41 Ga. 76 (1870); Southwestern R.R. v. Rowan & McCaury, 43 Ga. 411 (1871); Georgia S.R.R. v. Bigelow, 68 Ga. 219 (1881); Thorpe v. Wray, 68 Ga. 359 (1882); City & Suburban Ry. v. Brauss, 70 Ga. 368 (1883); Central of Ga. Ry. v. Perkerson, 112 Ga. 923, 38 S.E. 365, 53 L.R.A. 210 (1901); Anglin v. City of Columbus, 128 Ga. 469, 57 S.E. 780 (1907); Hayes v. City of Atlanta, 1 Ga. App. 25, 57 S.E. 1087 (1907); Central of Ga. Ry. v. Minor, 2 Ga. App. 804, 59 S.E. 81 (1907); Holland v. Williams, 3 Ga. App. 636, 60 S.E. 331 (1908); Seaboard Air-Line Ry. v. Bishop, 132 Ga. 71, 63 S.E. 1103 (1909); Seaboard Air-Line Ry. v. Lyon, 18 Ga. App. 266, 89 S.E. 384 (1916); Seaboard Air-Line Ry. v. Vaughn, 19 Ga. App. 397, 91 S.E. 516 (1917); Stalvey v. Statenville Ry., 27 Ga. App. 174, 107 S.E. 780 (1921); Cohen v. Phipps, 33 Ga. App. 431, 126 S.E. 881 (1925); Willcox v. State Hwy. Bd., 38 Ga. App. 373, 144 S.E. 214 (1928); State Hwy. Bd. v. Willcox, 168 Ga. 883, 149 S.E. 182 (1929); Southern Ry. v. Tudor, 46 Ga. App. 563, 168 S.E. 98 (1933); Moore v. Sears, Roebuck & Co., 48 Ga. App. 185, 172 S.E.

680 (1934); Slaughter v. Atlanta Coca-Cola Bottling Co., 48 Ga. App. 327, 172 S.E. 723 (1934); Sinclair v. Kelly, 50 Ga. App. 135, 177 S.E. 348 (1934); Metropolitan Life Ins. Co. v. Lovett, 50 Ga. App. 763, 179 S.E. 253 (1935); Evans v. Caldwell, 52 Ga. App. 475, 184 S.E. 440 (1936); Pierson v. M. & M. Bus. Co., 74 Ga. App. 537, 40 S.E.2d 561 (1946); Prudential Timber & Farm Co. v. Collins, 144 Ga. App. 849, 243 S.E.2d 80 (1978); Tab Sales, Inc. v. D & D Distribs., Inc., 153 Ga. App. 779, 266 S.E.2d 558 (1980); Graham Bros. Constr. Co. v. C.W. Matthews Contracting Co., 159 Ga. App. 546, 284 S.E.2d 282 (1981); Tuten v. Beckham, 162 Ga. App. 101, 290 S.E.2d 205 (1982); Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470 (1984); Quigley v. Jones, 174 Ga. App. 787, 332 S.E.2d 7 (1985); Leader Nat'l Ins. Co. v. Smith, 177 Ga. App. 267, 339 S.E.2d 321 (1985); Blue Cross of Georgia/Columbus, Inc. v. Whatley, 180 Ga. App. 93, 348 S.E.2d 459 (1986); Wheat Enters., Inc. v. Redi-Floors, Inc., 231 Ga. App. 853, 501 S.E.2d 30 (1998); Morris v. Savannah Valley Realty, Inc., 233 Ga. App. 762, 505 S.E.2d 259 (1998).

RESEARCH REFERENCES

C.J.S. — 25 C.J.S., Damages, §§ 105 et seq., 108 et seq.

ALR. — Inadequacy of verdict as ground of complaint by party against whom it is rendered, 31 ALR 1091; 174 ALR 765.

Rate of exchange to be taken into account in assessing damages for breach of contract, 50 ALR 1273; 105 ALR 640.

Value of contractor's own services not rendered because of breach, as deductible item in computing damages for breach of contract, 50 ALR 1397.

Power of court to reduce or increase verdict without giving party affected the option to submit to a new trial, 53 ALR 779; 95 ALR 1163.

Measure of damages for breach of contract for sale or purchase of equipment,

supplies of gasoline, etc., used in operation of gasoline filling station, 81 ALR 99.

Rule requiring reduction of future payments to present worth as applicable to determination of damages for breach of contract of employment, 90 ALR 1318.

Burden of proving value of relief from performing contract in suit based on defendant's breach preventing or excusing full performance, 17 ALR2d 968.

Right to recover, in action for breach of contract, expenditures incurred in preparation for performance, 17 ALR2d 1300.

Question, as one of law for court or of fact for jury, whether oral promise was an original one or was a collateral promise to answer for the debt, default, or miscarriage of another, 20 ALR2d 246.

13-6-5. Duty of injured party to lessen damages resulting from breach.

Where by a breach of contract a party is injured, he is bound to lessen the damages as far as is practicable by the use of ordinary care and diligence. (Civil Code 1895, § 3802; Civil Code 1910, § 4398; Code 1933, § 20-1410.)

History of Code section. — This Code section is derived from the decisions in *Western Union Tel. Co. v. Reid*, 83 Ga. 401, 10 S.E. 919 (1888), and *Georgia R.R. & Banking Co. v. Eskew*, 86 Ga. 641, 12 S.E. 1061 (1891).

Law reviews. — For annual survey of wills, trusts, guardianships, and fiduciary administration, see 58 *Mercer L. Rev.* 423 (2006).

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Plaintiff in an action is obligated to take reasonable steps to minimize plaintiff's damages, if any, from a breach of contract. *Kingston Pencil Corp. v. Jordan*, 115 Ga. App. 333, 154 S.E.2d 650 (1967).

Trial court stated that even if the court had found that a school breached a teacher's employment contract, the teacher's ability to recover the compensatory damages that the teacher sought would have been affected by the teacher's failure to accept the job offered by the school, which continued the salary and benefits under the teacher's original contract. *Zhou v. LaGrange Acad. Inc.*, 266 Ga. App. 445, 597 S.E.2d 522 (2004).

Although a school system did not send a timely non-renewal notice under O.C.G.A. § 20-2-942(b)(2), the teacher knew that the basis for the notice was the teacher's unexcused absences; because the teacher did not mitigate damages and the school system was stubbornly litigious, lost wages and attorney's fees (at the agreed-upon rate) were proper under O.C.G.A. §§ 13-6-5 and 13-6-11. *Boone v. Atlanta Indep. Sch. Sys.*, 275 Ga. App. 131, 619 S.E.2d 708 (2005).

When a bank was liable to the beneficiaries of a trust for breach of contract for not investing the trust's assets in treasury bills, the beneficiaries had a duty to mitigate the beneficiaries' damages, and the beneficiaries' delay in notifying the bank that the trust's settlor had died, and in probating the estate, causing the trust to be liable for past due estate taxes, reduced the damages the beneficiaries were entitled to because an "absolute promise to pay," which was exempt from mitigation, was not involved. *Wachovia Bank of Ga., N.A. v. Namik*, 275 Ga. App. 229, 620 S.E.2d 470 (2005).

Under O.C.G.A. § 13-6-5, a student had to mitigate the damages sustained due to a college's failure to follow procedure before expelling the student; thus, the student's damages for breach of contract under O.C.G.A. § 13-6-2 were limited to the lost

wages for the additional time needed to obtain a degree, the tuition costs of classes the student had to repeat, and a refund of one semester's tuition. *Morehouse College, Inc. v. McGaha*, 277 Ga. App. 529, 627 S.E.2d 39 (2005).

Plaintiff must use ordinary care to prevent foreseeable damage in event of breach. — If there was a breach of implied warranty that incubator was merchantable and reasonably suited to use intended by reason of a latent defect which might reasonably be expected to endanger safety of eggs therein, then if such defect became known to plaintiff, the plaintiff was bound to exercise reasonable care and diligence to lessen the damage which might result therefrom; the duty imposed on the plaintiff was to use ordinary care to prevent foreseeable damage. *Henley v. Sears-Roebuck & Co.*, 84 Ga. App. 723, 67 S.E.2d 171 (1951).

Law applies only if damages can be lessened by reasonable efforts and expense. *Reid v. Whisenant*, 161 Ga. 503, 131 S.E. 904, 44 A.L.R. 599 (1926).

What constitutes ordinary care in mitigating damages see *Atlanta Oil & Fertilizer Co. v. Phosphate Mining Co.*, 25 Ga. App. 430, 103 S.E. 873 (1920).

Genuine issue existed whether plaintiff mitigated. — Plaintiff was not entitled to summary judgment regarding the amount of damages owed as to a breach of contract as genuine issues of material fact existed as to whether plaintiff reasonably mitigated damages, O.C.G.A. § 13-6-5; *inter alia*, one defendant raised questions regarding costs incurred to plaintiff in moving equipment and the valuation of that equipment. *GE Capital Corp. v. Nucor Drilling, Inc.*, 551 F. Supp. 2d 1375 (M.D. Ga. 2008).

Application to damages resulting from breach of implied warranty. *Henley v. Sears-Roebuck & Co.*, 84 Ga. App. 723, 67 S.E.2d 171 (1951).

Lease contracts. — Unlike some jurisdictions, Georgia does not require mitigation of

damages in lease contracts. *Lamb v. Decatur Fed. Sav. & Loan Ass'n*, 201 Ga. App. 583, 411 S.E.2d 527 (1991).

Because evidence was presented that a commercial lessee successfully terminated its lease only because the lessee was forced out of business when the lessor refused to pay for stone the lessor received from the lessee, the trial court properly held that the lessor was required to mitigate the lessor's damages. *Allen v. Harkness Stone Co.*, 271 Ga. App. 397, 609 S.E.2d 647 (2004).

After obtaining consent from the probate court to sell construction equipment an executrix's decedent secured with a promissory note, the executrix was entitled to summary judgment as to the tort claims alleged against the decedent's corporation, after the corporation wrongfully retained possession of the equipment, converted two certificates of deposit, and the decedent's liability on the notes was extinguished under a provision of a stock sales agreement; furthermore, evidence was presented that the corporation's failure to release the equipment prevented the equipment's sale to third parties and thereby constituted a breach of a duty to mitigate damages. *Midway R.R. Constr. Co. v. Beck*, 281 Ga. App. 412, 636 S.E.2d 110 (2006).

Tenant must protect tenant's goods from damage, despite landlord's failure to repair premises. — Tenant is not excused from protecting tenant's goods from rain, even though landlord had failed to repair burned roof, after notice. *Nicholas v. Tanner*, 117 Ga. 223, 43 S.E. 489 (1903). See *Aikin v. Perry*, 119 Ga. 263, 46 S.E. 93 (1903).

Duty to mitigate damages arose when property was erroneously attached. *Maxwell v. Speth*, 9 Ga. App. 745, 72 S.E. 292 (1911).

Duty to mitigate damages arose when party accepted repudiation of executory contract. *Phosphate Mining Co. v. Atlanta Oil & Fertilizer Co.*, 20 Ga. App. 660, 93 S.E. 532 (1917), later appeal, 23 Ga. App. 338, 98 S.E. 232 (1919); 25 Ga. App. 430, 103 S.E. 873 (1920); *Mendel v. Converse & Co.*, 30 Ga. App. 549, 118 S.E. 586 (1923).

Law is inapplicable to suit for breach of warranty of title to real estate, and imposes no duty on plaintiff to settle suit. *Parker v. Cramton*, 143 Ga. 421, 85 S.E. 338 (1915).

No impact on severance package for failure to mitigate damages. — Trial court prop-

erly refused to reduce the judgment in a breach of an employment contract case based on any failure by a former employee to mitigate damages under O.C.G.A. § 13-6-5 because the former employee's right to severance pay under the contract was absolute and thus the former employee's right to this pay was unaffected by earnings which the former employee made or should have made after being suspended. *Ins. Indus. Consultants, LLC v. Alford*, 294 Ga. App. 747, 669 S.E.2d 724 (2008), cert. denied, No. S09C0465, 2009 Ga. LEXIS 200 (Ga. 2009).

Expenses incurred in protecting property from damage due to breach were recoverable under former Civil Code 1910, § 4402 (see O.C.G.A. § 13-6-9). *McNaughton v. Stephens*, 8 Ga. App. 545, 70 S.E. 61 (1911).

Expenses incurred in protecting property may be pleaded in recoupment. *Bernhardt v. Federal Terra Cotta Co.*, 24 Ga. App. 635, 101 S.E. 588 (1919).

Plaintiff need not allege plaintiff's efforts to mitigate damages when correct measure sued for. *Southern Upholstering Co. v. Lieberman*, 27 Ga. App. 703, 109 S.E. 509 (1921).

Provisions of this section can be invoked only by way of defense, and it is not necessary that petition negative failure of plaintiff to mitigate damages caused by defendant. *Norris v. Johnson*, 209 Ga. 293, 71 S.E.2d 540 (1952) (see O.C.G.A. § 13-6-5).

Defendant bears burden of alleging and proving plaintiff's failure to mitigate damages. *Mimms v. Betts Co.*, 9 Ga. App. 718, 72 S.E. 271 (1911), later appeal, 14 Ga. App. 786, 82 S.E. 474 (1914).

Evidence must enable jury to reasonably estimate amount by which damages could have been mitigated. — Contention that one has failed to comply with duty to mitigate damages must be supported by evidence from which jury could reasonably estimate amount by which damages could have been mitigated. *Considine Co. v. Turner Communications Corp.*, 155 Ga. App. 911, 273 S.E.2d 652 (1980).

Bank holding pledged certificates of deposit. — O.C.G.A. § 13-6-5 did not require a bank to hold pledged certificates of deposit until maturity when the principal plus added interest would have satisfied the amount due on delinquent promissory notes. *Willis v.*

National Bank, 176 Ga. App. 15, 334 S.E.2d 917 (1985).

No duty to mitigate damages of auto dealership. — Under the parties' contract, a car dealer expressly promised to repurchase a loan bought by a bank if a car buyer's identity was fraudulent, and the dealership expressly waived any right to require the bank to redeem, repossess, or return the car in such a case. Thus, when the bank discovered that a car purchased by a buyer with a fraudulent identity had been impounded, the bank did not owe the dealer a duty to mitigate the dealer's damages under O.C.G.A. § 13-6-5 by providing better notice to the dealer of the impoundment or by paying the impound fee and gaining possession of the car. *Cleveland Motor Cars, Inc. v. Bank of Am., N.A.*, 295 Ga. App. 100, 670 S.E.2d 892 (2008).

Plaintiff city had no duty to mitigate damages from a breach of contract by defendant county by challenging the county's tax refund obligation to a public utility. — Summary judgment for a city for \$2,885,827 damages was proper on the city's claim against a county for breach of an agreement under which the county was required to collect the city's taxes and remit them to the city, but instead the county withheld \$2,885,827 for an obligation owed by the county. The rule of mitigation, O.C.G.A. § 13-6-5, did not require the city to challenge the obligation owed by the county to refund taxes to a public utility under a settlement agreement to which the city was not a party. *Ferdinand v. City of E. Point*, 301 Ga. App. 333, 687 S.E.2d 617 (2009).

Negligence instruction properly refused. — Plaintiff's duty of care in a negligence action is inapplicable to a breach of contract action; an allegation of "negligent breach of contract" is founded upon a particular contractual duty which a defendant owes regardless of the plaintiff's actions. Thus, the trial court did not err in refusing to charge the jury on principles of comparative negligence as to the count for breach of contract. *Deloitte, Haskins & Sells v. Green*, 198 Ga. App. 849, 403 S.E.2d 818, cert. denied, 198 Ga. App. 897, 403 S.E.2d 818 (1991).

Cited in *Mansfield v. Richardson*, 118 Ga. 250, 45 S.E. 269 (1903); *Brown v. Georgia C. & N. Ry.*, 119 Ga. 88, 46 S.E. 71 (1903); *Georgia C. & N. Ry. v. Brown*, 120 Ga. 380, 47

S.E. 942 (1904); *Holbrook v. Town of Norcross*, 121 Ga. 319, 48 S.E. 922 (1904); *Southern Ry. v. Cunningham*, 123 Ga. 90, 50 S.E. 979 (1905); *Western Union Tel. Co. v. Truitt*, 5 Ga. App. 809, 63 S.E. 934 (1909); *Price v. High Shoals Mfg. Co.*, 132 Ga. 246, 64 S.E. 87, 22 L.R.A. (n.s.) 684 (1909); *Hardwood Lumber Co. v. Adam & Steinbrugge*, 134 Ga. 821, 68 S.E. 725, 32 L.R.A. (n.s.) 192 (1910); *Central of Ga. Ry. v. White*, 135 Ga. 524, 69 S.E. 818 (1910); *Farkas v. S. Cohn & Son*, 19 Ga. App. 472, 91 S.E. 892 (1917); *Pelham Phosphate Co. v. Daniels*, 21 Ga. App. 547, 94 S.E. 846 (1918); *Garcia S. en C. v. Taggart Coal Co.*, 27 Ga. App. 204, 108 S.E. 72 (1921); *Pelham & H.R.R. v. Walker*, 27 Ga. App. 398, 108 S.E. 814 (1921); *Kirkland v. Luke*, 30 Ga. App. 203, 117 S.E. 259 (1923); *Pullman Co. v. Strang*, 35 Ga. App. 59, 132 S.E. 399 (1926); *Western & Atl. R.R. v. Townsend*, 35 Ga. App. 70, 135 S.E. 439 (1926); *Evans v. Central of Ga. Ry.*, 38 Ga. App. 146, 142 S.E. 909 (1928); *Georgia Power & Light Co. v. Fruit Growers Express Co.*, 55 Ga. App. 520, 190 S.E. 669 (1937); *Speed Oil Co. v. Griffin*, 73 Ga. App. 242, 36 S.E.2d 205 (1945); *Albany Fed. Sav. & Loan Ass'n v. Henderson*, 200 Ga. 79, 36 S.E.2d 330 (1945); *Smith v. Hightower*, 80 Ga. App. 293, 55 S.E.2d 872 (1949); *Borochoff v. Breman*, 85 Ga. App. 256, 68 S.E.2d 915 (1952); *Exchange Ins. Ass'n v. Mathews*, 93 Ga. App. 470, 92 S.E.2d 121 (1956); *De Fore v. United States*, 145 F. Supp. 484 (M.D. Ga. 1956); *Davidson v. Consolidated Quarries Corp.*, 99 Ga. App. 359, 108 S.E.2d 495 (1959); *Kohlmeyer v. Lightfoot*, 118 Ga. App. 783, 165 S.E.2d 432 (1968); *Security Dev. & Inv. Co. v. Ben O'Callaghan Co.*, 125 Ga. App. 526, 188 S.E.2d 238 (1972); *Crown Constr. Co. v. Opelika Mfg. Corp.*, 343 F. Supp. 1266 (N.D. Ga. 1972); *Tillem v. Peltzel*, 139 Ga. App. 555, 229 S.E.2d 28 (1976); *Community Fed. Sav. & Loan Ass'n v. Foster Developers, Inc.*, 179 Ga. App. 861, 348 S.E.2d 326 (1986); *Western Host Atlanta, Inc. v. Bass*, 183 Ga. App. 160, 358 S.E.2d 312 (1987); *Esquire Carpet Mills, Inc. v. Kennesaw Transp., Inc.*, 186 Ga. App. 367, 367 S.E.2d 569 (1988); *Hinesville Bank v. Pony Express Courier Corp.*, 868 F.2d 1532 (11th Cir. 1989); *Leventhal v. Seiter*, 208 Ga. App. 158, 430 S.E.2d 378 (1993); *Gram Corp. v. Wilkinson*, 210 Ga. App. 680, 437 S.E.2d 341 (1993);

Harvey v. J. H. Harvey Co., 256 Ga. App. 333, 568 S.E.2d 553 (2002).

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Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, § 168 et seq.

C.J.S. — 25 C.J.S., Damages, §§ 26, 47, 49 et seq., 167 et seq.

ALR. — Contracts within the rule which requires one to use reasonable effort to obtain other employment in order to minimize damages from breach of contract, 15 ALR 751.

Loss of anticipated profits as damages for breach of seller's contract as to machine for buyer's use, 32 ALR 120.

Rights and remedies upon cancelation of sales agency, 32 ALR 209; 52 ALR 546; 89 ALR 252.

Right of construction contractor to complete performance and claim contract price, notwithstanding unjustifiable repudiation of contract by other party, 66 ALR 745.

Right of defendant to diminution of damages to real property on account of interest of plaintiff's cotenant who is not a party to the action, 80 ALR 992.

Dealings between seller and buyer after latter's knowledge of former's fraud as waiver of claim for damages on account of fraud, 106 ALR 172.

When landlord's reletting, or efforts to relet, after tenant's abandonment or refusal

to enter, deemed to be acceptance of surrender, 110 ALR 368.

Statutory liability for multiple damages, in event of tenant's failure to surrender possession, as affected by landlord's delay in ousting him, 134 ALR 890.

Earnings or opportunity of earning from other sources as reducing claim of public officer or employee wrongfully excluded from his office or position, 150 ALR 100.

Pleading mitigation of damages, or the like, in employee's action for breach of employment contract, 41 ALR2d 955.

Measure of damages for lessor's breach of contract to lease or to put lessee in possession, 88 ALR2d 1024.

Nature of alternative employment which employee must accept to minimize damages for wrongful discharge, 44 ALR3d 629.

Seller's promises or attempts to repair article sold as affecting buyer's duty to minimize damages for breach of sale contract or of warranty, 66 ALR3d 1162.

Measure and elements of damages for breach of contract to lend money, 4 ALR4th 682.

Products liability: manufacturer's postsale obligation to modify, repair, or recall product, 47 ALR5th 395.

13-6-6. Damages and expenses recoverable — Nominal damages.

In every case of breach of contract the injured party has a right to damages, but if there has been no actual damage, the injured party may recover nominal damages sufficient to cover the costs of bringing the action. (Orig. Code 1863, § 2887; Code 1868, § 2895; Code 1873, § 2946; Code 1882, § 2946; Civil Code 1895, § 3801; Civil Code 1910, § 4397; Code 1933, § 20-1409.)

Law reviews. — For annual survey of construction law, see 56 Mercer L. Rev. 109

(2004). For annual survey of insurance law, see 57 Mercer L. Rev. 221 (2005).

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Reason for awarding nominal damages in contract cases is to carry costs. Foote & Davies Co. v. Malony, 115 Ga. 985, 42 S.E. 413 (1902).

Any breach of contract can give rise to nominal damages. Southeastern Waste Treatment, Inc. v. Chem-Nuclear Sys., 506 F. Supp. 944 (N.D. Ga. 1980).

Although the record established that plaintiffs are not entitled to actual damages sought for the breach of contract dispute against the city for failure to follow certain personnel rules, plaintiffs are entitled to recover nominal damages sufficient to cover the costs of bringing the action. *Atkinson v. City of Roswell*, 203 Ga. App. 192, 416 S.E.2d 550 (1992).

Term nominal damages carries no suggestion of certainty as to amount. — Term nominal damages is purely relative, and carries with the term no suggestion of certainty as to amount, while the term generally refers to a trivial sum awarded. *Western Union Tel. Co. v. Glenn*, 8 Ga. App. 168, 68 S.E. 881 (1910).

Claim for nominal damages inadequately pled in complaint. — Bank was not entitled to nominal damages under O.C.G.A. § 13-6-6 on the bank's successful breach of contract claim because the bank's complaint sought equitable, injunctive, and declarative relief only; the complaint's boilerplate request for "all other relief that the Court deems just and proper under the circumstances" was too vague to support a claim for nominal damages. *Keybank Nat'l Ass'n v. Fairpoint, LLC*, 2008 U.S. Dist. LEXIS 82158 (N.D. Ga. Oct. 14, 2008).

Recovery restricted to nominal damages when evidence insufficient for jury to ascertain actual damages. — If plaintiff fails to furnish sufficient data to enable jury, with reasonable degree of certainty and exactness, to estimate actual damages sustained by purchaser, then the plaintiff's recovery will be restricted to nominal damages. *Crawford & Assocs. v. Groves-Keen, Inc.*, 127 Ga. App. 646, 194 S.E.2d 499 (1972).

Damages as precluding summary judgment. — Possible recovery of nominal damages to cover the cost of bringing the action is sufficient to preclude summary judgment in a claim for breach of contract, if plaintiff can establish a genuine issue of fact as to liability. *Poe v. Sears Roebuck & Co.*, 1 F. Supp. 2d 1472 (N.D. Ga. 1998).

When plaintiff patient sued defendant medical device manufacturer for breach of contract, alleging manufacturer in a letter agreed to pay for third surgery to remove and replace the device, manufacturer's motion for summary judgment that argued the patient could not prove damages because

the patient's insurer paid the costs of the surgery was denied because under O.C.G.A. § 13-6-6, even if there was no actual damage, the patient could recover nominal damages sufficient to cover the costs of bringing the action. *Trickett v. Advanced Neuromodulation Sys.*, 542 F. Supp. 2d 1338 (S.D. Ga. 2008).

In a breach of contract suit filed under the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499e, by a Chilean sweet onion grower against American produce buyers to determine the amount the buyers owed after a shipment of onions lost value due to delivery delay, summary judgment was not appropriate in favor of the grower on the issue of damages; although the buyers did not provide evidence of damages, under O.C.G.A. § 13-6-6, the buyers were eligible for nominal damages, and the issue could not be decided as a matter of law. *HAAC Chile, S.A. v. Bland Farms, LLC*, No. 606CV086, 2008 U.S. Dist. LEXIS 81859 (S.D. Ga. Aug. 26, 2008).

Healthcare facilities filed counterclaims against a company, alleging the facilities breach of the parties' contracts caused the facilities lost profits. As the facilities were entitled to nominal damages under O.C.G.A. § 13-6-6 if the facilities proved the company breached the contracts, the company was not entitled to summary judgment on the counterclaims based on the lack of evidence of the facilities' lost income. *Eastview Healthcare, LLC v. Synertx, Inc.*, 296 Ga. App. 393, 674 S.E.2d 641 (2009).

No application when only special or punitive damages are sought. *Haber, Blum, Bloch Hat Co. v. Southern Bell Tel. & Tel. Co.*, 118 Ga. 874, 45 S.E. 696 (1903); *Hadden v. Southern Messenger Serv.*, 135 Ga. 372, 69 S.E. 480 (1910); *King v. Cox*, 130 Ga. App. 91, 202 S.E.2d 216 (1973); *Solon Automated Servs., Inc. v. Pines Assoc.*, 156 Ga. App. 34, 274 S.E.2d 12 (1980).

When allegations are insufficient to authorize recovery of any special damages and there is no prayer for general damages, plaintiff is not entitled to recover nominal damages. *East Side Lumber & Coal Co. v. Barfield*, 195 Ga. 505, 24 S.E.2d 681 (1943).

Rule that in every case of breach of contract the other party has a right to recover nominal damages does not apply when only special damages are sued for and these are

not recoverable. *Bennett v. Associated Food Stores, Inc.*, 118 Ga. App. 711, 165 S.E.2d 581 (1968).

Defendant cannot seek nominal damages for breach by plaintiff in order to reduce plaintiff's claim. — Defendant cannot recover nominal damages under plea of recoupment to reduce plaintiff's claim in consequence of some breach of same contract by plaintiff. *Foote & Davies Co. v. Malony*, 115 Ga. 985, 42 S.E. 413 (1902).

Nominal damages are not available to defendant as defendant is not a party seeking damages. *Atlanta Bd. of Educ. v. Oxford Bldg. Servs.*, 136 Ga. App. 168, 220 S.E.2d 485 (1975).

Failure to instruct on nominal damages was error. — Trial court erred in not giving a jury charge requested by a seller in a breach of contract action, to the effect that a party not breaching a contract in a breach of contract action is entitled to at least nominal damages, because the requested charge was a correct statement of law under O.C.G.A. § 13-6-6, it was not substantially included in the instructions given, and the requested charge was adjusted to the evidence in the case; the trial court's failure to give the requested nominal damages charge, coupled with the use of a verdict form that specified actual damages but not nominal damages, improperly removed the issue of nominal damages from the jury's consideration. *Brock v. King*, 279 Ga. App. 335, 629 S.E.2d 829 (2006), *aff'd*, 282 Ga. 56, 646 S.E.2d 206 (2007).

Award of nominal damages for breach of warranty. — See *Taylor v. Allen*, 131 Ga. 416, 62 S.E. 291 (1908).

Award of nominal damages for breach of contract to carry freight. — See *Graham & Ward v. Macon, D. & S.R.R.*, 120 Ga. 757, 49 S.E. 75 (1904).

Award of nominal damages where lease broken before entry by tenant. — See *Kenny v. Collier*, 79 Ga. 743, 8 S.E. 58 (1887).

Award of nominal damages where breach of public duty shown. — See *Cole v. Western Union Tel. Co.*, 23 Ga. App. 479, 98 S.E. 407 (1919).

Award of nominal damages where general damages alleged but not proved. — See *Hadden v. Southern Messenger Serv.*, 135 Ga. 372, 69 S.E. 480 (1910).

New trial granted when plaintiff was improperly nonsuited, to enable plaintiff to recover nominal damages. This rule does not apply where reversal of judgment denying new trial is sought. *Bloom Sons v. Americus Grocery Co.*, 116 Ga. 784, 43 S.E. 54 (1902).

Award of nominal damages when amount of damages was speculative. — When a lessor showed evidence that premises leased to a lessee were damaged, the lessor's recovery was properly limited to nominal damages because the evidence as to the amount of damages was speculative. *Lay Bros., Inc. v. Golden Pantry Food Stores, Inc.*, 273 Ga. App. 870, 616 S.E.2d 160 (2005).

Cited in *Pausch v. Guerrard*, 67 Ga. 319 (1881); *Barrett v. Verdery*, 93 Ga. 526, 21 S.E. 64 (1893); *Sutton v. Southern Ry.*, 101 Ga. 776, 29 S.E. 53 (1897); *Cothran v. Witham*, 123 Ga. 190, 51 S.E. 285 (1905); *Glenn v. Western Union Tel. Co.*, 1 Ga. App. 821, 58 S.E. 83 (1907); *Williams v. Rome Ry. & Light Co.*, 4 Ga. App. 372, 61 S.E. 495 (1908); *Atlantic C.L.R.R. v. Thomas*, 14 Ga. App. 619, 82 S.E. 299 (1914); *Harris v. Black*, 143 Ga. 497, 85 S.E. 742 (1915); *Twin City Lumber Co. v. Daniels*, 22 Ga. App. 578, 96 S.E. 437 (1918); *Jeter v. Davis*, 33 Ga. App. 733, 127 S.E. 898 (1925); *Robbins v. Hays*, 107 Ga. App. 12, 128 S.E.2d 546 (1962); *Pure Oil Co. v. Dukes*, 107 Ga. App. 326, 130 S.E.2d 234 (1963); *Dukes v. Pure Oil Co.*, 112 Ga. App. 111, 143 S.E.2d 769 (1965); *Davis v. Boyd*, 118 Ga. App. 198, 162 S.E.2d 880 (1968); *Graham Bros. Constr. Co. v. C.W. Matthews Contracting Co.*, 159 Ga. App. 546, 284 S.E.2d 282 (1981); *Crites v. Delta Air Lines*, 177 Ga. App. 723, 341 S.E.2d 264 (1986); *Don Swann Sales Corp. v. Parr*, 189 Ga. App. 222, 375 S.E.2d 466 (1988); *Belcher v. Thomson Newspapers, Inc.*, 190 Ga. App. 466, 379 S.E.2d 204 (1989); *Haehn v. Alheit*, 212 Ga. App. 252, 441 S.E.2d 529 (1994); *McEntyre v. Edwards*, 261 Ga. App. 843, 583 S.E.2d 889 (2003).

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C.J.S. — 17A C.J.S., Contracts, §§ 523(1), 641.

ALR. — Rate of exchange to be taken into account in assessing damages for breach of contract, 50 ALR 1273; 105 ALR 640.

Damages for breach by seller or former employee of covenant, express or implied, not to engage in like business or enter employment of competitor of covenantee, 127 ALR 1152.

Measure and elements of sublessee's dam-

ages recoverable from sublessor for latter's failure to exercise option to renew his lease, 94 ALR2d 1345.

Liability of real-estate broker for interference with contract between vendor and another real-estate broker, 34 ALR3d 720.

Measure and elements of contract to lend money, 4 ALR4th 682.

13-6-7. Damages and expenses recoverable — Liquidated damages generally.

If the parties agree in their contract what the damages for a breach shall be, they are said to be liquidated and, unless the agreement violates some principle of law, the parties are bound thereby. (Orig. Code 1863, § 2881; Code 1868, § 2889; Code 1873, § 2940; Code 1882, § 2940; Civil Code 1895, § 3794; Civil Code 1910, § 4390; Code 1933, § 20-1402.)

Law reviews. — For comment, "Refocusing Liquidated Damages Law for Real Estate Contracts: Returning to the Historical Roots

of the Penalty Doctrine," see 39 Emory L.J. 267 (1990).

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Liquidated damages are a sum to be paid in lieu of performance. Thorne v. Lee Timber Prods., Inc., 158 Ga. App. 226, 279 S.E.2d 521 (1981).

Liquidated damages clause must be construed with other provisions of contract. Georgia Ports Auth. v. Norair Eng'g Corp., 127 Ga. App. 864, 195 S.E.2d 199 (1973).

Requirements for liquidated damages clause. — Liquidated damages are allowed in Georgia, but for a clause to comply with O.C.G.A. § 13-6-7, three conditions must be met: (1) injury caused by the breach must be difficult or impossible of estimation; (2) the parties must intend to provide for damages; and (3) the sum stipulated must be a reasonable pre-estimate of the probable loss. Wehunt v. ITT Bus. Communications Corp., 183 Ga. App. 560, 359 S.E.2d 383 (1987); Ramada Franchise Sys. v. Motor Inn Inv. Corp., 755 F. Supp. 1570 (S.D. Ga. 1991); Oasis Goodtime Emporium I, Inc. v. Cambridge Capital Group, Inc., 234 Ga. App. 641, 507 S.E.2d 823 (1998).

Words "liquidated damages" are not specifically required; however, some manifestation of the parties' intent to agree to liquidated damages is. ADP-Financial Computer

Servs., Inc. v. First Nat'l Bank, 703 F.2d 1261 (11th Cir. 1983).

Equity will not relieve one from duty to pay liquidated damages. Sutton v. Howard, 33 Ga. 536 (1863).

Parol evidence is admissible when terms of contract are ambiguous. Sanders & Ables v. Carter, 91 Ga. 450, 17 S.E. 345 (1893).

When note is given as liquidated damages and breach occurs, directed verdict is proper. Sikes v. Hart, 150 Ga. 121, 102 S.E. 831 (1920).

Damages accurately expressed in monetary terms to be distinguished from those which are not. — In determining the validity of a liquidated damages provision in a contract, it is important to distinguish damages which are difficult to accurately determine in monetary terms from those damages which can be accurately established, albeit via a complicated procedure. Thorne v. Lee Timber Prods., Inc., 158 Ga. App. 226, 279 S.E.2d 521 (1981).

Liquidated damages impossible to determine at time contract signed. — Since the extent and amount of damages were difficult or impossible to accurately estimate at the time the contract was executed that provi-

sion is void and unenforceable. *Ryder Truck Lines v. Goren Equip. Co.*, 576 F. Supp. 1348 (N.D. Ga. 1983).

Liquidated damages provision in aircraft lease was not unlawful penalty. — When aircraft leases provided that, upon default, the lessee was liable for stipulated loss values based on multiplication of the lessor's capitalized costs for the aircraft by a decreasing percentage, the amount due from the lessee was liquidated damages rather than an unlawful penalty. *Holmes v. GE Capital Corp.* (In re *Holmes*), 369 B.R. 708 (M.D. Ga. 2007), *aff'd*, 387 B.R. 896 (M.D. Ga. 2008).

In determining whether a provision is for liquidated damages or a penalty, the cardinal tests are intention of the parties, and reasonableness or unreasonableness of amount fixed, according to certainty and ease or difficulty in ascertainment of actual damages, and according to similarity or disproportion between amount provided and actual or probable loss. *National Manufacture & Stores Corp. v. Dekle*, 48 Ga. App. 515, 173 S.E. 408 (1934); *Krupp Realty Co. v. Joel*, 168 Ga. App. 480, 309 S.E.2d 641 (1983).

In deciding whether contract provision is enforceable as liquidated damages, the court makes a tripartite inquiry to determine if the following factors are present: first, injury caused by breach must be difficult or impossible of accurate estimation; second, parties must intend to provide for damages rather than for a penalty; and, third, sum stipulated must be a reasonable pre-estimate of probable loss. *Southeastern Land Fund, Inc. v. Real Estate World, Inc.*, 237 Ga. 227, 227 S.E.2d 340 (1976); *Gibson v. Sheriff*, 155 Ga. App. 578, 271 S.E.2d 710 (1980); *Thorne v. Lee Timber Prods., Inc.*, 158 Ga. App. 226, 279 S.E.2d 521 (1981); *Burns v. Gleason*, 183 Ga. App. 245, 358 S.E.2d 646 (1987); *Oami v. Delk Interchange, Ltd.*, 193 Ga. App. 640, 388 S.E.2d 706 (1989).

Penalty arises when stipulated amount in excess of actual damages. — If actual damages are uncertain and difficult to ascertain or prove, and contract furnishes no data for their ascertainment, the provision will, as a rule, be held to be one for liquidated damages, if amount is not unreasonable. But if actual damages are capable of exact computation under contract and legal rule for their measure, a stipulation for an amount in excess of such damages will generally be

deemed a penalty. *National Manufacture & Stores Corp. v. Dekle*, 48 Ga. App. 515, 173 S.E. 408 (1934).

Distinction between penalty and liquidated damages. — See *Sanders & Ables v. Carter*, 91 Ga. 450, 17 S.E. 345 (1893); *Heard v. Dooly County*, 101 Ga. 619, 28 S.E. 986 (1897).

Provision unenforceable when amount stipulated bears no reasonable relation to any probable actual damage. — Agreements to pay fixed sums as damages for breaches of contracts, when amount stipulated plainly has no reasonable relation to any probable actual damage which may follow breach, will not be enforced for agreed amount as liquidated damages, but will be construed as mere unenforceable provisions for penalties. *Miazza v. Western Union Tel. Co.*, 50 Ga. App. 521, 178 S.E. 764 (1935); *Daniels v. Johnson*, 191 Ga. App. 70, 381 S.E.2d 87 (1989).

A provision in a long-term retainer agreement between an attorney and a corporate client requiring the payment of fifty percent of the sums due under the remaining term of the agreement if the client terminated the agreement was unenforceable. *AFLAC, Inc. v. Williams*, 264 Ga. 351, 444 S.E.2d 314 (1994).

A liquidated damages clause in an employment contract, which provided that a computer consultant would pay \$50,000 if the consultant failed to provide one month's minimum notice prior to voluntary termination of employment, was unenforceable as such amount bore no rational relationship to actual or potential damages for any breach of contract. *Capricorn Sys. v. Pednekar*, 248 Ga. App. 424, 546 S.E.2d 554 (2001).

Considerations in determining whether amount stipulated is not disproportionate to probable loss. — In determining whether amount stipulated as a forfeiture is reasonable, and not disproportionate to damages which could necessarily flow from failure of performance, relation of parties, one to the other, their peculiar situation, absence or presence of fraud or oppression, and purpose agreement seeks to subserve, will in every instance furnish valuable assistance in reaching a fair and just conclusion. *Sanders v. Carney*, 118 Ga. App. 576, 164 S.E.2d 856 (1968).

Liquidated damages become maximum as well as minimum sum that can be collected.

— Breaching party cannot complain that actual damages are less than those specified as liquidated damages. *Southeastern Land Fund, Inc. v. Real Estate World, Inc.*, 237 Ga. 227, 227 S.E.2d 340 (1976).

When contract provides for liquidated damages, nonbreaching party cannot elect to take actual damages. — A feature implicit in the concept of liquidated damages is that both parties are bound by their agreement. A nonbreaching party who has agreed to accept liquidated damages cannot elect after breach to take actual damages should those damages prove greater than sum specified. *Southeastern Land Fund, Inc. v. Real Estate World, Inc.*, 237 Ga. 227, 227 S.E.2d 340 (1976).

Retention of right to elect specific performance does not render valid liquidated damages provision unenforceable. *Southeastern Land Fund, Inc. v. Real Estate World, Inc.*, 237 Ga. 227, 227 S.E.2d 340 (1976).

Agreement to deposit specified sum as security for performance as stipulation for liquidated damages. — That the parties agree to deposit a specified sum as security for performance, using language which imports an understanding that upon a breach the holder is to pay such amount over to the injured party without further formality, will generally be held decisive of the intent to stipulate for liquidated damages, though other considerations, of equal weight, may often turn the scale. *Sanders v. Carney*, 118 Ga. App. 576, 164 S.E.2d 856 (1968).

Rent provision in building contract, dependent upon failure to complete building within stated time, is enforceable. *Heard v. Dooly County*, 101 Ga. 619, 28 S.E. 986 (1897).

Earnest money provision. — Provision in a real estate sales contract that if “this contract is not consummated by reason of Buyer’s refusal or inability to perform, then such earnest money shall be paid to Seller as liquidated damages for Buyer’s breach” was an enforceable liquidated damages clause, not an unenforceable penalty. *Swan Kang, Inc. v. Tae Sang Kang*, 243 Ga. App. 684, 534 S.E.2d 145 (2000).

Employment agreement provision requiring employee to reimburse employer for relocation expenses that had been provided

to the employee if the employee did not work at least 12 months could not be construed as a liquidated damages provision since the provision did not contemplate the payment of damages in lieu of a breach. *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491 (11th Cir. 1989).

Golden parachute agreement. — Liquidated damages analysis is inapplicable to a “golden parachute” agreement with a corporate officer, where the severance agreement does not purport to be a stipulated sum for damages for a breach, but is the price, in addition to ongoing compensation, for plaintiff’s continued performance which plaintiff was not otherwise obligated to render. *Royal Crown Cos. v. McMahon*, 183 Ga. App. 543, 359 S.E.2d 379, cert. denied, 183 Ga. App. 907, 359 S.E.2d 379 (1987).

Loss, destruction, or failure to return rented item. — When the contract does not contemplate payment of rental until the item is returned, nor payment as to the item’s loss or destruction, the measure of damages is the fair market value of the property, that is, if lost, destroyed, or simply not returned, or if damaged, the measure of damages is the difference in the market value immediately before and immediately after the damage. *Letteer v. Archer*, 160 Ga. App. 373, 287 S.E.2d 89 (1981).

Lease late charge provision. — A lease provision for a \$50 charge as “additional rent” when a rent check was returned without payment or when the rent was received late met the requirements for liquidated damages when such charge was made to compensate the owner for additional bookkeeping and clerical expenses. *Krupp Realty Co. v. Joel*, 168 Ga. App. 480, 309 S.E.2d 641 (1983).

Liquidated damages clause upheld. — Generally speaking, a late charge clause provision contained in a lease is enforceable provided the provision constitutes a lawful liquidated-damages provision rather than an unlawful penalty. *Mathis v. Rome Tractor Co.*, 180 Ga. App. 426, 349 S.E.2d 282 (1986).

In a breach of contract action filed by a school against an enrolled student’s parents seeking payment of a full year’s tuition, the trial court properly granted summary judgment to the school as the parents failed in the parents’ burden of showing that a liqui-

dated damages clause in the contract amounted to an unenforceable penalty. *Turner v. Atlanta Girls' Sch., Inc.*, 288 Ga. App. 115, 653 S.E.2d 380 (2007).

Law permitted parties to contract for liquidated damages precisely because of the difficulty of predicting future events and consequences; thus, the fact that a certain purchaser's purchase of debtor's property may have limited debtor's damages did not establish that liquidated damages of \$1 million was not a reasonable estimate of loss if the "stalking horse" purchaser did not purchase the property. Furthermore, the damages flowing from the stalking horse's breach were difficult or impossible of accurate estimation, and the parties intended to provide for damages. *Galleria Invs. LLC v. Hong Duck, LLC (In re Galleria Invs. LLC)*, No. A06-62557-PWB, 2008 Bankr. LEXIS 1860 (Bankr. N.D. Ga. Apr. 4, 2008).

Liquidated damages provision in a rental contract for a storage unit was enforceable. *Lancaster v. SUSA P'ship, L.P.*, 300 Ga. App. 567, 685 S.E.2d 474 (2009).

Burden is on the defaulting party to show that a liquidated damages clause is a penalty. *Oasis Goodtime Emporium I, Inc. v. Cambridge Capital Group, Inc.*, 234 Ga. App. 641, 507 S.E.2d 823 (1998).

Liquidated damages is not a jury issue. — Trial courts should not ordinarily submit the issue of whether a contract provides for liquidated damages or a penalty to the jury. *Roswell Properties, Inc. v. Salle*, 208 Ga. App. 202, 430 S.E.2d 404 (1993).

Cited in *Martin v. Lott*, 144 Ga. 660, 87 S.E. 902 (1916); *Tuten v. Morgan*, 160 Ga. 90, 127 S.E. 143 (1925); *Standard Motors Fin. Co. v. O'Neal*, 35 Ga. App. 727 (1926);

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Provision in land contract for pecuniary forfeiture or penalty upon default of the purchaser as affecting the vendor's right to maintain an action for the purchase price, 32 ALR 617.

Stipulation as to amount recoverable for breach of contract against entering certain business or employment as a provision for liquidated damages or for a penalty, 59 ALR 1135.

Stipulation as to damages in case of

breach of contract for purchase of goods to be manufactured by other party, as penalty or liquidated damages, 79 ALR 188.

Provision in land contract for pecuniary forfeiture or penalty upon default of purchaser as affecting vendor's right to maintain action for damages for breach of contract, 97 ALR 1493.

Provisions by which upon breach of contract the entire amount remaining unpaid thereon shall become immediately due as one for penalty or for liquidated damages, 104 ALR 223.

Provision for liquidated damages in contract for sale of goods, 138 ALR 594.

Liability of building or construction contractor for liquidated damages for breach of time limit where work is delayed by contractee or third person, 152 ALR 1349.

Power of guardian or committee to compromise liquidated contract claim or money judgment, and of courts to authorize or approve such a compromise, 155 ALR 196.

Provision in land contract for forfeiture of payments as one for liquidated damages or penalty, 6 ALR2d 1401; 4 ALR4th 993.

Validity, construction, and effect of limited liability or stipulated damages clause in fire or burglar alarm service contract, 42 ALR2d 591.

Validity and construction of liquidated damage provision in sign contract, 60 ALR3d 550.

Enforceability of provision in loan commitment agreement authorizing lender to charge stand by fee, commitment fee, or similar deposit, 93 ALR3d 1156.

Contractual liquidated damages provisions under UCC Article 2, 98 ALR3d 586.

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Liability of person furnishing, installing, or servicing burglary or fire alarm system for burglary or fire loss, 37 ALR4th 47.

Liability of contractor who abandons building project before completion for liquidated damages for delay, 15 ALR5th 376.

Liability for breach of employment severance agreement, 27 ALR5th 1.

Provision in land contract for liquidated damages upon default of purchaser as affecting right of vendor to maintain action for damages for breach of contract, 39 ALR5th 33.

13-6-8. Damages and expenses recoverable — Remote or consequential damages.

Remote or consequential damages are not recoverable unless they can be traced solely to the breach of the contract or unless they are capable of exact computation, such as the profits which are the immediate fruit of the contract, and are independent of any collateral enterprise entered into in contemplation of the contract. (Orig. Code 1863, § 2885; Code 1868, § 2893; Code 1873, § 2944; Code 1882, § 2944; Civil Code 1895, § 3798; Civil Code 1910, § 4394; Code 1933, § 20-1406.)

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JUDICIAL DECISIONS

Tortious acts not necessary for recovery. — Even though the statutory definitions of

general and special damages (see O.C.G.A. § 51-12-2) refer to tortious acts, general and

special damages also may be recovered in contract actions if the damages are not remote or consequential and arose naturally and according to the usual course of things from the breach. *Bill Parker & Assocs. v. Rahr*, 216 Ga. App. 838, 456 S.E.2d 221 (1995).

Fact that damages are to some extent contingent does not necessarily prevent their recovery. — Damages which are the legal and natural result of breach are not necessarily too remote merely because the damages may be to some extent contingent. *Walker v. Jenkins*, 32 Ga. App. 238, 123 S.E. 161 (1924); *Reynolds v. Speer*, 38 Ga. App. 570, 144 S.E. 358 (1928).

To recover substantial, compensatory damages, there must be some evidence of actual damages, and amount of those damages. *Lurlee, Inc. v. Pernoshal-39 Co.*, 135 Ga. App. 724, 218 S.E.2d 701 (1975).

Burden is on plaintiff to show both breach and damage, and this must be done by evidence which will furnish the jury data sufficient to enable the jury to estimate with reasonable certainty the amount of damages; it cannot be left to speculation, conjecture, and guesswork. *Bennett v. Associated Food Stores, Inc.*, 118 Ga. App. 711, 165 S.E.2d 581 (1968).

As a general rule, expected profits of commercial business are too uncertain, speculative, and remote to permit recovery for their loss. *Atlanta Gas Light Co. v. Newman*, 88 Ga. App. 252, 76 S.E.2d 536 (1953).

Speculative damages — the loss of conjectural profits — are too remote and uncertain to be recoverable. *Davis v. Boyd*, 118 Ga. App. 198, 162 S.E.2d 880 (1968).

Loss of anticipated profits from contract which are completely conjectural are not recoverable. *Hip Pocket, Inc. v. Levi Strauss & Co.*, 144 Ga. App. 792, 242 S.E.2d 305 (1978).

When anticipated profits are recoverable. — While anticipated profits of an unestablished future business are generally too speculative for recovery, where the business has been long established, has uniformly made profits, and there are definite, certain, and reasonable data for their ascertainment, and such profits reasonably must have been in contemplation of parties at time of contract, the damages may be recovered at least for a limited reasonable

future time, even though the damages cannot be computed with exact mathematical certainty. *B.H. Levy Bro. & Co. v. Allen*, 53 Ga. App. 246, 185 S.E. 369 (1936).

Party who has been injured by a breach of contract can recover profits that would have resulted from performance when the amount of the loss and the fact that the loss could have been prevented by the breach can be proved with reasonable certainty. *Graham Bros. Constr. Co. v. C.W. Matthews Contracting Co.*, 159 Ga. App. 546, 284 S.E.2d 282 (1981).

Lost profits not recoverable unless capable of definite ascertainment and traceable directly to other party's acts. — In general, unless lost profits are capable of definite ascertainment, and are traceable directly to acts of other party, lost profits are not recoverable in action for breach of contract. *Kingston Pencil Corp. v. Jordan*, 115 Ga. App. 333, 154 S.E.2d 650 (1967).

Claim for lost profits precluded. — In suit by van manufacturer against dealership for breach of contract, van manufacturer's lost profits were clearly precluded by O.C.G.A. § 13-6-8; the lost profits sought by van manufacturer were not independent of any collateral enterprise entered into in contemplation of the claimed contract and, in fact, the lost profits were very dependent upon the market for the vans — a market which the testimony indicated was suffering from a recession. *Hixson-Hopkins Autoplex, Inc.*, 208 Ga. App. 820, 432 S.E.2d 224 (1993).

Contractual provision prohibiting the recovery of special damages precluded an award for contractual profits actually lost as a result of the breach of the contract. *Imaging Sys. Int'l v. Magnetic Resonance Plus, Inc.*, 227 Ga. App. 641, 490 S.E.2d 124 (1997).

When a contract specifically prohibited recovery of "any lost profits" by either party, both consequential and direct damages, to the extent those damages concerned lost profits, were not recoverable. *Imaging Sys. Int'l v. Magnetic Resonance Plus, Inc.*, 227 Ga. App. 641, 490 S.E.2d 124 (1997).

Lost profits not shown. — A contractor was not entitled to recover lost profits pursuant to O.C.G.A. § 13-6-8 in its claim for breach of contract against a defaulting supplier, because the contractor failed to demonstrate a history of profitability and failed to provide definite, certain, and reasonable

data to ascertain the amount of lost profits on the job at issue. *Triad Drywall, LLC v. Bldg. Materials Wholesale, Inc.*, 300 Ga. App. 745, 686 S.E.2d 364 (2009).

Lost profits recoverable when hotelkeeper injured due to lessor's failure to repair. *Stewart v. Lanier House Co.*, 75 Ga. 582 (1885).

Breach of contract and lost income. — When a defendant's breach of contract causes a hotel to lose business, compensation for lost income is recoverable and the hotel operator need only show generally the facts which will enable the jury to approximate the operator's losses and ascertain the operator's damages. *McDevitt & Street Co. v. K-C Air Conditioning Serv., Inc.*, 203 Ga. App. 640, 418 S.E.2d 87, cert. denied, 203 Ga. App. 906, 418 S.E.2d 87 (1992).

When a defendant's breach of contract caused a dump truck owner to lose income and its senior status with an account, compensation for lost income was recoverable since the dump truck owner's lost profits claim was supported by tax and income records. *Freightliner Chattanooga, LLC v. Whitmire*, 262 Ga. App. 157, 584 S.E.2d 724 (2003).

When items cannot be traced solely to defendant's breach of the contract, the trial court errs by awarding these sums as consequential damages. *DOT v. Arapaho Constr., Inc.*, 180 Ga. App. 341, 349 S.E.2d 196 (1986), *aff'd*, 257 Ga. 269, 357 S.E.2d 593 (1987).

Lost profits not too remote when telegraph operation knowingly sends erroneous messages intended to deceive. — When telegraph operator knowingly sends false, fraudulent, and fictitious messages, which are intended to and do deceive addressee, liability for lost profits is not too remote. *Jenkins v. Cobb*, 47 Ga. App. 456, 170 S.E. 698 (1933).

Current profits of going manufacturing concern are too uncertain to form basis of award of damages for breach of contract affecting operation of the plant. *Consolidated Phosphate Co. v. B.F. Sturtevant Co.*, 20 Ga. App. 474, 93 S.E. 155 (1917).

Breach of real estate sales contract. — In an action by a seller against a buyer for breach of a real estate sales contract, there can be no recovery for continued insurance coverage, utility bills, maintenance costs, ad

valorem taxes, and loss of use of proceeds of sale, in the absence of a clause in the parties' contract expressly authorizing such recovery. *Quigley v. Jones*, 255 Ga. 33, 334 S.E.2d 664 (1985).

Damages for breach of share-cropping contract by landlord. — See *Wideman v. Selph*, 71 Ga. App. 343, 30 S.E.2d 797 (1944).

Measure of damages for breach of construction contract by owner is usually profits, that is, price less what it would have cost contractor to perform. *Crosswell v. Arten Constr. Co.*, 152 Ga. App. 162, 262 S.E.2d 522 (1979).

Damages resulting from nature of traveler's business, unknown to railroad contracting with traveler, are too remote. — Damages resulting from the particular character of business of traveler, unknown to railroad company contracting with the traveler, are too remote to be recovered. *Georgia R.R. v. Hayden*, 71 Ga. 518, 51 Am. R. 274 (1833).

Law inapplicable in action for breach of promise of marriage. *Parker v. Forehand*, 99 Ga. 743, 28 S.E. 400 (1896).

Validity of clause excluding consequential damages. — To the extent that consequential damages are recoverable in breach of contract actions, a clause excluding such damages is valid and binding unless prohibited by statute or public policy. *Mark Singleton Buick, Inc. v. Taylor*, 194 Ga. App. 630, 391 S.E.2d 435 (1990).

Entitlement to due process. — Plaintiff could not provide an exact computation of the plaintiff's consequential damages, O.C.G.A. § 13-6-8, and had not provided specific consequential damages in any pleading or brief showing a loss that could be traced solely to defendants' failure to provide the defendant with the defendant's contractual guarantee of procedural due process. Therefore, because defendants' alleged breach of plaintiff's employment contract did not result in any cognizable loss relating to the plaintiff's status as a tenured faculty member, there was no genuine issue of material fact concerning whether plaintiff was still entitled to the due process protections afforded by the plaintiff's employment contract. *Soloski v. Adams*, 600 F. Supp. 2d 1276 (N.D. Ga. 2009).

Attorney fees in condemnation case. — Trial court did not err as a matter of law by

including in the court's award to plaintiff the attorney fees plaintiff incurred in litigating a condemnation case unsuccessfully brought by defendant since these fees were consequential damages incurred as a direct result of defendant's failure to provide the rights-of-way as required by the contract between the parties. *DOT v. Arapaho Constr., Inc.*, 180 Ga. App. 341, 349 S.E.2d 196 (1986), *aff'd*, 257 Ga. 269, 357 S.E.2d 593 (1987).

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S.E. 642 (1927); *Gary v. Central of Ga. Ry.*, 37 Ga. App. 744, 141 S.E. 819 (1928); *Buffington v. Atlanta Title & Trust Co.*, 43 Ga. App. 444, 159 S.E. 297 (1931); *Bankers' Health & Life Ins. Co. v. James*, 177 Ga. 520, 170 S.E. 357 (1933); *Toccoa Falls Light & Power Co. v. Georgia Power Co.*, 53 Ga. App. 522, 186 S.E. 436 (1936); *Sanford v. Patent Scaffolding Co.*, 199 Ga. 41, 33 S.E.2d 422 (1945); *Weathers Bros. Transf. Co. v. Jarrell*, 72 Ga. App. 317, 33 S.E.2d 805 (1945); *Speed Oil Co. v. Griffin*, 73 Ga. App. 242, 36 S.E.2d 205 (1945); *Bigelow-Sanford Carpet Co. v. Goodroe*, 98 Ga. App. 394, 106 S.E.2d 45 (1958); *Camilla Cotton Oil Co. v. Spencer Kellogg & Sons*, 257 F.2d 162 (5th Cir. 1958); *Smith v. A.A. Wood & Son Co.*, 103 Ga. App. 802, 120 S.E.2d 800 (1961); *Atlanta Tallow Co. v. John W. Eshelman & Sons*, 110 Ga. App. 737, 140 S.E.2d 118 (1964); *State Hwy. Dep't v. Knox-Rivers Constr. Co.*, 117 Ga. App. 453, 160 S.E.2d 641 (1968); *Eastern Fed. Corp. v. Avco-Embassy Pictures, Inc.*, 326 F. Supp. 1280 (N.D. Ga. 1970); *Crawford & Assocs. v. Groves-Keen, Inc.*, 127 Ga. App. 646, 194 S.E.2d 499 (1972); *Radlo of Ga., Inc. v. Little*, 129 Ga. App. 530, 199 S.E.2d 835 (1973); *Brown v. Hilton Hotels Corp.*, 133 Ga. App. 286, 211 S.E.2d 125 (1974); *Control, Inc. v. H-K Corp.*, 134 Ga. App. 349, 214 S.E.2d 588 (1975); *Trawick v. Trax, Inc.*, 136 Ga. App. 62, 220 S.E.2d 70 (1975); *Consolidated Eng'g Co. v. U.I.R. Contractors*, 136 Ga. App. 923, 222 S.E.2d 692 (1975); *Lindgren v. Dowis*, 236 Ga. 278, 223 S.E.2d 682 (1976); *Cagle v. Southern Bell Tel. & Tel. Co.*, 143 Ga. App. 603, 239 S.E.2d 182 (1977); *LDH Properties, Inc. v. Morgan Guar. Trust Co.*, 145 Ga. App. 132, 243 S.E.2d 278 (1978); *Corrosion Control, Inc. v. William Armstrong Smith Co.*, 157 Ga. App. 291, 277 S.E.2d 287 (1981); *Leader Nat'l Ins. Co. v. Smith*, 177 Ga. App. 267, 339 S.E.2d 321 (1985); *All-Georgia Dev., Inc. v. Kadis*, 178 Ga. App. 37, 341 S.E.2d 885 (1986); *Complete Concepts, Ltd. v. General Handbag Corp.*, 880 F.2d 382 (11th Cir. 1989).

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Rate of exchange to be taken into account in assessing damages for breach of contract, 43 ALR 520; 50 ALR 1273; 105 ALR 640.

Injury to prestige or reputation as element of damages for employer's breach of contract for services, 56 ALR 901.

Expenses incurred in seeking or in obtaining other employment as element of damages in an action for wrongful discharge of employee, 84 ALR 171.

Measure of damages recoverable for loss of or failure to obtain employment for indefinite term, as result of telegraph company's breach of duty as to transmission or delivery of message, 103 ALR 546.

Damages for breach by seller or former employee of covenant, express or implied, not to engage in like business or enter employment of competitor of covenantee, 127 ALR 1152.

Right to recover, in action for breach of contract, expenditures incurred in preparation for performance, 17 ALR2d 1300.

Measure of damages for lessor's breach of contract to lease or to put lessee in possession, 88 ALR2d 1024.

Mental anguish as element of damages in action for breach of contract to furnish goods, 88 ALR2d 1367.

Measure and elements of sublessee's damages recoverable from sublessor for latter's failure to exercise option to renew his lease, 94 ALR2d 1345.

Damages to franchisee for failure of franchisor of national brand or service to provide the services or facilities contracted for, 41 ALR3d 1436.

Civil liability of undertaker in connection with embalming or preparation of body for burial, 48 ALR3d 261.

Recovery for mental anguish or emotional distress, absent independent physical injury, consequent upon breach of contract in connection with sale of real property, 61 ALR3d 922.

Recovery of expected profits lost by lessor's breach of lease preventing or delaying operation of new business, 92 ALR3d 1286.

Buyer's incidental and consequential damages from seller's breach under UCC § 2-715, 96 ALR3d 299.

Recovery by writer, artist, or entertainer for loss of publicity or reputation resulting from breach of contract, 96 ALR3d 437.

Recovery for mental anguish or emotional distress, absent independent physical injury, consequent upon breach of contract or warranty in connection with construction of home or other building, 7 ALR4th 1178.

Special or consequential damages recoverable, on account of delay in delivering possession, by purchaser of real property awarded specific performance, 11 ALR4th 891.

Recovery of anticipated lost profits of new business: post-1965 cases, 55 ALR4th 507.

13-6-9. Damages and expenses recoverable — Expenses necessary for compliance with contract.

Any necessary expense which one of two contracting parties incurs in complying with the contract may be recovered as damages. (Orig. Code 1863, § 2891; Code 1868, § 2899; Code 1873, § 2950; Code 1882, § 2950; Civil Code 1895, § 3806; Civil Code 1910, § 4402; Code 1933, § 20-1414.)

JUDICIAL DECISIONS

Tortious acts not necessary for recovery. — Even though the statutory definitions of general and special damages (see O.C.G.A. § 51-12-2) refer to tortious acts, general and special damages also may be recovered in contract actions if the damages are not remote or consequential and arose naturally and according to the usual course of things

from the breach. *Bill Parker & Assocs. v. Rahr*, 216 Ga. App. 838, 456 S.E.2d 221 (1995).

Incurred obligations to pay fall under this statute. Those obligations must be such as arise in the usual course of events within contemplation of parties. *Murray v. Americare-Medical Designs, Inc.*, 123 Ga.

App. 557, 181 S.E.2d 871 (1971) (see O.C.G.A. § 13-6-9).

Allegation that obligation has been incurred suffices, although such obligation remains unpaid. — Allegation in petition, that expense of hiring has been contracted for, is sufficient allegation of expense incurred, even though hiring has not been paid for. *Murphey v. Northeastern Constr. Co.*, 31 Ga. App. 715, 121 S.E. 848 (1924).

Recovery of profits under former Civil Code 1895, § 3799 (see O.C.G.A. § 13-6-2) prevented recovery of expenses under former Civil Code 1895, § 3806 (see O.C.G.A. § 13-6-9). *Anderson v. Hilton & Dodge Lumber Co.*, 121 Ga. 688, 49 S.E. 725 (1905).

Cost of completion of building contract recoverable. *Smith v. Aultman*, 30 Ga. App. 507, 118 S.E. 459, cert. denied, 30 Ga. App. 801 (1923).

Costs of attending arbitration proceedings recoverable. *McKenzie v. Mitchell*, 123 Ga. 72, 51 S.E. 34 (1905).

Attorney's fees for examining title recoverable. *Horine v. Hicks*, 25 Ga. App. 802, 104 S.E. 922 (1920).

Improvements by tenant necessary for utilization of premises are recoverable in event of constructive eviction. — Net profit to landlord in permanent improvements made by tenant in order to utilize premises for purpose for which rented is recoverable in case of constructive eviction. *Hathaway v. Gorfine*, 134 Ga. App. 748, 216 S.E.2d 338 (1975).

Necessary expenses may be sought in actions for breach of warranty of title to realty. *State Mut. Ins. Co. v. McJenkin Ins. & Realty Co.*, 86 Ga. App. 442, 71 S.E.2d 670 (1952), disapproved, 137 Ga. App. 771, 225 S.E.2d 88 (1976).

Tenant may setoff expenses of repairing premises in action for rent when landlord was under duty to repair by provisions in lease. *McNaughton v. Stephens*, 8 Ga. App. 545, 70 S.E. 61 (1911).

Burden of proof. — It is incumbent on the plaintiff to prove that each of the items of expense incurred by the plaintiff was necessary in obtaining such as the plaintiff was entitled to have under the plaintiff's

contract. *Gainesville Glass Co. v. Don Hammond, Inc.*, 157 Ga. App. 640, 278 S.E.2d 182 (1981).

Evidence must show how and why expenses incurred were necessary to performance of contract. — Evidence that plaintiff incurred expenses in making trips and telephone calls in preparing to improve premises pursuant to option to do so contained in lease did not show necessity for such expenses, since it did not appear how and why it was necessary to performance of contract by plaintiff that such trips and telephone calls be made. *Price v. Burns*, 43 Ga. App. 821, 160 S.E. 531 (1931).

Improvements not removable. — O.C.G.A. § 13-6-9 was particularly germane because, in compliance with terms of the contract, expenses were incurred to make improvements, and most of the improvements were not removable. *Akhtar v. Food & Gas, Inc.*, 225 Ga. App. 255, 483 S.E.2d 359 (1997).

Proof of local custom to pay certain expenses suffices under O.C.G.A. § 13-6-9. — Proof of local custom to pay storage in addition to purchase price, as part of contract of purchase, is evidence of such expenses. *Maddox v. Washburn-Crosby Milling Co.*, 135 Ga. 539, 69 S.E. 821 (1910).

Cited in *Durden v. Carhart & Bro.*, 41 Ga. 76 (1870); *Butler v. Moore*, 68 Ga. 780, 45 Am. R. 508 (1882); *Fontaine v. Baxley, Boles & Co.*, 90 Ga. 416, 17 S.E. 1015 (1892); *Mitchell v. Henry Vogt Mach. Co.*, 3 Ga. App. 542, 60 S.E. 295 (1908); *Hardwood Lumber Co. v. Adam & Steinbrugge*, 134 Ga. 821, 68 S.E. 725, 32 L.R.A. (n.s.) 192 (1910); *Steinhauer v. Thompson*, 16 Ga. App. 470, 85 S.E. 677 (1915); *Croom v. Allen*, 145 Ga. 347, 89 S.E. 199 (1916); *Freeman v. Petty*, 22 Ga. App. 199, 95 S.E. 737 (1918); *Garcia S. en C. v. Taggart Coal Co.*, 27 Ga. App. 204, 108 S.E. 72 (1921); *Anderson, Clayton & Co. v. Mangham*, 32 Ga. App. 152, 123 S.E. 159 (1924); *Baldwin v. Davis*, 188 Ga. 587, 4 S.E.2d 458 (1939); *Crosswell v. Arten Constr. Co.*, 152 Ga. App. 162, 262 S.E.2d 522 (1979); *Scott v. Wells Fargo Home Mtg., Inc.*, 281 Bankr. 404 (Bankr. M.D. Ga. 2002); *Hopper v. M & B Builders, Inc.*, 261 Ga. App. 702, 583 S.E.2d 533 (2003).

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ALR. — Reduction of claim under contract as affecting right to interest, 89 ALR 678.

Right to recover, in action for breach of

contract, expenditures incurred in preparation for performance, 17 ALR2d 1300.

Measure and element of damages recoverable from vendor where there has been a mistake as to amount of land conveyed, 94 ALR3d 1091.

13-6-10. Damages and expenses recoverable — Exemplary damages.

Unless otherwise provided by law, exemplary damages shall never be allowed in cases arising on contracts. (Orig. Code 1863, § 2884; Code 1868, § 2892; Code 1873, § 2943; Code 1882, § 2943; Civil Code 1895, § 3797; Civil Code 1910, § 4393; Code 1933, § 20-1405.)

Law reviews. — For article on bond liability and righting the wrongs of Georgia local

government officers, see 13 Ga. L. Rev. 747 (1979).

JUDICIAL DECISIONS

Punitive damages may not be demanded in an ex contractu action. *Pelletier v. Schultz*, 157 Ga. App. 64, 276 S.E.2d 118 (1981).

Since a plaintiff did not show any duty owed to the plaintiff by a defendant other than a contractual duty, the trial court correctly held that a tort action could not be maintained and punitive damages could not be recovered. *Wells v. New York Life Ins. Co.*, 195 Ga. App. 79, 392 S.E.2d 251 (1990).

Obligation to pay dividends arises from a contract between the corporation and stockholder and the corporation's failure to pay dividends could not support a claim of punitive damages, even if the corporation acted in bad faith. *Mikart, Inc. v. Marquez*, 211 Ga. App. 209, 438 S.E.2d 633 (1994).

Law applies even though refusal to pay may be in bad faith. *Nestle Co. v. J.H. Ewing & Sons*, 153 Ga. App. 328, 265 S.E.2d 61 (1980); *Hospital Auth. v. Bryant*, 157 Ga. App. 330, 277 S.E.2d 322 (1981); *Horne v. Drachman*, 247 Ga. 802, 280 S.E.2d 338 (1981).

Punitive damages are not awarded for breach of contract, but are awarded in response to tortious conduct. See *Gower v. Cohn*, 643 F.2d 1146 (5th Cir. 1981).

Plaintiff was not entitled to an award of punitive damages since the trial court had granted a directed verdict on plaintiff's

"fraud count" leaving only a claim of breach of contract. *Johnson v. Waddell*, 193 Ga. App. 692, 388 S.E.2d 723 (1989).

Punitive damages are not available in actions for breach of contract. *Trust Co. Bank v. Citizens & S. Trust Co.*, 260 Ga. 124, 390 S.E.2d 589 (1990).

In an action by a shipper against an air carrier for breach of contract and conversion based on lost shipments, punitive damages were not recoverable since there was no evidence of illegal conversion and punitive damages cannot be awarded for breach of contract. *Burlington Air Express, Inc. v. Georgia Pac. Corp.*, 211 Ga. App. 113, 438 S.E.2d 97 (1993), cert. denied, 1994 Ga. Lexis 262 (1994).

Amount of punitive damages to a plaintiff in trademark infringement suit evinced the likelihood that the award was based upon the breach of the parties' agreement because the award reflected the 50/50 profit share division of the agreement; thus, the sum awarded suggested that breach of contract, not trademark infringement, was the act for which the jury punished the defendant. *Go Med. Indus. Pty, Ltd. v. Inmed Corp.*, No. 1:01-CV-313-TWT, 2005 U.S. Dist. LEXIS 19588 (N.D. Ga. Jan. 25, 2005).

Punitive damages not recoverable for breach of contract, although defense sounds

in tort. — In action based on contract, with defense offered in amendment based on breach of that contract, although defense sounds in tort, punitive damages are not recoverable. *Overstreet v. Schulman*, 77 Ga. App. 320, 48 S.E.2d 474 (1948), appeal dismissed, 206 Ga. 504, 57 S.E.2d 589 (1950).

After a real estate agent's judgment against an owner for tortious interference was reversed on appeal, the court's award of punitive damages was also reversed because its other claims, quantum meruit and promissory estoppel, could not support an award of punitive damages. *ASC Constr. Equip. USA, Inc. v. City Commer. Real Estate, Inc.*, No. A10A0733; No. A10A0734, 2010 Ga. App. LEXIS 343 (Mar. 31, 2010).

Bad faith. — Claim for punitive damages will not lie in cases arising on contracts, even if the breaching party is in bad faith. *Builders Transp., Inc. v. Hall*, 183 Ga. App. 812, 360 S.E.2d 60, cert. denied, 183 Ga. App. 905, 360 S.E.2d 60 (1987).

Claim for punitive damages will not lie when no other damages are recovered. *Horne v. Drachman*, 247 Ga. 802, 280 S.E.2d 338 (1981).

Evidence of willful misconduct, malice, want of care which authorizes punitive damages. — To authorize the imposition of punitive or exemplary damages there must be evidence of willful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences. *Speir Ins. Agency, Inc. v. Lee*, 158 Ga. App. 512, 281 S.E.2d 279 (1981).

Evidence of fraud justifies charge on punitive damages. — In an action for breach of contract, when there are matters of record relating to fraud, punitive damages can be awarded. Thus, the evidence of the defendant's participation in a fraudulent scheme justifies a district court in putting the question of punitive damages to the jury. *Gower v. Cohn*, 643 F.2d 1146 (5th Cir. 1981).

Punitive damages are recoverable in breach of contract action if fraud is present. — Even in action for breach of contract, when there were matters of record relating to fraud, punitive damages can be awarded, for fraud, if found, is tortious conduct. *Clark v. Aenchbacher*, 143 Ga. App. 282, 238 S.E.2d 442 (1977).

Although the litigation involves contracts of insurance, the plaintiff's alleged fraud, if found by the jury, would amount to tortious conduct, authorizing an award of punitive damages. *Guarantee Trust Life Ins. Co. v. Wood*, 631 F. Supp. 15 (N.D. Ga. 1984).

Punitive damages awarded to plaintiff and cross-claimant against defendant are appropriate for conversion as a tort. *Privitera v. Addison*, 190 Ga. App. 102, 378 S.E.2d 312 (1989).

When, on appeal, plaintiff did not enumerate as error the grant of summary judgment to defendant on plaintiff's fraud claim, any claim of error regarding that grant of summary judgment was abandoned; therefore, in the absence of an allegation in the complaint that would support the award of punitive damages, plaintiff's enumeration concerning the grant of summary judgment on the claim for punitive damages was moot. *Young v. Turner Heritage Homes, Inc.*, 241 Ga. App. 400, 526 S.E.2d 82 (1999).

General contractor's punitive damages claim in the contractor's breach of contract action failed under O.C.G.A. § 13-6-10 because the general contractor failed to present evidence establishing a genuine issue of material fact on each of the elements of fraud. *Apac-Southeast, Inc. v. Coastal Caisson Corp.*, 514 F. Supp. 2d 1373 (N.D. Ga. 2007).

Punitive damages unwarranted when fraud only went to plaintiff's inducement to enter contract. — Because the appellate court could not say that the allegations of fraud went to anything other than a plaintiff's inducement to enter into the contract, and the plaintiff was not entitled to recover damages for both a breach of contract and a tort claim, the judgment was vacated and the case remanded for the plaintiff to have the opportunity to make an election of remedies. *Tankersley v. Barker*, 286 Ga. App. 788, 651 S.E.2d 435 (2007), cert. denied, 2007 Ga. LEXIS 742 (Ga. 2007).

Equitable rescission based on fraud may sound in tort, thus justifying punitive damages. — A suit for equitable rescission of contract on grounds of fraud and deceit may sound in tort and the jury may find circumstances of fraud sufficiently aggravating to impose punitive damages. *Brown v. Techdata Corp.*, 238 Ga. 622, 234 S.E.2d 787 (1977).

Exemplary damages are not allowed in

cases based on breach of express warranty, since express warranties arise by contract. *Simmons v. Taylor Childre Chevrolet-Pontiac, Inc.*, 629 F. Supp. 1030 (M.D. Ga. 1986).

Mere failure to perform an automobile repair contract according to the contract's terms, whether attributable to negligence or otherwise, was not sufficient in and of itself to support an award of punitive damages. *Hub Motor Co. v. Burdakin*, 192 Ga. App. 872, 386 S.E.2d 854 (1989).

Real estate contract claim not involving tortious acts. — A jury award of exemplary damages to the seller of a house in the seller's action on a real estate contract against the buyer had to be stricken from judgment, for the action involved neither allegations nor evidence of tortious conduct by appellant which would support an award of exemplary damages. *Jones v. Brooks*, 174 Ga. App. 12, 329 S.E.2d 300 (1985).

Violation of duty flowing from relations created by contract. — Although the relationship between the parties (employer and employee) arose contractually, the employee was not barred from bringing a tort action (and recovering punitive damages) for the violation of a duty flowing from relations between the parties which were created by contract. *Atlantic Mechanical Contractors v. Hurston*, 185 Ga. App. 511, 364 S.E.2d 638 (1988); *Anderson v. Chatham*, 190 Ga. App. 559, 379 S.E.2d 793 (1989).

Since the jury found for plaintiffs on both the plaintiffs' negligence and breach of contract claims but awarded damages on the breach of contract claim only, plaintiffs could not receive punitive damages. *Menchio v. Rymer*, 179 Ga. App. 852, 348 S.E.2d 76 (1986).

Failure to charge which of multiple counts will support punitive damages. — It was error to deny the defendant's motion for new trial on the issue of punitive damages when plaintiff sued defendant on two counts, only one of which could support an award of punitive damages, but the trial court's charge did not so indicate and the Court of Appeals was, therefore, unable to determine the count on which the jury hinged the jury's award of punitive damages. *Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 157 Ga. App. 497, 277 S.E.2d 785 (1981).

Upon reversal of tort recovery, punitive damages reversed. — Since a claim for punitive damages will not lie in cases arising on contracts, having reversed the tort recovery, the appellate court must accordingly also reverse the award of punitive damages. *Ebco Gen. Agency v. Mitchell*, 186 Ga. App. 874, 368 S.E.2d 782, cert. denied, 186 Ga. App. 917, 368 S.E.2d 782 (1988).

Award of specific performance does not, as a matter of law, bar a party from recovering attorney fees or punitive damages. *Clayton v. Deverell*, 257 Ga. 653, 362 S.E.2d 364 (1987).

No recovery since parent company was not a stranger to subsidiary's contract. — Insured could not sustain a claim that the parent insurance company interfered with a policy issued by its subsidiary and induced the subsidiary to breach the policy because the parent company could not be a stranger to the subsidiary's contractual relations; therefore, the insured's claims for tortious interference with contractual relations and punitive damages arising out of that tortious interference were dismissed for failure to state a claim. *Perry v. Unum Life Ins. Co. of Am.*, 353 F. Supp. 2d 1237 (N.D. Ga. Jan. 11, 2005).

Cited in *Goins v. Western R.R.*, 68 Ga. 190 (1881); *Chase v. Western Union Tel. Co.*, 44 F. 554, 10 L.R.A. 464 (N.D. Ga. 1890); *Hadden v. Southern Messenger Serv.*, 135 Ga. 372, 69 S.E. 480 (1910); *Bennett v. Tucker & Pennington*, 32 Ga. App. 288, 123 S.E. 165 (1924); *Copeland v. Dunehoo*, 36 Ga. App. 817, 138 S.E. 267 (1927); *Carlan v. Fidelity & Cas. Co.*, 55 Ga. App. 271, 190 S.E. 47 (1937); *Georgia Power Co. v. Banks*, 56 Ga. App. 774, 194 S.E. 63 (1937); *Cain v. Tuten*, 82 Ga. App. 102, 60 S.E.2d 485 (1950); *Nichols v. Williams Pontiac, Inc.*, 95 Ga. App. 752, 98 S.E.2d 659 (1957); *Bigelow-Sanford Carpet Co. v. Goodroe*, 98 Ga. App. 394, 106 S.E.2d 45 (1958); *Rhine v. Sanders*, 100 Ga. App. 68, 110 S.E.2d 128 (1959); *Pure Oil Co. v. Dukes*, 101 Ga. App. 786, 115 S.E.2d 449 (1960); *Jones v. Central Bldrs. Supply Co.*, 217 Ga. 190, 121 S.E.2d 633 (1961); *Kilgore v. National Life & Accident Ins. Co.*, 110 Ga. App. 280, 138 S.E.2d 397 (1964); *Siler v. Gunn*, 117 Ga. App. 325, 160 S.E.2d 427 (1968); *Turpin v. North Am. Acceptance Corp.*, 119 Ga. App. 212, 166 S.E.2d 588 (1969); *Cohen v. Garland*, 119 Ga. App. 333, 167 S.E.2d 599 (1969); *Murray v. Americare-Medical Designs, Inc.*, 123 Ga.

App. 557, 181 S.E.2d 871 (1971); *McMichen v. Martin Burks Chevrolet, Inc.*, 128 Ga. App. 482, 197 S.E.2d 395 (1973); *Eskew v. Camp*, 130 Ga. App. 779, 204 S.E.2d 465 (1974); *Wallace v. Bleakman*, 131 Ga. App. 856, 207 S.E.2d 254 (1974); *F.N. Roberts Pest Control Co. v. McDonald*, 132 Ga. App. 257, 208 S.E.2d 13 (1974); *Liberty Mut. Ins. Co. v. Coburn*, 132 Ga. App. 859, 209 S.E.2d 655 (1974); *Brown v. Hilton Hotels Corp.*, 133 Ga. App. 286, 211 S.E.2d 125 (1974); *Wilson v. Strange*, 235 Ga. 156, 219 S.E.2d 88 (1975); *Kaplan v. Sanders*, 136 Ga. App. 902, 222 S.E.2d 630 (1975); *Spurlock v. Commercial Banking Co.*, 138 Ga. App. 892, 227 S.E.2d 790 (1976); *Rosenberg v. Mossman*, 140 Ga. App. 694, 231 S.E.2d 417 (1976); *Corrosion Control, Inc. v. William Armstrong Smith Co.*, 148 Ga. App. 75, 251 S.E.2d 49 (1978); *Four Oaks Properties, Inc. v. Carusi*, 156 Ga. App. 422, 274 S.E.2d 783 (1980); *Blank v. Preventive Health Programs, Inc.*, 504 F. Supp. 416 (S.D. Ga. 1980); *Stroud v. Elias*, 247 Ga. 191, 275 S.E.2d 46 (1981); *Raybestos-Manhattan, Inc. v. Friedman*, 156 Ga. App. 880, 275 S.E.2d 817 (1981); *Mayfield v. Ideal Enters., Inc.*, 157 Ga. App. 266, 277 S.E.2d 62 (1981);

Alewine v. City Council, 505 F. Supp. 880 (S.D. Ga. 1981); *Alliance Transp., Inc. v. Mayer*, 165 Ga. App. 344, 301 S.E.2d 290 (1983); *Parsells v. Orkin Exterminating Co.*, 172 Ga. App. 74, 322 S.E.2d 91 (1984); *Bekele v. Ryals*, 177 Ga. App. 445, 339 S.E.2d 655 (1986); *Towery v. Massey*, 179 Ga. App. 61, 345 S.E.2d 90 (1986); *Bank S. v. Harrell*, 181 Ga. App. 64, 351 S.E.2d 263 (1986); *Kauka Farms, Inc. v. Scott*, 256 Ga. 642, 352 S.E.2d 373 (1987); *Sasser v. Mixon Contracting, Inc.*, 181 Ga. App. 710, 353 S.E.2d 525 (1987); *Braddy v. Morgan Oil Co.*, 183 Ga. App. 157, 358 S.E.2d 305 (1987); *Metro Complete Servs., Inc. v. Liberty Mut. Ins. Co.*, 188 Ga. App. 221, 372 S.E.2d 491 (1988); *Ideal Pool Corp. v. Baker*, 189 Ga. App. 739, 377 S.E.2d 511 (1988); *Hester Enters., Inc. v. Narvais*, 198 Ga. App. 580, 402 S.E.2d 333 (1991); *Ledbetter v. Ledbetter*, 222 Ga. App. 858, 476 S.E.2d 626 (1996); *McDuffie v. Argroves*, 230 Ga. App. 723, 497 S.E.2d 5 (1998); *Taylor v. Powertel, Inc.*, 250 Ga. App. 356, 551 S.E.2d 765 (2001); *Strickland v. CADD Ctrs. of Fla., Inc. (In re Strickland)*, No. 04-70716-JB, 2007 Bankr. LEXIS 2590 (Bankr. N.D. Ga. May 23, 2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, § 199.

C.J.S. — 25 C.J.S., Damages, § 195.

ALR. — Punitive or exemplary damages for breach of contract, other than contracts to marry and actions on statutory bonds, 84 ALR 1345.

Punitive or exemplary damages in action in tort based on fraudulent sale, 165 ALR 614.

Right of principal to recover punitive damages for agent's or broker's breach of duty, 67 ALR2d 952.

Measure and elements of sublessee's damages recoverable from sublessor for latter's

failure to exercise option to renew his lease, 94 ALR2d 1345.

Damages to franchisee for failure of franchisor of national brand or service to provide the services or facilities contracted for, 41 ALR3d 1436.

Sufficiency of showing of actual damages to support award of punitive damages — modern cases, 40 ALR4th 11.

Recovery of punitive damages for breach of building or construction contract, 40 ALR4th 110.

Punitive damages: power of equity court to award, 58 ALR4th 844.

13-6-11. Recovery of expenses of litigation generally.

The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them. (Orig. Code 1863, § 2883; Code 1868,

§ 2891; Code 1873, § 2942; Code 1882, § 2942; Civil Code 1895, § 3796; Civil Code 1910, § 4392; Code 1933, § 20-1404; Ga. L. 1984, p. 22, § 13.)

Cross references. — Recovery of costs in contract actions, see § 9-15-9.

Law reviews. — For article advocating that payment of attorneys fees be assigned to the losing party, see 18 Ga. B.J. 439 (1956). For article discussing available remedies in this state for deceptive trade practices, in light of the model Unfair Trade Practices and Consumer Protection Law proposed in Georgia in 1973, see 10 Ga. St. B.J. 281 (1973). For article surveying developments in Georgia contracts law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 67 (1981). For article surveying developments in the Georgia torts law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 247 (1981). For survey article on torts, see 34 Mercer L. Rev. 271 (1982). For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982). For survey article on wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982). For article discussing damages in an excess liability action, "The Liability Insurance Policy — Above and Beyond Coverage: Extra-Contractual Rights and Duties," see 22 Ga. State Bar J. 137 (1986). For annual survey of law of contracts, see 38 Mercer L. Rev. 107 (1986). For annual survey on trial practice and procedure, see 38 Mercer L. Rev. 383 (1986). For article, "Nonjudicial Foreclosures in Georgia Revisited," see 24 Ga. St. B.J. 43 (1987). For article, "Battling the Many-Headed Hydra: Abusive Litigation Law in Georgia," see 25 Ga. St. B.J. 65 (1988). For article, "Procedure and Problems in

Georgia Ad Valorem Tax Appeals," see 26 Ga. St. B.J. 98 (1990). For annual survey of construction law, see 43 Mercer L. Rev. 141 (1991). For annual survey on law of torts, see 43 Mercer L. Rev. 395 (1991). For article, "Appeals, Interlocutory and Discretionary Applications, and Post-Judgment Motions in the Georgia Courts: The Current Practice and the Need for Reform Legislation," see 44 Mercer L. Rev. 17 (1992). For article, "Construction Law," see 53 Mercer L. Rev. 173 (2001). For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004). For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005). For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005). For survey article on insurance law, see 59 Mercer L. Rev. 195 (2007). For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007). For survey article on legal ethics, see 60 Mercer L. Rev. 237 (2008). For survey article on local government law, see 60 Mercer L. Rev. 263 (2008). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008). For annual survey on appellate practice and procedure, see 61 Mercer L. Rev. 31 (2009). For annual survey on zoning and land use law, see 61 Mercer L. Rev. 427 (2009).

For comment on *White v. Lamar*, 165 Ga. 306, 140 S.E. 875 (1927), see 1 Ga. L. Rev. No. 3 P. 52 (1927). For case comments, "Yost v. Torok and Abusive Litigation: A New Tort to Solve an Old Problem," see 21 Ga. L. Rev. 429 (1986).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

AVAILABILITY OF SECTION TO DEFENDANTS

APPLICATION: IN GENERAL

APPLICATION: SPECIFIC EXAMPLES

BAD FAITH, FRAUD, AND DECEIT

APPLICATION OF BAD FAITH, FRAUD, AND DECEIT

STUBBORN LITIGIOUSNESS

UNNECESSARY TROUBLE AND EXPENSE

EFFECT OF REFUSAL TO PAY DEBT

PLEADINGS AND PRACTICE

EVIDENTIARY ISSUES

JURY-COURT DETERMINATIONS

JURY INSTRUCTIONS

General Consideration

Statute is codified from the common law.

Jones v. Spindel, 122 Ga. App. 390, 177 S.E.2d 187 (1970), cert. dismissed, 227 Ga. 264, 180 S.E.2d 242 (1971) (but see *Monumental Properties v. Frontier*, 159 Ga. App. 35, 282 S.E.2d 660 (1981)) (see O.C.G.A. § 13-6-11).

Attorney fees were not allowable at common law. *Money v. Thompson & Green Mach. Co.*, 155 Ga. App. 566, 271 S.E.2d 699 (1980).

No constitutional mandate that attorney's fees be awarded only pursuant to O.C.G.A. § 9-15-14 or O.C.G.A. § 13-6-11. — Trial court erred in finding that the Tort Reform Act of 2005, O.C.G.A. § 9-11-68, violated Ga. Const. 1983, Art. I, Sec. I, Para. XII, since it permitted the recovery of attorney's fees absent the prerequisite showings of either O.C.G.A. § 9-15-14 or O.C.G.A. § 13-6-11, because there was no constitutional requirement that attorney's fees be awarded only pursuant to § 9-15-14 or § 13-6-11; in Georgia, attorney's fees are recoverable when authorized by some statutory provision or by contract, and § 9-11-68, is such a statutory provision authorizing the recovery of attorney's fees under specific circumstances. *Smith v. Baptiste*, No. S09A1543, 2010 Ga. LEXIS 215 (Mar. 15, 2010).

Only fees attributable to prevailing claim recoverable. — In an action for damages based on multiple counts, the plaintiff was entitled to attorney fees attributable solely to the prevailing claim. *R.T. Patterson Funeral Home v. Head*, 215 Ga. App. 578, 451 S.E.2d 812 (1994).

Attorney's fees are not recoverable against a defendant in a suit based upon a "statutory liability." *First Union Nat'l Bank v. Big John's Auto Sales, Inc.*, 203 Ga. App. 797, 417 S.E.2d 416 (1992).

Dischargeability in bankruptcy. — Since the defendant's actions did not rise to the level of willful and malicious conduct, the award of attorney's fees was dischargeable in bankruptcy. *Fincher v. Holt*, 173 Bankr. 806 (Bankr. M.D. Ga. 1994).

Debt for attorney's fees awarded to creditor in prior state court judgment for defamation was nondischargeable under 11 U.S.C. § 523(a)(b) because under Georgia law, it constituted additional, special damages flowing from the underlying tort. *Mills v.*

Ellerbee, 177 Bankr. 731 (Bankr. N.D. Ga. 1995).

Debt to a creditor awarded in a state court judgment for malicious and willful trespass that damaged the creditor's property, which included attorney's fees, was nondischargeable under federal bankruptcy law because under Georgia law, the award for attorney's fees constituted additional and needless costs for damages that were the consequences of the underlying tort. *Stinson v. Morris* (In re *Morris*), No. 05-61838, 2005 Bankr. LEXIS 2685 (Bankr. N.D. Ga. Dec. 1, 2005).

Section not limited to "attorney's fees and costs". — O.C.G.A. § 13-6-11 does not confine itself to "attorney's fees and costs," but instead incorporates the broader term "expenses of litigation." *Salsbury Labs., Inc. v. Merieux Labs., Inc.*, 735 F. Supp. 1555 (M.D. Ga. 1989), aff'd, 908 F.2d 706 (11th Cir. 1990).

Section provides for damages to plaintiffs but not to defendants. — O.C.G.A. § 13-6-11 provides for bad faith damages to plaintiffs for having to resort to litigation, but not to defendants. *Vogle v. Coleman*, 259 Ga. 115, 376 S.E.2d 861 (1989).

Generally, only plaintiffs may recover under O.C.G.A. § 13-6-11, and such recovery is available only upon a showing that the defendant's bad faith conduct forced the plaintiff into prosecuting the suit. *Salsbury Labs., Inc. v. Merieux Labs., Inc.*, 735 F. Supp. 1555 (M.D. Ga. 1989), aff'd, 908 F.2d 706 (11th Cir. 1990).

True focus of O.C.G.A. § 13-6-11 is to punish party that has acted in bad faith. — Relationship between a party's bad faith and amount of damages awarded versus amount sought is generally purely coincidental. *Ballenger Corp. v. Dresco Mechanical Contractors*, 156 Ga. App. 425, 274 S.E.2d 786 (1980), cert. denied, 156 Ga. App. 425, 274 S.E.2d 786 (1981).

Purpose of O.C.G.A. § 13-6-11 is to punish a party that has acted in bad faith. *Salsbury Labs., Inc. v. Merieux Labs., Inc.*, 735 F. Supp. 1555 (M.D. Ga. 1989), aff'd, 908 F.2d 706 (11th Cir. 1990).

Establishment of prevailing party required. — When equitable relief consisted of an order that corrective work be done and it could not be determined if plaintiffs would be required to pay more, less than, or the

same amount as defendants, plaintiffs were not established as the prevailing parties. *Ellis v. Gallof*, 220 Ga. App. 518, 469 S.E.2d 288 (1996).

Choice of law. — Award under O.C.G.A. § 13-6-11 did not further a Georgia public policy to punish or penalize and, thus, a choice of law provision in the parties' contract electing Illinois substantive law governed the parties' dispute, and under Illinois' substantive law, O.C.G.A. § 13-6-11 was inapplicable. *Elberta Crate & Box Co. v. Cox Automation Sys., LLC*, No. 6:05-CV-03 (HL), 2005 U.S. Dist. LEXIS 17490 (M.D. Ga. Aug. 10, 2005).

Erie analysis. — O.C.G.A. § 13-6-11 is substantive under an Erie analysis; however, an award under § 13-6-11 did not further a Georgia public policy to punish or penalize, and, therefore, the choice of law provision electing Illinois substantive law governed the availability of attorney's fees. *Elberta Crate & Box Co. v. Cox Automation Sys., LLC*, No. 6:05-CV-03 (HL), 2005 U.S. Dist. LEXIS 17490 (M.D. Ga. Aug. 10, 2005).

Preservation of issue. — Plaintiff preserved the issue of litigation expenses by including in the proposed verdict form (which was part of the pretrial order) a finding of attorneys' fees based on stubborn litigiousness. *Parks v. Breedlove*, 241 Ga. App. 72, 526 S.E.2d 137 (1999).

Attorney fee issue not preserved for review. — Restaurant patron's claim for attorney fees under O.C.G.A. § 13-6-11 was not reviewable on appeal as the patron failed to raise the issue of stubborn litigiousness in the trial court; instead, the patron alleged that the restaurant exhibited bad faith in the trial court and, accordingly, the patron's argument was not preserved for review. *Wilson v. J & L Melton, Inc.*, 270 Ga. App. 1, 606 S.E.2d 47 (2004).

No creation of an independent cause of action. — O.C.G.A. § 13-6-11 merely establishes the circumstances in which a plaintiff may recover the expenses of litigation as an additional element of plaintiff's damages. *Brown v. Baker*, 197 Ga. App. 466, 398 S.E.2d 797 (1990); *Lamb v. Salvage Disposal Co.*, 244 Ga. App. 193, 535 S.E.2d 258 (2000).

Other elements of damages must be recoverable. — Expenses of litigation are not recoverable pursuant to O.C.G.A. § 13-6-11 unless other elements of damages are recov-

erable. *Connell v. Houser*, 189 Ga. App. 158, 375 S.E.2d 136 (1988); *Lincoln Nat'l Life Ins. Co. v. Davenport*, 201 Ga. App. 175, 410 S.E.2d 370 (1991); *Trulove v. Woodmen of World Life Ins. Soc'y*, 204 Ga. App. 362, 419 S.E.2d 324 (1992); *Steele v. Russell*, 262 Ga. 651, 424 S.E.2d 272 (1993).

Attorney fees are not awardable pursuant to O.C.G.A. § 13-6-11 unless other damages are recoverable. *Wheat v. First Union Nat'l Bank*, 196 Ga. App. 26, 395 S.E.2d 351 (1990).

Expenses of litigation are ancillary and recoverable only in cases where other elements of damages are recoverable. *Barnett v. Morrow*, 196 Ga. App. 201, 396 S.E.2d 11 (1990).

Only expenses of action at hand are recoverable. — Recovery of expenses of litigation pursuant to O.C.G.A. § 13-6-11 may not be had when the expenses do not arise out of the action at hand. *Alston v. Stubbs*, 170 Ga. App. 417, 317 S.E.2d 272 (1984).

No expenses of litigation incurred in other lawsuits can be awarded pursuant to O.C.G.A. § 13-6-11. Only expenses of litigation incurred in the present lawsuit can be awarded under § 13-6-11. *Eways v. Georgia R.R. Bank*, 806 F.2d 991 (11th Cir. 1986).

Defendant bank could not recover under O.C.G.A. § 13-6-11 for the costs of defending against plaintiff's complaint; rather, the bank could recover only the expenses incurred in prosecuting the bank's independent counterclaims. *Eways v. Georgia R.R. Bank*, 806 F.2d 991 (11th Cir. 1986).

Section inapplicable to case where attorney's fees sought arise out of separate legal proceeding. *Randolph v. Merchants & Mechanics Banking & Loan Co.*, 58 Ga. App. 566, 199 S.E. 549 (1938).

Fees must arise from present litigation. — Law is not applicable to a case wherein attorney's fees sought did not grow out of this suit, but were part of another legal proceeding. *Atlantic C.L.R.R. v. Nellwood Lumber Co.*, 21 Ga. App. 209, 94 S.E. 86 (1917).

Post judgment interest proper. — Trial court properly excluded an award of pre-judgment interest in calculating the amount of post-judgment interest and properly applied post-judgment interest to the award of attorney fees under O.C.G.A. § 13-6-11. *Davis v. Whitford Props.*, 282 Ga.

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App. 143, 637 S.E.2d 849 (2006).

Only fees allocable to efforts to establish liability recoverable. — Counsel may recover under O.C.G.A. § 13-6-11 only that portion of counsel's fees which the court finds are allocable to counsel's efforts to establish liability. *Fuller v. Moister*, 248 Ga. 287, 282 S.E.2d 889 (1981).

Ordinarily, services of an attorney must be paid for by client who employs the attorney. *Hill v. Bush*, 206 Ga. 543, 57 S.E.2d 670 (1950); *Arrington v. Thompson*, 211 Ga. 734, 88 S.E.2d 402 (1955).

Fraud not established by award of attorney fees. — An award of attorneys fees was not evidence that a default judgment was based on fraud since O.C.G.A. § 13-6-11 on its face provides alternative grounds for awarding of attorney fees. *Wilcox v. Hritz*, 197 Bankr. 702 (Bankr. N.D. Ga. 1996).

Attorney fees are recoverable only when authorized by some statutory provision or by contract. *Money v. Thompson & Green Mach. Co.*, 155 Ga. App. 566, 271 S.E.2d 699 (1980); *Spivey v. Rogers*, 173 Ga. App. 233, 326 S.E.2d 227 (1984).

Unless expressly authorized by special statute, attorney's fees are recoverable only under this statute. *Bankers Fid. Life Ins. Co. v. Oliver*, 106 Ga. App. 305, 126 S.E.2d 887 (1962) (see O.C.G.A. § 13-6-11).

Generally, a party cannot recover attorney fees absent statutory provision providing for such recovery. *Solomon Refrigeration, Inc. v. Osburn*, 148 Ga. App. 772, 252 S.E.2d 686 (1979).

Recovery for expenses of litigation can be had only by virtue of this statute, and then only under certain conditions and circumstances, and provision is made for recovery by plaintiff against defendant. *Wallace v. Jones*, 101 Ga. App. 563, 114 S.E.2d 436 (1960) (see O.C.G.A. § 13-6-11).

Appellate attorney fees and expenses not recoverable. — O.C.G.A. § 13-6-11 does not authorize a trial court to award attorney fees and expenses of litigation incurred as a result of defending an appeal after a jury verdict has been rendered. *Kent v. Davis G. Brown, PE, Inc.*, 248 Ga. App. 447, 545 S.E.2d 598 (2001).

Time lost not recoverable as expense. — Since plaintiff was not entitled to any actual

damages, plaintiff was not entitled to recover for time lost as an expense of litigation. *Ayers v. Mobley*, 163 Ga. App. 239, 293 S.E.2d 470 (1982).

Pro se litigant, who was not an attorney, was not entitled to recover attorney's fees. *Demido v. Wilson*, 261 Ga. App. 165, 582 S.E.2d 151 (2003).

Damages allowed under this statute are compensatory, not punitive or vindictive. *Bankers Fid. Life Ins. Co. v. Oliver*, 106 Ga. App. 305, 126 S.E.2d 887 (1962); *Rogers v. Georgia Ports Auth.*, 183 Ga. App. 325, 358 S.E.2d 855, cert. denied, 183 Ga. App. 906, 358 S.E.2d 855 (1987) (see O.C.G.A. § 13-6-11).

Expenses of litigation, including attorney fees, are not punitive or exemplary damages. *Busbee v. Sellers*, 71 Ga. App. 26, 29 S.E.2d 710 (1944); *F.N. Roberts Pest Control Co. v. McDonald*, 132 Ga. App. 257, 208 S.E.2d 13 (1974).

Attorney fees and expenses of litigation are not punitive or vindictive damages, but are recoverable only in cases when other elements of damages are recoverable. *Cleary v. Southern Motors of Savannah, Inc.*, 142 Ga. App. 163, 235 S.E.2d 623 (1977).

Attorney's fees are distinct from punitive damages. *Fratelli Gardino v. Caribbean Lumber Co.*, 447 F. Supp. 1337 (S.D. Ga. 1978), aff'd in part and rev'd in part, *Fratelli Gardino v. Caribbean Lumber Co.*, 587 F.2d 204 (5th Cir. 1979).

Attorney's fees as expenses of litigation are not punitive or vindictive damages. *Mosely v. Sanders*, 76 Ga. 293 (1886); *B-X Corp. v. Jeter*, 210 Ga. 250, 78 S.E.2d 790 (1953); *Scott v. Dudley*, 214 Ga. 565, 105 S.E.2d 752 (1958); *Moon v. Georgia Power Co.*, 127 Ga. App. 524, 194 S.E.2d 348 (1972); *Standard Oil Co. v. Mount Bethel United Methodist Church*, 230 Ga. 341, 196 S.E.2d 869 (1973); *Ford Motor Credit Co. v. Milline*, 137 Ga. App. 585, 224 S.E.2d 437 (1976).

Recovery of this character of damages presupposes right on part of plaintiff to bring action, and deals with question of measure of damages recoverable. *King v. Pate*, 215 Ga. 593, 112 S.E.2d 589 (1960).

Recovery under federal law. — Because a cable television subscriber would automatically recover attorney fees if the subscriber prevailed on the subscriber's claim against

cable television providers under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-399(d), and was highly likely to recover fees under O.C.G.A. § 13-6-11 if the subscriber prevailed on intentional tort claims for fraud and trespass, an attorney would have an incentive to represent the subscriber during arbitration. Therefore, a class action waiver contained in an arbitration clause in the parties' subscription contract was not unconscionable under Georgia law, and the arbitration clause was enforceable under the Federal Arbitration Act, 9 U.S.C. § 2. *Honig v. Comcast of Ga. I, LLC*, 537 F. Supp. 2d 1277 (N.D. Ga. 2008).

Award can be part of federal claim for damages and no state law claim need exist.

— There is no requirement that a viable state law claim exist in order for the jury to award litigation expenses pursuant to O.C.G.A. § 13-6-11. Rather, § 13-6-11 constitutes a vehicle for the collection of attorney fees even when only a federal law claim for damages is submitted to the finder of fact. Thus, the jury could award a developer attorney fees as an element of the damages the jury awarded on the developer's federal equal protection claim, regardless of whether the developer could prevail on any state law claim for damages. *Fulton County v. Legacy Inv. Group, LLC*, 296 Ga. App. 822, 676 S.E.2d 388 (2009).

Sovereign immunity. — O.C.G.A. § 13-6-11 does not state a cause of action, but merely establishes the circumstances in which a plaintiff may recover the expenses of litigation as an additional element of plaintiff's damages, and, therefore, no separate statutory waiver of sovereign immunity is required to allow the recovery of such damages against a governmental entity. *Waters v. Glynn County*, 237 Ga. App. 438, 514 S.E.2d 680 (1999).

Public entity liability. — Governmental entity may be subject to an award of litigation expenses and attorney fees under O.C.G.A. § 13-6-11. *Forsyth County v. Martin*, 279 Ga. 215, 610 S.E.2d 512 (2005).

Liability of municipality. — While governmental entities are not subject to awards intended to penalize or punish, the award of attorney fees and litigation expenses is designed to compensate an injured party, and may be imposed against municipalities. Even when a bona fide controversy exists, a party

may be liable for attorney fees if the party sought to be charged has acted in bad faith. *City of Warner Robins v. Holt*, 220 Ga. App. 794, 470 S.E.2d 238 (1996).

Liability of counties. — Counties are not protected from claims for attorney fees as expenses of litigation by the doctrine of sovereign immunity. *Eastern Air Lines v. Fulton County*, 183 Ga. App. 891, 360 S.E.2d 425, cert. denied, 183 Ga. App. 906, 360 S.E.2d 425 (1987).

Abusive litigation claim asserted as compulsory counterclaim. — Under *Yost v. Torok*, 256 Ga. 92, 344 S.E.2d 414 (1986), a defendant's claim for abusive litigation is an independent claim for damages, but it must be asserted as a compulsory counterclaim without regard to whether the claimant is the plaintiff or the defendant in the original suit. *Vogle v. Coleman*, 259 Ga. 115, 376 S.E.2d 861 (1989).

Error to admit parol evidence. — In an action involving the sale of land, because no adequate description of the property sought to be sold could be found within the four corners of the parties' final agreement, no exhibits were attached, and the words used in the contract did not provide a sufficient description of the land, the trial court erred in admitting parol evidence to provide a legally sufficient description of the property at issue; hence, an award of attorney's fees for the alleged bad faith to the buyer, pursuant to O.C.G.A. § 13-6-11, was also reversed. *McClung v. Atlanta Real Estate Acquisitions, LLC*, 282 Ga. App. 759, 639 S.E.2d 331 (2006).

Attorney fee award under § 13-1-11 held excessive. — In an action to recover on a promissory note with past due interest, and upon entering summary judgment in favor of the lender, the trial court erred in awarding the lender \$10,195.40 in attorney fees in a judgment in which the principal and interest amounted to only \$6,259.12; under the formula delineated under O.C.G.A. § 13-1-11, such amount was limited to \$650.91. *Long v. Hogan*, 289 Ga. App. 347, 656 S.E.2d 868 (2008), cert. denied, 2008 Ga. LEXIS 516 (Ga. 2008).

Requirement that losing party pay full cost. — O.C.G.A. § 9-15-14 applies to conduct occurring during the litigation and permits an attorney fees award for frivolous claims, and O.C.G.A. § 13-6-11 permits an

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award of attorney fees if the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense and applies to conduct arising from the underlying transaction; O.C.G.A. § 13-6-11 has been held to require that a party acting in bad faith pay the full price for losing. *Trotter v. Summerour*, 273 Ga. App. 263, 614 S.E.2d 887 (2005).

Attorney fees not apportioned. — Award of attorney fees is not apportioned to only those attorney fees attributable to the claims on which the plaintiffs prevailed. “In our view, a party acting in bad faith should pay the full price for losing.” *Crocker v. Stevens*, 210 Ga. App. 231, 435 S.E.2d 690 (1993), cert. denied, 511 U.S. 1053, 114 S. Ct. 1613, 128 L. Ed. 2d 340 (1994), overruled on other grounds, *Kim v. Lim*, 254 Ga. App. 627, 563 S.E.2d 485 (2002).

Appellee was properly entitled to an award of fees under O.C.G.A. § 13-6-11 for successful claim of tortious interference with business operations; however, the district court did not delineate which hours and entries were excluded or reduced as relating to (1) the unsuccessful claims, (2) the defense of counterclaims, and (3) the numerous hours that appellee alleges were excessive for the tasks performed. A blanket twenty-five percent reduction, without explanation as to why such reduction was appropriate, is insufficient. *Maid of the Mist Corp. v. Alcatraz Media, LLC*, No. 07-14214; No. 07-14235; No. 07-15200; No. 07-15865, 2008 U.S. App. LEXIS 20827 (11th Cir. Sept. 19, 2008) (Unpublished).

Attorney fees apportioned. — When the court found that a Chapter 7 debtor, as owner of an insured, submitted fraudulent and non-fraudulent claims to the insurer, the insurer was entitled to attorney fees pursuant to O.C.G.A. § 13-6-11 in an amount that the court deemed reasonable for the prosecution only of the successful portion of the insurer's claim against the debtor; it was deemed appropriate to apportion the fees between successful and unsuccessful claims based on the ratio of the amount the insurer was entitled to recover to the total amount claimed by the insurer. *Cincinnati Ins. Co. v. Porter* (In re Porter),

No. 05-44583-PWB, 2007 Bankr. LEXIS 2185 (Bankr. N.D. Ga. May 23, 2007).

Award based on O.C.G.A. § 19-6-2 allowed when award under O.C.G.A. § 13-6-11 unauthorized. — Although an award of attorney fees to a wife in a declaratory judgment action brought by a husband seeking a determination of the husband's obligations under a divorce decree was not authorized by either O.C.G.A. § 9-4-9 or O.C.G.A. § 13-6-11, the award was allowed by O.C.G.A. § 19-6-2(a)(1) because the wife's separate contempt action based on the husband's failure to comply with the divorce decree was consolidated for disposition with the husband's declaratory judgment action, and the trial court found in favor of the wife in that declaratory judgment action. *Waits v. Waits*, 280 Ga. App. 734, 634 S.E.2d 799 (2006).

Cited in *Mayor of Savannah v. Waldner*, 49 Ga. 316 (1873); *Guernsey, Bartram & Hendrix v. Shellman*, 59 Ga. 797 (1877); *Juchter v. Boehm, Bendheim & Co.*, 67 Ga. 534 (1881); *Butler v. Moore*, 68 Ga. 780, 45 Am. R. 508 (1882); *Chambers & Co. v. Harper*, 83 Ga. 382, 9 S.E. 717 (1889); *Farrar v. Brackett*, 86 Ga. 463, 12 S.E. 686 (1891); *Carhart v. Wainman*, 114 Ga. 632, 40 S.E. 781, 88 Am. St. R. 45 (1902); *Georgia R.R. & Banking Co. v. Gardner*, 118 Ga. 723, 45 S.E. 600 (1903); *Mendel v. Leader*, 136 Ga. 442, 71 S.E. 753 (1911); *Twin City Lumber Co. v. Daniels*, 22 Ga. App. 578, 96 S.E. 437 (1918); *Chance v. Commercial Credit Co.*, 30 Ga. App. 543, 118 S.E. 465 (1923); *Felder v. Paulk*, 165 Ga. 135, 139 S.E. 873 (1927); *O'Neal v. Spivey*, 167 Ga. 176, 145 S.E. 71 (1928); *Herndon v. Sheats*, 176 Ga. 199, 167 S.E. 506 (1933); *Pone v. Barbre*, 57 Ga. App. 684, 196 S.E. 287 (1938); *Walker v. Grand Int'l Bhd. of Locomotive Eng'rs*, 186 Ga. 811, 199 S.E. 146 (1938); *West v. Haas*, 191 Ga. 569, 13 S.E.2d 376 (1941); *Savannah & A. Ry. v. De Busk*, 68 Ga. App. 529, 23 S.E.2d 529 (1942); *Dye v. Alexander*, 195 Ga. 676, 25 S.E.2d 419 (1943); *Thompson v. Thompson*, 202 Ga. 683, 44 S.E.2d 260 (1947); *Sapp v. Howe*, 79 Ga. App. 1, 52 S.E.2d 571 (1949); *Murphey v. Brock*, 206 Ga. 9, 55 S.E.2d 564 (1949); *Graham v. Lynch*, 206 Ga. 301, 57 S.E.2d 86 (1950); *Copeland v. Carpenter*, 206 Ga. 822, 59 S.E.2d 245 (1950); *Stelling v. Richmond County*, 81 Ga. App. 571, 59 S.E.2d 414 (1950); *Williams v. Harris*, 207

Ga. 576, 63 S.E.2d 386 (1951); *Harrison v. Harrison*, 208 Ga. 70, 65 S.E.2d 173 (1951); *Camp v. Anderson*, 84 Ga. App. 228, 66 S.E.2d 103 (1951); *Story v. Howell*, 85 Ga. App. 661, 70 S.E.2d 29 (1952); *Fireman's Fund Ins. Co. v. McConnell*, 198 F.2d 401 (5th Cir. 1952); *Milwaukee Mechanics Ins. Co. v. Davis*, 198 F.2d 441 (5th Cir. 1952); *Whiteway Neon-Ad, Inc. v. Maddox*, 211 Ga. 27, 83 S.E.2d 676 (1954); *Nichols v. Williams Pontiac, Inc.*, 95 Ga. App. 752, 98 S.E.2d 659 (1957); *Pickett v. Georgia, F. & A.R.R.*, 98 Ga. App. 709, 106 S.E.2d 285 (1958); *Public Nat'l Ins. Co. v. Wheat*, 100 Ga. App. 695, 112 S.E.2d 194 (1959); *Broyles v. Johnson*, 103 Ga. App. 102, 118 S.E.2d 734 (1961); *United States ex rel. Dixie Plumbing Supply Co. v. Taylor*, 293 F.2d 717 (5th Cir. 1961); *Spielberg v. McEntire*, 105 Ga. App. 545, 125 S.E.2d 134 (1962); *Hopkins v. West Publishing Co.*, 106 Ga. App. 596, 127 S.E.2d 849 (1962); *U.S. Fid. & Guar. Co. v. Luttrell*, 108 Ga. App. 606, 134 S.E.2d 77 (1963); *Anderson v. Cheely*, 109 Ga. App. 680, 137 S.E.2d 382 (1964); *Smith v. Maples*, 114 Ga. App. 529, 151 S.E.2d 815 (1966); *Jackson v. Hatch*, 115 Ga. App. 623, 155 S.E.2d 676 (1967); *Southern Ry. v. Overnite Transp. Co.*, 223 Ga. 825, 158 S.E.2d 387 (1967); *Klag v. Home Ins. Co.*, 116 Ga. App. 678, 158 S.E.2d 444 (1967); *Townsend & Ghegan Enters. v. W.R. Bean & Son*, 117 Ga. App. 109, 159 S.E.2d 776 (1968); *Greenway v. Griffith*, 225 Ga. 632, 170 S.E.2d 423 (1969); *Terry v. Wonder Seal Co.*, 120 Ga. App. 423, 170 S.E.2d 745 (1969); *Roberts v. J.L. Todd Auction Co.*, 120 Ga. App. 444, 170 S.E.2d 862 (1969); *Padgett v. Bryant*, 121 Ga. App. 807, 175 S.E.2d 884 (1970); *Howard Stores Corp. v. Howard Clothing, Inc.*, 311 F. Supp. 704 (N.D. Ga. 1970); *Sam Finley, Inc. v. Pilcher*, *Livingston & Wallace, Inc.*, 314 F. Supp. 654 (S.D. Ga. 1970); *Bowers v. Fulton County*, 227 Ga. 814, 183 S.E.2d 347 (1971); *Harvey v. Travelers Ins. Co.*, 339 F. Supp. 262 (N.D. Ga. 1971); *Colbert Co. v. Newsom*, 125 Ga. App. 571, 188 S.E.2d 266 (1972); *Hinton v. Georgia Power Co.*, 126 Ga. App. 416, 190 S.E.2d 811 (1972); *City Council v. Hydrick*, 126 Ga. App. 611, 191 S.E.2d 563 (1972); *Small Equip. Co. v. Walker*, 129 Ga. App. 710, 200 S.E.2d 904 (1973); *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973); *Liberty Mut. Ins. Co. v. Coburn*, 132 Ga. App. 859, 209 S.E.2d 655 (1974); *Shearer v.*

Griffin, 233 Ga. 47, 210 S.E.2d 5 (1974); *City of Jesup v. Spivey*, 133 Ga. App. 403, 210 S.E.2d 859 (1974); *Allstate Ins. Co. v. Harris*, 133 Ga. App. 567, 211 S.E.2d 783 (1974); *Sheet Metal Workers Int'l Ass'n v. Carter*, 133 Ga. App. 872, 212 S.E.2d 645 (1975); *Strickland v. Williams*, 234 Ga. 752, 218 S.E.2d 8 (1975); *Wilson v. Strange*, 235 Ga. 156, 219 S.E.2d 88 (1975); *Vineyard Village-Georgia, Inc. v. Crum*, 136 Ga. App. 335, 221 S.E.2d 208 (1975); *Davis v. Griffin-Spalding County Bd. of Educ.*, 445 F. Supp. 1048 (N.D. Ga. 1975); *Ford Motor Credit Co. v. Moulder*, 137 Ga. App. 527, 224 S.E.2d 435 (1976); *Biltmore Constr. Co. v. Tri-State Elec. Contractors*, 137 Ga. App. 504, 224 S.E.2d 487 (1976); *Midtown Properties, Inc. v. George F. Richardson, Inc.*, 139 Ga. App. 182, 228 S.E.2d 303 (1976); *Guest v. Riddle*, 237 Ga. 535, 228 S.E.2d 910 (1976); *Ponce de Leon Condominiums v. DiGirolamo*, 238 Ga. 188, 232 S.E.2d 62 (1977); *Tam v. Newsome*, 141 Ga. App. 76, 232 S.E.2d 613 (1977); *U.S.A., Inc. v. Kirland*, 142 Ga. App. 484, 236 S.E.2d 130 (1977); *Strother Ford, Inc. v. Bullock*, 142 Ga. App. 843, 237 S.E.2d 208 (1977); *Sturdivant v. Allstate Ins. Co.*, 143 Ga. App. 19, 237 S.E.2d 408 (1977); *Hood v. Hallman*, 143 Ga. App. 507, 239 S.E.2d 194 (1977); *Burnette v. Southern Consol. Inns, Inc.*, 240 Ga. 98, 239 S.E.2d 513 (1977); *Atlanta Army & Navy Store, Inc. v. Stuckman*, 143 Ga. App. 850, 240 S.E.2d 220 (1977); *Department of Human Resources v. Bagley*, 240 Ga. 306, 240 S.E.2d 867 (1977); *Woodson v. Burton*, 241 Ga. 130, 243 S.E.2d 885 (1978); *Chambers v. Citizens & S. Nat'l Bank*, 242 Ga. 498, 249 S.E.2d 214 (1978); *Corrosion Control, Inc. v. William Armstrong Smith Co.*, 148 Ga. App. 75, 251 S.E.2d 49 (1978); *International Ass'n of Bridge Ironworkers, Local 387 v. Moore*, 149 Ga. App. 431, 254 S.E.2d 438 (1979); *Bowen v. Ken-Mar Constr. Co.*, 152 Ga. App. 568, 263 S.E.2d 463 (1979); *Citizens & S. Nat'l Bank v. Bougas*, 245 Ga. 412, 265 S.E.2d 562 (1980); *Columbus Dodge, Inc. v. Garlock*, 153 Ga. App. 652, 266 S.E.2d 311 (1980); *Davis v. Hospital Auth.*, 154 Ga. App. 654, 269 S.E.2d 867 (1980); *City of Columbus v. Myszka*, 246 Ga. 571, 272 S.E.2d 302 (1980); *Sterling Motor Freight Co. v. Wendt*, 156 Ga. App. 516, 275 S.E.2d 101 (1980); *Taylor v. Greiner*, 156 Ga. App. 663, 275 S.E.2d 737 (1980); *Alewine v. City Council*,

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505 F. Supp. 880 (S.D. Ga. 1981); Hospital Auth. v. Bryant, 157 Ga. App. 330, 277 S.E.2d 322 (1981); Eiberger v. West, 247 Ga. 767, 281 S.E.2d 148 (1981); Willett Lincoln-Mercury, Inc. v. Larson, 158 Ga. App. 540, 281 S.E.2d 297 (1981); Pleasant Hill Acres, Inc. v. Todd, 158 Ga. App. 730, 282 S.E.2d 148 (1981); Rae v. Griffin, 160 Ga. App. 96, 286 S.E.2d 64 (1981); Fountain v. Burke, 160 Ga. App. 262, 287 S.E.2d 39 (1981); Jordan v. Goff, 160 Ga. App. 636, 287 S.E.2d 640 (1981); Sherrer v. Hale, 248 Ga. 793, 285 S.E.2d 714 (1982); Dunaway v. Clark, 536 F. Supp. 664 (S.D. Ga. 1982); Hayes v. Irwin, 541 F. Supp. 397 (N.D. Ga. 1982); Management Assistance, Inc. v. Computer Dimensions, Inc., 546 F. Supp. 666 (N.D. Ga. 1982); Raymar, Inc. v. Peachtree Golf Club, Inc., 161 Ga. App. 336, 287 S.E.2d 768 (1982); Williams v. Struble, 162 Ga. App. 196, 290 S.E.2d 538 (1982); Hines v. Good Housekeeping Shop, 161 Ga. App. 318, 291 S.E.2d 238 (1982); Jordan Bridge Co. v. I.S. Bailey, Jr., Inc., 164 Ga. App. 124, 296 S.E.2d 107 (1982); Mansell v. Benson Chevrolet Co., 165 Ga. App. 568, 302 S.E.2d 114 (1983); Fritts v. Mid-Coast Trading Corp., 166 Ga. App. 31, 303 S.E.2d 148 (1983); Tedoff v. Moncrief Unique Indoor Comfort, Inc., 166 Ga. App. 426, 304 S.E.2d 529 (1983); Alterman Foods, Inc. v. G.C.C. Beverages, Inc., 168 Ga. App. 921, 310 S.E.2d 755 (1983); McCall v. Allstate Ins. Co., 251 Ga. 869, 310 S.E.2d 513 (1984); City of Marietta v. Holland, 252 Ga. 299, 314 S.E.2d 97 (1984); Joseph Camacho Assocs. v. Millard, 169 Ga. App. 937, 315 S.E.2d 478 (1984); Sun v. Langston, 170 Ga. App. 60, 316 S.E.2d 172 (1984); Sepulvado v. Daniels Lincoln-Mercury, Inc., 170 Ga. App. 109, 316 S.E.2d 554 (1984); Starling, Inc. v. Housing Auth., 170 Ga. App. 858, 318 S.E.2d 728 (1984); White Repair & Contracting Co. v. Daniel, 171 Ga. App. 501, 320 S.E.2d 205 (1984); Parsells v. Orkin Exterminating Co., 172 Ga. App. 74, 322 S.E.2d 91 (1984); Gluckin v. Ross (In re Specialty Prods., Inc.), 37 Bankr. 880 (Bankr. N.D. Ga. 1984); Khoury v. Skidaway Island Eng'g, Inc., 172 Ga. App. 503, 323 S.E.2d 692 (1984); Johnston v. Lyon, 173 Ga. App. 524, 327 S.E.2d 519 (1985); Omni Express, Inc. v. Cleveland Express, Inc., 178 Ga. App. 42,

341 S.E.2d 911 (1986); Towery v. Massey, 179 Ga. App. 61, 345 S.E.2d 90 (1986); Olden Camera & Lens Co. v. White, 179 Ga. App. 728, 347 S.E.2d 696 (1986); Munna v. Lewis, 181 Ga. App. 860, 354 S.E.2d 181 (1987); Perry & Co. v. New S. Ins. Brokers of Ga., Inc., 182 Ga. App. 84, 354 S.E.2d 852 (1987); Esquire Mobile Homes, Inc. v. Arrendale, 182 Ga. App. 528, 356 S.E.2d 250 (1987); Brunswick Mfg. Co. v. Sizemore, 183 Ga. App. 482, 359 S.E.2d 180 (1987); Meyer v. Citizens & S. Nat'l Bank, 117 F.R.D. 180 (M.D. Ga. 1987); Hayes Constr. Co. v. Thompson, 184 Ga. App. 482, 361 S.E.2d 865 (1987); Carpet Transp., Inc. v. Dixie Truck Tire Co., 185 Ga. App. 181, 363 S.E.2d 840 (1987); Brunswick Floors, Inc. v. Shuman, 185 Ga. App. 362, 364 S.E.2d 96 (1987); California Fed. Sav. & Loan Ass'n v. Hudson, 185 Ga. App. 384, 364 S.E.2d 582 (1987); Ostrom v. Kapetanakos, 185 Ga. App. 728, 365 S.E.2d 849 (1988); Ferguson v. City of Doraville, 186 Ga. App. 430, 367 S.E.2d 551 (1988); IMC Motor Express, Inc. v. Cochran, 186 Ga. App. 873, 368 S.E.2d 817 (1988); S & W Mechanical Co. v. City of Homerville, 682 F. Supp. 546 (M.D. Ga. 1988); Typo-Repro Servs., Inc. v. Bishop, 188 Ga. App. 576, 373 S.E.2d 758 (1988); Peachtree Purchasing Co. v. Carver, 189 Ga. App. 73, 374 S.E.2d 834 (1988); Weprin v. Peterson, 736 F. Supp. 1131 (N.D. Ga. 1988); Easley v. Clement, 259 Ga. 107, 376 S.E.2d 860 (1989); Doughty v. Simpson, 190 Ga. App. 718, 380 S.E.2d 57 (1989); Bulldog Trucking, Inc. v. Adams, 259 Ga. 382, 380 S.E.2d 702 (1989); Perfect Image, Inc. v. M & M Elec. Constructors, Inc., 191 Ga. App. 605, 382 S.E.2d 405 (1989); Borg-Warner Acceptance Corp. v. Valentine Assocs., 192 Ga. App. 123, 384 S.E.2d 223 (1989); Market Ins. Corp. v. IHM, Inc., 192 Ga. App. 441, 385 S.E.2d 307 (1989); Home Ins. Co. v. North River Ins. Co., 192 Ga. App. 551, 385 S.E.2d 736 (1989); Beall v. F.H.H. Constr., Inc., 193 Ga. App. 544, 388 S.E.2d 342 (1989); Johnson v. Waddell, 193 Ga. App. 692, 388 S.E.2d 723 (1989); Borg-Warner Acceptance Corp. v. Boat Trading, Inc., 194 Ga. App. 63, 389 S.E.2d 555 (1989); Davidson Mineral Properties, Inc. v. Baird, 260 Ga. 75, 390 S.E.2d 33 (1990); Trust Co. Bank v. Citizens & S. Trust Co., 260 Ga. 124, 390 S.E.2d 589 (1990); Lineberger v. Williams, 195 Ga. App. 186, 393 S.E.2d 23 (1990); Colquitt v. Network

Rental, Inc., 195 Ga. App. 244, 393 S.E.2d 28 (1990); Madden v. Bellew, 195 Ga. App. 131, 393 S.E.2d 31 (1990); Marcoux v. Fields, 195 Ga. App. 573, 394 S.E.2d 361 (1990); Backus Cadillac-Pontiac, Inc. v. Ernest, 195 Ga. App. 579, 394 S.E.2d 367 (1990); Callahan v. Panfel, 195 Ga. App. 891, 395 S.E.2d 80 (1990); Hirsh v. Goodlett, 196 Ga. App. 127, 395 S.E.2d 626 (1990); Clark v. West, 196 Ga. App. 456, 395 S.E.2d 884 (1990); N.D.T., Inc. v. Connor, 196 Ga. App. 314, 395 S.E.2d 901 (1990); Stone v. King, 196 Ga. App. 251, 396 S.E.2d 45 (1990); Cora v. Wagner, 196 Ga. App. 774, 397 S.E.2d 46 (1990); Famiglietti v. Brevard Medical Investors, Ltd., 197 Ga. App. 164, 397 S.E.2d 720 (1990); Hester Enters., Inc. v. Narvais, 198 Ga. App. 580, 402 S.E.2d 333 (1991); Rivergate Corp. v. BCCP Enters., Inc., 198 Ga. App. 761, 403 S.E.2d 65 (1991); Baxley Veneer & Clete Co. v. Maddox, 261 Ga. 309, 404 S.E.2d 554 (1991); Pirkle v. Hawley, 199 Ga. App. 371, 405 S.E.2d 71 (1991); Polma, Inc. v. Coastal Canvas Prods. Co., 199 Ga. App. 616, 405 S.E.2d 531 (1991); Read v. Benedict, 200 Ga. App. 4, 406 S.E.2d 488 (1991); Karlan, Inc. v. King, 202 Ga. App. 713, 415 S.E.2d 319 (1992); Tom Barrow Co. v. St. Paul Fire & Marine Ins. Co., 205 Ga. App. 10, 421 S.E.2d 85 (1992); Re-Max Executives, Inc. v. Wallace, 205 Ga. App. 170, 421 S.E.2d 540 (1992); Ralston v. Etowah Bank, 207 Ga. App. 775, 429 S.E.2d 102 (1993); Leventhal v. Seiter, 208 Ga. App. 158, 430 S.E.2d 378 (1993); Roswell Properties, Inc. v. Salle, 208 Ga. App. 202, 430 S.E.2d 404 (1993); Russell Corp. v. BancBoston Fin. Co., 209 Ga. App. 660, 434 S.E.2d 716 (1993); Ayers Enters., Ltd. v. Exterior Designing, Inc., 829 F. Supp. 1330 (N.D. Ga. 1993); Aetna Cas. & Sur. Co. v. Empire Fire & Marine Ins. Co., 212 Ga. App. 642, 442 S.E.2d 778 (1994); Armstrong Transf. & Storage Co. v. Mann Constr., Inc., 217 Ga. App. 538, 458 S.E.2d 481 (1995); Baker v. Miller, 265 Ga. 486, 458 S.E.2d 621 (1995); Toncee, Inc. v. Thomas, 219 Ga. App. 539, 466 S.E.2d 27 (1995); Southern Co. v. Hamburg, 220 Ga. App. 834, 470 S.E.2d 467 (1996); Duffy Street S.R.O., Inc. v. Mobley, 266 Ga. 849, 471 S.E.2d 507 (1996); Hendricks v. Blake & Pendleton, Inc., 221 Ga. App. 651, 472 S.E.2d 482 (1996); Boardman Petro., Inc. v. Federated Mut. Ins. Co., 926 F. Supp. 1566 (S.D. Ga. 1995); First Union Nat'l Bank v. Cook, 223

Ga. App. 374, 477 S.E.2d 649 (1996); Jennings Enters., Inc. v. Carte, 224 Ga. App. 538, 481 S.E.2d 541 (1997); King Indus. Realty, Inc. v. Rich, 224 Ga. App. 629, 481 S.E.2d 861 (1997); T.O.H. Assocs. v. 2B Enters., Inc., 224 Ga. App. 730, 482 S.E.2d 393 (1997); Pulte Home Corp. v. Woodland Nursery & Landscapes, Inc., 230 Ga. App. 455, 496 S.E.2d 546 (1998); Fried Group, Inc. v. Sundance Tractor & Mower, 218 Bankr. 247 (Bankr. M.D. Ga. 1998); Smith v. Stuckey, 233 Ga. App. 79, 503 S.E.2d 284 (1998); Great W. Bank v. Southeastern Bank, 234 Ga. App. 420, 507 S.E.2d 191 (1998); M & H Constr. Co. v. North Fulton Dev. Corp., 238 Ga. App. 713, 519 S.E.2d 287 (1999); Parker v. Kennon, 242 Ga. App. 627, 530 S.E.2d 527 (2000); Glynn-Brunswick Mem. Hosp. Auth. v. Gibbons, 243 Ga. App. 341, 530 S.E.2d 736 (2000); Glisson v. Freeman, 243 Ga. App. 92, 532 S.E.2d 442 (2000); Garrett v. Women's Health Care Of Gwinnett, P.C., 243 Ga. App. 53, 532 S.E.2d 164 (2000); Perimeter Realty v. Gapi, Inc., 243 Ga. App. 584, 533 S.E.2d 136 (2000); Physician Specialists in Anesthesia, P.C. v. MacNeill, 246 Ga. App. 398, 539 S.E.2d 216 (2000); Felker v. Chipley, 246 Ga. App. 296, 540 S.E.2d 285 (2000); Buckley v. Turner Heritage Homes, Inc., 248 Ga. App. 793, 547 S.E.2d 373 (2001); Centre Pointe Invs., Inc. v. Frank M. Darby Co., 249 Ga. App. 782, 549 S.E.2d 435 (2001); Kent v. A.O. White, Jr., Consulting Eng'r, P.C., 249 Ga. App. 893, 553 S.E.2d 1 (2001); Vernon Library Supplies, Inc. v. Ard, 249 Ga. App. 853, 550 S.E.2d 108 (2001); Bryan v. Brown Childs Realty Co., 252 Ga. App. 502, 556 S.E.2d 554 (2001); In re Estate of Garmon, 254 Ga. App. 84, 561 S.E.2d 216 (2002); St. Paul Fire & Marine Ins. Co. v. Clark, 255 Ga. App. 14, 566 S.E.2d 2 (2002); Scott v. Wells Fargo Home Mtg., Inc., 281 Bankr. 404 (Bankr. M.D. Ga. 2002); Parker v. Clary Lakes Rec. Ass'n, 265 Ga. App. 93, 592 S.E.2d 880 (2004); Action Marine, Inc. v. Cont'l Carbon, Inc., 481 F.3d 1302 (11th Cir. 2007); Clay v. Oxendine, 285 Ga. App. 50, 645 S.E.2d 553 (2007); King v. Brock, 282 Ga. 56, 646 S.E.2d 206 (2007); Strickland v. CADD Ctrs. of Fla., Inc. (In re Strickland), No. 04-70716-JB, 2007 Bankr. LEXIS 2590 (Bankr. N.D. Ga. May 23, 2007); Dale v. Comcast Corp., 498 F.3d 1216 (11th Cir. 2007); Rice v. Lost Mt. Homeowners Ass'n,

General Consideration (Cont'd)

288 Ga. App. 714, 655 S.E.2d 214 (2007); *Cooney v. Burnham*, 283 Ga. 134, 657 S.E.2d 239 (2008); *Reebaa Constr. Co. v. Chong*, 283 Ga. 222, 657 S.E.2d 826 (2008); *Hicks v. Khoury*, 283 Ga. 407, 658 S.E.2d 616 (2008); *Allstate Ins. Co. v. Sutton*, 290 Ga. App. 154, 658 S.E.2d 909 (2008); *Green v. Raw Deal, Inc.*, 290 Ga. App. 464, 659 S.E.2d 856 (2008); *Clarendon Nat'l Ins. Co. v. Johnson*, 293 Ga. App. 103, 666 S.E.2d 567 (2008); *Morrill v. Cotton States Mut. Ins. Co.*, 293 Ga. App. 259, 666 S.E.2d 582 (2008); *South-eastern Stud & Components, Inc. v. Am. Eagle Design Build Studios, LLC*, No. 7:07-cv-077 (HL), 2008 U.S. Dist. LEXIS 59701 (M.D. Ga. July 30, 2008); *Perry Golf Course Dev., LLC v. Hous. Auth.*, 294 Ga. App. 387, 670 S.E.2d 171 (2008); *Hanson Staple Co. v. Eckelberry*, 297 Ga. App. 356, 677 S.E.2d 321 (2009); *Bd. of Regents of the Univ. Sys. of Ga. v. Ambati*, 299 Ga. App. 804, 685 S.E.2d 719 (2009).

Availability of Section to Defendants

Authority given by this statute is to plaintiff against defendant. *Wallace v. Jones*, 101 Ga. App. 563, 114 S.E.2d 436 (1960); but see *Ballenger Corp. v. Dresco Mechanical Contractors*, 156 Ga. App. 425, 274 S.E.2d 786 (1980) (see O.C.G.A. § 13-6-11).

Section is generally restricted to plaintiffs. — The very purpose of O.C.G.A. § 13-6-11 is to prevent the recovery of attorney fees when the recovery would amount to a successful counterclaim against the plaintiff merely for filing suit. *Ravenwood Church v. Starbright, Inc.*, 168 Ga. App. 870, 310 S.E.2d 582 (1983).

Defendant cannot avail oneself of provisions of this statute. *King v. Pate*, 215 Ga. 593, 112 S.E.2d 589 (1960); *Pitman v. Dixie Ornamental Iron Co.*, 122 Ga. App. 404, 177 S.E.2d 167 (1970); *G.E.C. Corp. v. Levy*, 126 Ga. App. 604, 191 S.E.2d 461 (1972); *Hickman v. Frazier*, 128 Ga. App. 552, 197 S.E.2d 441 (1973). But see *Ballenger Corp. v. Dresco Mechanical Contractors*, 156 Ga. App. 425, 274 S.E.2d 786 (1980) (see O.C.G.A. § 13-6-11).

Statute does not apply to defendants. *Watson v. Planters & Citizens Bank*, 110 Ga. App. 725, 140 S.E.2d 30 (1964); *Metropolitan Tractor, Inc. v. Samples Grading Co.*, 167

Ga. App. 102, 306 S.E.2d 68 (1983) (see O.C.G.A. § 13-6-11).

Statute is not applicable to defense of an action. *McDonald v. Rogers*, 229 Ga. 369, 191 S.E.2d 844 (1972), disapproved on other grounds, 235 Ga. 348, 219 S.E.2d 447 (1975) (see O.C.G.A. § 13-6-11).

Statute applies only to plaintiffs when defendant acts in bad faith. A defendant cannot avail oneself of the law's provisions, including a condemnee in a condemnation proceeding. *Taylor v. Georgia Power Co.*, 137 Ga. App. 44, 222 S.E.2d 869 (1975) (see O.C.G.A. § 13-6-11).

Defendants cannot recover attorney fees against plaintiffs. *DuBose v. Box*, 246 Ga. 660, 273 S.E.2d 101 (1980).

O.C.G.A. § 13-6-11 did not permit the recovery of expenses incurred in defending a lawsuit when the buyers in a contract dispute failed to show the absence of a genuine dispute on the issues in the counterclaim, the award of attorney fees to the buyers was improper. *Dennis-Smith v. Freeman*, 277 Ga. App. 822, 627 S.E.2d 872 (2006).

An award of attorney fees to the purchaser of building supplies in a supplier's action to recover sums allegedly due for the supplies was in error as the purchaser was the defendant in the case. *Cox Interior, Inc. v. Bayland Props., LLC*, 293 Ga. App. 612, 667 S.E.2d 452 (2008).

Underlying policy of this statute barring defendant from transforming plaintiff's case into defendant's damage suit for having been sued in no manner relates to cases wherein defendant has asserted a viable, independent claim against plaintiff. *Ballenger Corp. v. Dresco Mechanical Contractors*, 156 Ga. App. 425, 274 S.E.2d 786 (1980), cert. denied, 156 Ga. App. 425, 274 S.E.2d 786 (1981) (see O.C.G.A. § 13-6-11).

Plaintiff's litigiousness as defense. — Defendant may defend against claim for attorney fees which alleges stubborn litigiousness by showing that it was plaintiff rather than defendant who was stubbornly litigious. *Ryle v. Sliz*, 162 Ga. App. 868, 293 S.E.2d 451 (1982).

O.C.G.A. § 13-6-11 does not automatically bar recovery by defendant of litigation expenses incurred in prosecuting independent claim. — When a defendant asserts a claim for relief independent of a claim for litigation

tion expenses incurred in defending against plaintiff's case-in-chief, this statute does not automatically operate to bar any recovery by defendant of litigation expenses incurred in prosecuting such independent claim. *Ballenger Corp. v. Dresco Mechanical Contractors*, 156 Ga. App. 425, 274 S.E.2d 786 (1980), cert. denied, 156 Ga. App. 425, 274 S.E.2d 786 (1981) (see O.C.G.A. § 13-6-11).

Even though a defendant may not avail oneself of O.C.G.A. § 13-6-11 in order to recover one's attorney's fees by way of counterclaim, that section should be read to permit the defendant to prosecute a viable, independent claim to recover attorney fees whenever the enumerated statutory criteria are met. *Homac, Inc. v. Fort Wayne Mtg. Co.*, 577 F. Supp. 1065 (N.D. Ga. 1983).

Although O.C.G.A. § 13-6-11 creates a cause of action for bad faith damages to a plaintiff for having to resort to litigation, no such provision is available to a defendant in the absence of a viable independent counterclaim asserting a claim for relief independent of the assertion of the plaintiff's harassment, litigiousness, and bad faith in bringing plaintiff's suit. *Gibson v. Southern Gen. Ins. Co.*, 199 Ga. App. 776, 406 S.E.2d 121 (1991); *Steele v. Russell*, 262 Ga. 651, 424 S.E.2d 272 (1993).

Existence of one statutory condition sufficient. — It is only necessary to show the existence of one of the statutory conditions of O.C.G.A. § 13-6-11 in order to authorize an award of damages for expenses of litigation. *Fine & Block v. Evans*, 201 Ga. App. 294, 411 S.E.2d 73 (1991).

O.C.G.A. § 13-6-11 should be available to any party prosecuting viable, independent claim for attorney fees. — Statute should be read to permit any party prosecuting a viable, independent claim to recover attorney fees whenever enumerated statutory criteria for such award are met. *Ballenger Corp. v. Dresco Mechanical Contractors*, 156 Ga. App. 425, 274 S.E.2d 786 (1980), cert. denied, 156 Ga. App. 425, 274 S.E.2d 786 (1981) (see O.C.G.A. § 13-6-11).

Defendant's counterclaim not viable. — When defendant does not contend that defendant's independent counterclaim against plaintiff was viable, it follows that the trial court correctly refused to submit to the jury the issue of defendant's entitlement to a recovery. *White v. Lance H. Herndon, Inc.*,

203 Ga. App. 580, 417 S.E.2d 383, cert. denied, 203 Ga. App. 908, 417 S.E.2d 383 (1992).

Defendant may claim attorney's fees in prosecuting independent claim. — Defendant, who is in effect, a plaintiff in an independent counterclaim, may assert a claim for attorney fees incurred in prosecuting defendant's independent claim. *Glenn v. Fourteen W. Realty, Inc.*, 169 Ga. App. 549, 313 S.E.2d 730 (1984).

Defendant asserting independent claims for relief by way of counterclaim may recover expenses under O.C.G.A. § 13-6-11 upon a showing that plaintiff acted in bad faith, or has been stubbornly litigious, or has caused defendant unnecessary trouble and expense. *Wood v. National Benefit Life Ins. Co.*, 631 F. Supp. 6 (N.D. Ga. 1984).

When a defendant asserts a claim for relief independent of a claim for litigation expenses incurred in defending against a plaintiff's case-in-chief, defendant may recover litigation expenses incurred in prosecuting such an independent claim in accordance with O.C.G.A. § 13-6-11. *Gardner v. Kinney*, 230 Ga. App. 771, 498 S.E.2d 312 (1998).

Defendant's right to recover litigation expenses in connection with an independent counterclaim is limited to recovering only the portion of the defendant's attorney fees allocable to the prosecution of the defendant's counterclaim. *Williamson v. Harvey Smith, Inc.*, 246 Ga. App. 745, 542 S.E.2d 151 (2000).

Reasons for making section available to defendants in appropriate cases. — See *Ballenger Corp. v. Dresco Mechanical Contractors*, 156 Ga. App. 425, 274 S.E.2d 786 (1980), cert. denied, 156 Ga. App. 425, 274 S.E.2d 786 (1981).

Defendant acting in good faith can recover. — Defendant was not chargeable with the expenses of litigation unless defendant acted in bad faith because the constitutional right to be heard in the courts was granted to defendants as well as plaintiffs. *Bush v. Northside Trucking, Inc.*, 252 Ga. App. 729, 556 S.E.2d 909 (2001).

Requirement of independent counterclaims aside from plaintiff's alleged bad faith. — When defendant did not have viable independent counterclaims asserting claims for relief independent of an assertion

Availability of Section to Defendants (Cont'd)

of plaintiffs' harassment, litigiousness, and bad faith in bringing their suits, the defendant was not a true plaintiff in a counterclaim so as to claim litigation expenses under O.C.G.A. § 13-6-11. *Florida Rock Indus., Inc. v. Smith*, 163 Ga. App. 361, 294 S.E.2d 553 (1982).

Counterclaim not specifically pled. — Since the record demonstrates on the record's face that the corporate defendant did not specifically plead a viable independent counterclaim for plaintiff's breach of contract such as would otherwise authorize a recovery of attorney's fees, the instant award of attorney's fees cannot be upheld as authorized. *First Union Nat'l Bank v. Big John's Auto Sales, Inc.*, 203 Ga. App. 797, 417 S.E.2d 416 (1992).

Counterclaim found not to be "viable" claim. — Counterclaim, while entirely independent of any simple assertion that plaintiff acted in bad faith in filing suit, found not to be "viable" claim. See *Spoon v. Herndon*, 167 Ga. App. 794, 307 S.E.2d 693 (1983).

When there were no viable independent counterclaims remaining in a construction company's claims against a labor supplier, the company could no longer assert a claim for attorney fees and litigation costs under O.C.G.A. § 13-6-11 and, accordingly, summary judgment under O.C.G.A. § 9-11-56 to the supplier was proper. *Langley v. Nat'l Labor Group, Inc.*, 262 Ga. App. 749, 586 S.E.2d 418 (2003).

Trial court erred in not granting a plaintiff's motion for a directed verdict as to the defendant's counterclaim, the defendant was not entitled to fees under O.C.G.A. § 13-6-11 for prosecuting a successful counterclaim. *Caincare, Inc. v. Ellison*, 272 Ga. App. 190, 612 S.E.2d 47 (2005).

Application: In General

When a plaintiff is caused unnecessary trouble and expense above the normal trouble and expense associated with litigation, fees and expenses may be awarded under O.C.G.A. § 13-6-11. *MDC Blackshear, L.L.C. v. Littell*, 273 Ga. 169, 537 S.E.2d 356 (2000).

O.C.G.A. § 13-6-11 authorizes an attorney fee award even when nominal damages are recovered. See *Tyler v. Lincoln*, 272 Ga. 118,

527 S.E.2d 180 (2000).

Substantially related to the ultimate prosecution. — Attorney fees and expenses were recoverable under O.C.G.A. § 13-6-11 since the time spent by plaintiff's counsel successfully defending the motion to compel arbitration, whether under the federal act or under a warranty program, was substantially related to the ultimate prosecution of the claims raised in the state court. *Magnus Homes, LLC v. DeRosa*, 248 Ga. App. 31, 545 S.E.2d 166 (2001).

Law can apply to suits in both contract and tort. *Spicer v. American Home Assurance Co.*, 292 F. Supp. 27 (N.D. Ga. 1967), aff'd, 402 F.2d 988 (5th Cir. 1968), cert. denied, 394 U.S. 946, 89 S. Ct. 1275, 22 L. Ed. 2d 479 (1969).

Although this statute appears under contracts title of Code, it is, in appropriate situations, applied in principle to tort actions. *Jones v. Spindel*, 122 Ga. App. 390, 177 S.E.2d 187 (1970), cert. dismissed, 227 Ga. 264, 180 S.E.2d 242 (1971) (see O.C.G.A. § 13-6-11).

O.C.G.A. § 13-6-11 specifically refers to actions in contract and may apply to suits when recovery as to a contract lies in both contract and tort, that is, when the contract was procured or transacted in bad faith or was induced by fraud and deceit. *Country Pride Homes, Inc. v. DuBois*, 201 Ga. App. 740, 412 S.E.2d 282 (1991); *Evans Toyota, Inc. v. Cronin*, 233 Ga. App. 318, 503 S.E.2d 358 (1998).

Statute applies to torts. *Parks v. Parks*, 89 Ga. App. 725, 80 S.E.2d 837 (1954); *Dodd v. Slater*, 101 Ga. App. 358, 114 S.E.2d 167 (1960) (see O.C.G.A. § 13-6-11).

Attorney fees are generally limited to ex delicto actions. *State Mut. Ins. Co. v. McJenkin Ins. & Realty Co.*, 86 Ga. App. 442, 71 S.E.2d 670 (1952); *Raybestos-Manhattan, Inc. v. Friedman*, 156 Ga. App. 880, 275 S.E.2d 817 (1981).

Minority view as to application of this law is that tendency is to limit recovery of attorney fees to ex delicto actions, but that fees are recoverable when there is bad faith in transaction out of which cause of action arises. *Palmer v. Howse*, 133 Ga. App. 619, 212 S.E.2d 2 (1974).

Law is generally applied to ex delicto actions. *Brooks v. Steele*, 139 Ga. App. 496, 229 S.E.2d 3 (1976).

Law may be applied to equity cases. Jones v. Spindel, 239 Ga. 68, 235 S.E.2d 486 (1977); Redfearn v. Huntcliff Homes Ass'n, 243 Ga. App. 222, 531 S.E.2d 376 (2000).

Attorney fees in equity cases. — When plaintiffs have only set out a complaint in equity, plaintiffs are not entitled to an award of attorney fees under O.C.G.A. § 13-6-11 or O.C.G.A. § 51-12-7. Glynn County Fed. Employees Credit Union v. Peagler, 256 Ga. 342, 348 S.E.2d 628 (1986).

When a party has to resort to litigation to enforce an agreement such circumstances may authorize an award of litigation expenses under O.C.G.A. § 13-6-11. Fulton County Tax Comm'r v. GMC, 234 Ga. App. 459, 507 S.E.2d 772 (1998).

Proof of bad faith is not required if a contract clause provides that if one party must use an attorney to enforce the agreement, then the defaulting party shall pay attorney fees. Sylar v. Hodges, 250 Ga. App. 42, 550 S.E.2d 438 (2001).

Motion to dismiss a claim for attorney's fees pursuant to O.C.G.A. § 13-6-11 against an insurer was granted because, since an administrator's only viable claim for damages was predicated on the insurer's failure to pay benefits under the policy, there was no claim for damages that supported an award under O.C.G.A. § 13-6-11. Estate of Thornton v. Unum Life Ins. Co. of Am., 445 F. Supp. 2d 1379 (N.D. Ga. 2006).

Requirements for award of punitive or exemplary damages. — To authorize the imposition of punitive or exemplary damages, there must be evidence of willful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Speir Ins. Agency, Inc. v. Lee, 158 Ga. App. 512, 281 S.E.2d 279 (1981).

Plaintiff may recover attorney's fees if the defendant acted in bad faith in the transaction out of which the cause of action arose, or was stubbornly litigious, or caused the plaintiff unnecessary trouble and expense. National Serv. Indus., Inc. v. Hartford Accident & Indem. Co., 661 F.2d 458 (5th Cir. 1981).

Generally, the expenses of litigation are not allowed as part of the damages in a suit for breach of contract but the jury may allow expenses if the plaintiff can show that one of

the three conditions required by O.C.G.A. § 13-6-11 exists. Franchise Enters., Inc. v. Ridgeway, 157 Ga. App. 458, 278 S.E.2d 33 (1981).

Expenses of litigation are not generally allowed as a part of the damages, but if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow those expenses. Speir Ins. Agency, Inc. v. Lee, 158 Ga. App. 512, 281 S.E.2d 279 (1981).

Expenses of litigation are not generally allowed unless it be shown that the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, all of which must arise out of the transaction from which the cause of action arose. Bayliner Marine Corp. v. Prance, 159 Ga. App. 456, 283 S.E.2d 676 (1981).

One element is sufficient for award of fees. — All three elements need not be present; it is sufficient if there is one of the elements. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

It is only necessary to show that any one of the three conditions in this statute exists in order to recover attorneys' fees. D.H. Overmyer Co. v. Nelson-Brantley Glass Co., 119 Ga. App. 599, 168 S.E.2d 176 (1969) (see O.C.G.A. § 13-6-11).

It is only necessary to plaintiff's recovery that the plaintiff show any one of the three conditions in this statute exists. Altamaha Convalescent Ctr., Inc. v. Godwin, 137 Ga. App. 394, 224 S.E.2d 76 (1976) (see O.C.G.A. § 13-6-11).

Plaintiff only needs to show that any one of three conditions exists to be awarded litigation expenses. Marler v. River Creek Assocs., 138 Ga. App. 471, 226 S.E.2d 311 (1976).

It is necessary to show existence of only one of the three statutory conditions of this statute in order to authorize an award of damages for expenses of litigation. Gordon v. Ogden, 154 Ga. App. 641, 269 S.E.2d 499 (1980) (see O.C.G.A. § 13-6-11).

Plaintiff need only establish existence of one of three conditions to recover attorney's fees. Vacca v. Meetze, 499 F. Supp. 1089 (S.D. Ga. 1980); Blank v. Preventive Health Programs, Inc., 504 F. Supp. 416 (S.D. Ga. 1980).

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Any one of these three species of bad conduct may authorize recovery of attorney's fees. Acting in bad faith, or being stubbornly litigious, or causing plaintiff unnecessary trouble or expense might in a particular case suffice to authorize a finding for attorney's fees. *Thomas v. Dumas*, 207 Ga. 161, 60 S.E.2d 356 (1950); *Employers Liab. Assurance Corp. v. Sheftall*, 97 Ga. App. 398, 103 S.E.2d 143 (1958).

Plaintiff need demonstrate existence of only one of three enumerated grounds in order to obtain attorney's fees. *National Serv. Indus., Inc. v. Hartford Accident & Indem. Co.*, 661 F.2d 458 (5th Cir. 1981).

When expenses of litigation are recoverable in actions ex contractu. — Right to recover expenses of litigation for breach of contract requires fraud, deceit, breach of trust, wilful misappropriation of funds, or fraud in securing contract, or property thereunder. *Lovell v. Frankum*, 145 Ga. 106, 88 S.E. 569 (1916).

In action ex contractu expenses of litigation are recoverable when it appears that a contract was entered into in bad faith or was procured by fraud, or that defendant had been stubbornly litigious. *Bankers Health & Life Ins. Co. v. Plumer*, 67 Ga. App. 720, 21 S.E.2d 515 (1942).

Georgia does not normally allow attorney's fees in contractual matters and thus, attorney's fees are not recoverable unless it appears that such contract was entered into by defendant in bad faith or procured by the defendant through fraud or deceit. *Kuniansky v. D.H. Overmyer Whse. Co.*, 406 F.2d 818 (5th Cir. 1968), cert. denied, 398 U.S. 905, 90 S. Ct. 1697, 26 L. Ed. 2d 64 (1970).

In actions on contracts, attorney fees may only be awarded when contract was entered into in bad faith by defendant in first instance, or was procured by fraud and deceit. *Canal Ins. Co. v. Lawson*, 123 Ga. App. 376, 181 S.E.2d 91 (1971).

When recovery of expenses of litigation is allowed in an action for mere breach of contract because of bad faith, those expenses are not allowed for bad faith in refusing to pay, but only when defendant has acted in bad faith in transaction and dealing out of which cause of action arose.

Brooks v. Steele, 139 Ga. App. 496, 229 S.E.2d 3 (1976).

Bona fide controversy negates possibility of award. — When bad faith is not an issue and the only asserted basis for a recovery of attorney fees is either stubborn litigiousness or the causing of unnecessary trouble and expense, there is not "any evidence" to support an award if a bona fide controversy clearly exists between the parties. *Dimambro Northend Assocs. v. Williams*, 169 Ga. App. 219, 312 S.E.2d 386 (1983); *Backus Cadillac-Pontiac, Inc. v. Brown*, 185 Ga. App. 746, 365 S.E.2d 540 (1988); *Candler v. Wickes Lumber Co.*, 195 Ga. App. 239, 393 S.E.2d 99 (1990); *Tower Fin. Servs., Inc. v. Smith*, 204 Ga. App. 910, 423 S.E.2d 257, cert. denied, 204 Ga. App. 922, 423 S.E.2d 257 (1992); *Fuel S., Inc. v. Metz*, 217 Ga. App. 731, 458 S.E.2d 904 (1995); *Lamb v. State Farm Mut. Auto. Ins. Cos.*, 240 Ga. App. 363, 522 S.E.2d 573 (1999).

When the evidence showed a dispute as to the terms of the oral contract between the parties and when reasonable persons could differ as to whether the evidence showed abandonment of the contract, it could not be said that there was no "bona fide controversy" as contemplated by *Buffalo Cab. Co. v. Williams*, 126 Ga. App. 522, 191 S.E.2d 317 (1972). *Glen Restaurant, Inc. v. West*, 173 Ga. App. 204, 325 S.E.2d 781 (1984).

In a case where bad faith is not at issue, attorney fees are not authorized under O.C.G.A. § 13-6-11 if the evidence shows that a genuine dispute exists. *Steele v. Gold Kist, Inc.*, 186 Ga. App. 569, 368 S.E.2d 196, cert. denied, 186 Ga. App. 919, 368 S.E.2d 196 (1988).

It was error to deny an adjacent lot owner's motions for a directed verdict and judgment notwithstanding the verdict under O.C.G.A. § 9-11-50 in an action by property owners, alleging property damage and requesting an award of attorney fees under O.C.G.A. § 13-6-11, as there was a bona fide controversy regarding the adjacent lot owner's liability in the circumstances; further, there was no showing that the adjacent lot owner acted with bad faith. *Lowery v. Roper*, 293 Ga. App. 243, 666 S.E.2d 710 (2008).

When a bona fide dispute exists and defendant has a reasonable defense at trial, the defendant should not be burdened with the plaintiff's attorney fees. *Jeff Goolsby Homes*

Corp. v. Smith, 168 Ga. App. 218, 308 S.E.2d 564 (1983).

When the record showed that a justiciable controversy existed as to defendants liability under the agreement at issue, which prevented the recovery of bad faith expenses under O.C.G.A. § 13-6-11, the trial court did not abuse the court's discretion in denying plaintiff's request for assessed attorney fees. *Rivergate Corp. v. Atlanta Indoor Adv. Concepts, Inc.*, 210 Ga. App. 501, 436 S.E.2d 697 (1993); *Auto-Owners Ins. Co. v. Crawford*, 240 Ga. App. 748, 525 S.E.2d 118 (1999).

Absence of bona fide controversy. — Jury award of attorney fees and costs under O.C.G.A. § 13-6-11 will be affirmed if there is any evidence from which the jury could have concluded that there is no bona fide controversy. *WMI Urban Servs., Inc. v. Erwin*, 215 Ga. App. 357, 450 S.E.2d 830 (1994).

Award of attorney fees is permissible even though no compensatory damages are awarded. See *Sheppard v. Tribble Heating & Air Conditioning, Inc.*, 163 Ga. App. 732, 294 S.E.2d 572 (1982).

Defendant fails to answer. — Trial court erred in refusing to grant attorney's fees to plaintiff when defendant did not file an action to the suit. *Hartford Ins. Co. v. Mobley*, 164 Ga. App. 363, 297 S.E.2d 312 (1982).

Generally, attorney fees are not included in terms "cost" or "expenses" absent some statutory provision, rule of court, or contract provision. *Money v. Thompson & Green Mach. Co.*, 155 Ga. App. 566, 271 S.E.2d 699 (1980).

Attorney's fees have been authorized in breach of contract actions when no fraud or misrepresentation is alleged. *Fratelli Gardino v. Caribbean Lumber Co.*, 447 F. Supp. 1337 (S.D. Ga. 1978), *aff'd* in part and *rev'd* in part, *Fratelli Gardino v. Caribbean Lumber Co.*, 587 F.2d 204 (5th Cir. 1979).

Attorney's fees may be recovered although only injunctive relief is granted in action. — In action for injunctive relief and damages, when injunctive relief is granted, failure of jury to find damages would not prevent the jury from finding attorney's fees, when evidence authorizes a determination that defendants have acted in bad faith, been stubbornly litigious, or caused petitioners unnecessary trouble and expense. *Adams v.*

Cowart, 224 Ga. 210, 160 S.E.2d 805 (1968).

Election of specific performance does not bar award of attorney fees. — Election of specific performance as a remedy does not act as a waiver to bar an award of attorney fees. *Golden v. Frazier*, 244 Ga. 685, 261 S.E.2d 703 (1979).

Attorney's fees recoverable in suit to enjoin interference with rights of successful party to a judgment. — In suit to enjoin further interference with rights of successful party to a judgment, attorney's fees may be recovered. However, counsel fees incurred in procuring original judgment are not to be included. *Stovall v. Caverly*, 139 Ga. 243, 77 S.E. 29 (1913).

Trial court cannot summarily award attorney fees to a litigant for merely opposing a motion. *Kyle v. King*, 138 Ga. App. 612, 226 S.E.2d 767 (1976).

When claim abandoned. — Because a corporation was entitled to judgment notwithstanding the verdict on the only substantive claim remaining in the litigation, breach of the duty of good faith, due to the fact that a broker had abandoned that claim, the corporation was also entitled to judgment on the broker's attorney fee claim. *Quantum Trading Corp. v. Forum Realty Corp.*, 278 Ga. App. 485, 629 S.E.2d 420 (2006).

Attorney's fees recoverable must be reasonable, whether computed in gross or as percentage. — Reasonable fee is exactly what the term implies, regardless of whether the fee's computation begins in gross or from percentages, taking into consideration all legitimate aspects of the case. *State Farm Mut. Auto. Ins. Co. v. Smoot*, 381 F.2d 331 (5th Cir. 1967), *cert. denied*, 390 U.S. 1005, 88 S. Ct. 1248, 20 L. Ed. 2d 105 (1968).

Attorney fees are recoverable only as the fees relate to claims against defendant chargeable with the claims. *Altamaha Convalescent Ctr., Inc. v. Godwin*, 137 Ga. App. 394, 224 S.E.2d 76 (1976).

Allowance for litigation expenses cannot be based on guesswork. *Davis v. Fomon*, 144 Ga. App. 14, 240 S.E.2d 581 (1977).

Attorney fees paid out in previous litigation are not generally recoverable in a later suit. *State Mut. Ins. Co. v. McJenkin Ins. & Realty Co.*, 86 Ga. App. 442, 71 S.E.2d 670 (1952).

Time spent by nonattorney personnel recoverable. — Plaintiff's "in-house" costs for

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the time that plaintiff's nonattorney personnel spent in preparing for litigation were "expenses of litigation" as contemplated under O.C.G.A. § 13-6-11. *Salsbury Labs., Inc. v. Merieux Labs., Inc.*, 735 F. Supp. 1555 (M.D. Ga. 1989), *aff'd*, 908 F.2d 706 (11th Cir. 1990).

Time spent by plaintiff's in-house nonattorney personnel solely because of the litigation was an "expense of litigation." *Salsbury Labs., Inc. v. Merieux Labs., Inc.*, 908 F.2d 706 (11th Cir. 1990).

Party entitled only to fees attributable to prevailing claims. — As awards to a lessor of rent and the costs of maintenance and repair of the premises were reversed on appeal, and attorney fees awarded under O.C.G.A. § 13-6-11 had to be apportioned to fees attributable to claims on which the lessor prevailed, the case was remanded for a determination of what, if any, remaining claims would authorize an award of fees to the lessor under § 13-6-11. *Savannah Yacht Corp. v. Thunderbolt Marine, Inc.*, 297 Ga. App. 104, 676 S.E.2d 728 (2009).

Failure to prevail on common-law theories of liability meant no recovery. — After a professional basketball player was held not liable to inexperienced businessmen who invested and lost money by hosting sports event-related parties with two men claiming to act as the player's agents, attorney fees were unwarranted under O.C.G.A. § 13-6-11 because the businessmen failed to prevail on their various state common-law theories of liability. *J'Carpc, LLC v. Wilkins*, 545 F. Supp. 2d 1330 (N.D. Ga. 2008).

Attorney's fees not supportable without award of relief on underlying claim. — In an attorney negligence case, the district court's interlocutory ruling excluding the clients' expert was case-dispositive as the crux of the clients' unjust enrichment and breach of fiduciary duty claims was the law firm's failure to meet the standard of care imposed by the attorney-client relationship; both the breach of fiduciary duty and unjust enrichment counts incorporated the allegations of legal malpractice without adding any independent factual allegations, and the latter count expressly alleged that the law firm was unjustly enriched by receiving compensation for defective, unskillful, and harmful legal

advice. Additionally, the clients' O.C.G.A. § 13-6-11 attorney's fee claim and O.C.G.A. § 51-12-5.1 punitive damages claim were not supportable without an award of relief on an underlying claim; thus, the clients' claims, as pled, all required proof of attorney malpractice, and the interlocutory ruling excluding the clients' expert's testimony was case-dispositive. *OFS Fitel, LLC v. Epstein*, 549 F.3d 1344 (11th Cir. 2008).

Dismissal of attorney's fees claim was proper because all substantive claims had been dismissed. — Trial court erred in dismissing all of an employee's substantive counterclaims against the employer except a counterclaim for attorney's fees under O.C.G.A. § 13-6-11, because the attorney's fee claim could not stand in the absence of the recovery of damages or other relief on an underlying claim. *Prof'l Energy Mgmt. v. Necaise*, 300 Ga. App. 223, 684 S.E.2d 374 (2009).

Question under O.C.G.A. § 13-6-11 is not how case is being defended, but how contract was breached. — If breach of a contract, which is the cause of action, is colored or poisoned by bad faith, expenses of litigation may be allowed. It is not a question of how case is being defended, instead, it is how contract was breached. *Edwards-Warren Tire Co. v. Coble*, 102 Ga. App. 106, 115 S.E.2d 852 (1960).

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Section inapplicable to mere motion to set aside judgment rendered in case between parties. *American Liberty Ins. Co. v. Sanders*, 122 Ga. App. 407, 177 S.E.2d 176 (1970).

Requirements of O.C.G.A. § 13-6-11 inapplicable to suit on bond of public officer for official misconduct. — In suit on bond of public officer for official misconduct, in order to collect attorney's fees, it is unnecessary to show bad faith or the like as a condition to such recovery. *Glens Falls Indem. Co. v. Dempsey*, 68 Ga. App. 607, 23 S.E.2d 493 (1942).

Nuisance actions against municipalities. — Attorney fees are not recoverable in nuisance actions against municipalities absent proof of bad faith or other grounds delineated in O.C.G.A. § 13-6-11. *City of Lawrenceville v. Heard*, 194 Ga. App. 580, 391 S.E.2d 441 (1990).

When the owners' evidence of repeated

flooding established an abatable nuisance, an award of both personal and property damages as well as attorney's fees against a city were adequate; the trial court's jury charge was proper and the court did not abuse the court's discretion in denying a directed verdict or a judgment notwithstanding the verdict. *City of Gainesville v. Waters*, 258 Ga. App. 555, 574 S.E.2d 638 (2002).

County liability when ownership of dam previously decided. — County's motion for a directed verdict as to the homeowners' claim for costs and attorney fees under O.C.G.A. § 13-6-11 was properly denied because there was no viable issue of the county's ownership interest in a dam under the Georgia Safe Dams Act, O.C.G.A. § 12-5-370 et seq., because that issue was resolved in a prior administrative action; however, the evidence did not distinguish attorney fees and costs incurred on claims on which the homeowners prevailed from those that were decided adversely to the homeowners, and the award was limited to the issues on which the homeowners were successful. *Forsyth County v. Martin*, 279 Ga. 215, 610 S.E.2d 512 (2005).

Attorney's fees recoverable in contractual actions against the state. — Constitutional waiver of sovereign immunity in contract actions against the state is not limited to a waiver of only certain elements of recoverable compensatory damages. *DOT v. Fru-Con Constr. Corp.*, 206 Ga. App. 821, 426 S.E.2d 905 (1992).

Attorney fees not recoverable in sale of company's assets. — When a company sought attorney fees, under O.C.G.A. § 13-6-11, and punitive damages from the company's attorneys regarding their participation in a sale of the company's assets, summary judgment should have been granted in favor of the attorneys because no claims as to which such relief might have been awarded were found to be proper. *R.W. Holdco, Inc. v. Johnson*, 267 Ga. App. 859, 601 S.E.2d 177 (2004).

Summary judgment dismissing claims of corporate investor improper. — Because corporate defendants did not demonstrate that they were entitled to judgment as a matter of law on an investor's claims for money had and received and for conversion, summary judgment dismissing the investor's claims for punitive damages and litigation expenses

based on those causes of action was improper. *Fernandez v. WebSingularity, Inc.*, 299 Ga. App. 11, 681 S.E.2d 717 (2009).

Attorney's fees in breach of contract suit. — In a breach of contract suit, a bank was entitled to attorney fees because the bank was the prevailing party and had adequately pled a claim for such fees under O.C.G.A. § 13-6-11. *Keybank Nat'l Ass'n v. Fairpoint, LLC*, 2008 U.S. Dist. LEXIS 82158 (N.D. Ga. Oct. 14, 2008).

Attorney's fees when defendant failed to pay admitted debt. — Based on a default, a corporation admitted that the corporation incurred the debt, did not dispute the validity of the debt, refused to pay despite numerous demands, caused a staffing company unnecessary trouble and expense by refusing to pay the debt, and acted in bad faith; by failing to respond to the allegations, the corporation admitted the facts alleged in the complaint and waived any defenses thereto, and the trial court did not err in awarding the staffing company attorney fees under O.C.G.A. § 13-6-11. *Hope Elec. Enters. v. Proforce Staffing, Inc.*, 268 Ga. App. 302, 601 S.E.2d 723 (2004).

Attorney's fee award in contract for roof repair. — Award of attorney's fees was proper since there was evidence on which a jury could have found bad faith arising out of the contract for the new roof on which the cause of action was based. *Hendon v. Superior Roofing Co.*, 242 Ga. App. 307, 528 S.E.2d 548 (2000).

No fee award when dispute between contractor, homeowner, and insurer. — When there was a bona fide controversy between the parties as to whether a contractor was employed by homeowners or by the homeowners' insurer, and when there was no suggestion of any bad faith on the part of the insurer, in connection with this matter, the trial court erred in denying the insurer's motion for summary judgment with respect to the plaintiffs' claim for litigation expenses based on bad faith and stubborn litigiousness. *Carter v. Allstate Ins. Co.*, 197 Ga. App. 738, 399 S.E.2d 500 (1990).

Attorneys fees in breach of employment contract between realtors. — In an action regarding an alleged breach of an employment contract seeking commissions on two deals made by a real estate agent that a former real estate broker alleged it was

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entitled to, the trial court erred in entering summary judgment against the agent, and finding that the agent owed the broker commissions as to one of two contested deals because: (1) the agent closed the deal with that client after terminating employment with the broker; and (2) it was undisputed that the agent had not agreed to share commissions with the broker on deals struck after the agent left the broker's employ; thus, since summary judgment was properly entered in the agent's favor regarding commissions paid to the agent as to the second of the two contested clients, the broker was not entitled to litigation costs under O.C.G.A. § 13-6-11. *Morgan v. Richard Bowers & Co.*, 280 Ga. App. 533, 634 S.E.2d 415 (2006).

Attorney's fees in actions on lease. — Because no evidence was presented that a lessee's son acted as a agent for the lessee when the lease on the rented premises was entered into, and the lessee never ratified the son's actions on the lease, the lessee was not liable for unpaid rents on the leased premises; as a result, since such was the basis for the lessor's counterclaim, an award of attorney's fees under O.C.G.A. § 13-6-11 was reversed. *Ellis v. Fuller*, 282 Ga. App. 307, 638 S.E.2d 433 (2006).

Seller could not recover attorney's fees. — Ancillary award of attorney fees and expenses in favor of a seller was ordered struck, pursuant to O.C.G.A. § 9-12-8, as: (1) the jury failed to find the buyers liable on the seller's underlying substantive claims; (2) the award was based on O.C.G.A. § 13-6-11, not O.C.G.A. § 10-5-14; and, as a result; (3) the lack of a damages award in favor of the seller did not support the award. *Davis v. Johnson*, 280 Ga. App. 318, 634 S.E.2d 108 (2006).

Attorney fee awards in tort actions. — Because a customer did not show that a restaurant was liable on the customer's tort claims, it was proper to grant summary judgment for the restaurant on the customer's claims for attorney fees and punitive damages under O.C.G.A. §§ 13-6-11 and 51-12-5.1. *Dowdell v. Krystal Co.*, 291 Ga. App. 469, 662 S.E.2d 150 (2008), cert. denied, 2008 Ga. LEXIS 787 (Ga. 2008).

Negligence per se supporting fee award. — As a jury could have determined that an

employee for a tractor company was negligent per se pursuant to O.C.G.A. § 40-6-140(f) for driving a tractor-trailer over a railroad crossing, whereupon the tractor-trailer got stuck due to insufficient undercarriage clearance, the jury's subrogation award to an insurer whose insured suffered damages from the incident was supported by the evidence as was the award of litigation expenses under O.C.G.A. § 13-6-11; accordingly, it was proper to deny a motion by the insurer for the tractor company, against which the judgment was entered, for judgment notwithstanding the verdict. *Universal Underwriters Group v. Southern Guar. Ins. Co.*, 297 Ga. App. 587, 677 S.E.2d 760 (2009).

Injured party was properly awarded damages for litigation expenses under O.C.G.A. § 13-6-11 after a driver's testimony tended to show that the injured party did not yield the right-of-way and that the driver was liable; the trial court was authorized to conclude that a bona fide controversy did not exist as to liability for the automobile accident and did not err by allowing evidence of the injured party's litigation expenses, denying the driver's motion for a directed verdict, or in charging the jury on the claim for litigation expenses. *Daniel v. Smith*, 266 Ga. App. 637, 597 S.E.2d 432 (2004).

Bona fide dispute as to driver's liability meant no award of fees. — After a motorist being sued in a personal injury case testified that the rear-end collision at issue was caused when the injured person's car swerved suddenly into the motorist's lane, the injured person's witness, the driver of the other car, was a long-time friend of the injured person and that witness's testimony could have been self-serving, the motorist's deposition was consistent with the trial testimony, and the only substantial variation in the motorist's versions of events was between the police report, of which the officer had no independent recollection, and the motorist's testimony, there was a bona fide dispute as to liability and a reasonable defense, which precluded the award of attorney fees and expenses under O.C.G.A. § 13-6-11. *Anderson v. Cayes*, 278 Ga. App. 592, 630 S.E.2d 441 (2006).

Attorney's fees recoverable in intentional tort action. — Because the appeals court found that other intentional tort claims sur-

vived summary judgment which would authorize the imposition of punitive damages if the jury were to find that a retailer and the retailer's employees acted with a wanton disregard of a nine-year-old child's rights, the trial court did not err by denying summary judgment on these grounds; moreover, every intentional tort invoked a species of bad faith that entitled a person wronged to recover the expenses of litigation, including attorney fees under O.C.G.A. § 13-6-11. *Todd v. Byrd*, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, *Ferrell v. Mikula*, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

O.C.G.A. § 13-6-11 does not apply in garnishment proceedings. See *Worsham Bros. Co. v. FDIC*, 167 Ga. App. 163, 305 S.E.2d 816 (1983).

Mere refusal to defend title pursuant to a general warranty deed will not necessarily give rise to a claim for attorney fees. *Cary v. Guiragossian*, 270 Ga. 192, 508 S.E.2d 403 (1998).

Claim for attorney fees against title insurance company failed as there was a bona fide controversy between the parties precluding an award based on alleged stubborn litigiousness or causing the plaintiff unnecessary trouble and expense; further, the owner failed to show that the insurance company made an alleged oral contract in bad faith or breached the oral contract as a result of some sinister motive. *Marshall v. King & Morgenstern*, 272 Ga. App. 515, 613 S.E.2d 7 (2005).

Attorney's fees in tax lien encumbrance suit. — When there was a bona fide controversy regarding whether the defendant, as an assignee, could recover from plaintiffs in a tax lien encumbrances suit and the evidence did not establish that the plaintiffs acted in a manner to warrant the imposition of attorney fees, the state court's award of fees was improper. *Homeland Communities, Inc. v. Rahall & Fryer*, 235 Ga. App. 440, 509 S.E.2d 714 (1998).

Claim for attorney's fees based on real estate tax lien. — Real estate investors who claimed that three mortgage companies were liable for damages based on ostensible injury caused to the investors' credit scores by reason of the filing of a tax lien triggered by the companies' failure to pay a tax bill were denied litigation expenses under

O.C.G.A. § 13-6-11 because a required predicate for such an award was a finding that there was no bona fide controversy or dispute regarding liability for the underlying cause of action, and such a finding was not justified by the evidence on the companies' motions for summary judgment. *Burch v. Chase Manhattan Mortg. Corp.*, No. 1:07-CV-0121-JOF, 2008 U.S. Dist. LEXIS 76595 (N.D. Ga. Sept. 15, 2008).

Federal Automobile Dealer's Day in Court Act does not include attorney fees in the definition of "cost of suit"; however, a prevailing plaintiff would not be precluded from recovering only attorney fees under O.C.G.A. § 13-6-11. *Nissan Motor Acceptance Corp. v. Stovall Nissan, Inc.*, 224 Ga. App. 295, 480 S.E.2d 322 (1997).

Actions under Carmack Amendment. — Plaintiff could not recover the attorneys' fees and costs sought under Georgia law because they were preempted by the Carmack Amendment, which provides for the liability of a "common carrier" to the person entitled to recover under receipt or bill of lading for loss or injury to goods incurred during transportation. *PolyGram Group Distribution, Inc. v. Transus, Inc.*, 990 F. Supp. 1454 (N.D. Ga. 1997).

Application in condemnation cases. — Condemnee, as plaintiff in an action to recover from the government just and adequate compensation for the taking of plaintiff's land for a public purpose, may successfully avail oneself of the provisions of O.C.G.A. § 13-6-11 and recover attorney fees. *DeKalb County v. Daniels*, 174 Ga. App. 319, 329 S.E.2d 620 (1985); *DOT v. Edwards*, 267 Ga. 733, 482 S.E.2d 260 (1997).

Action in which landowners sought to vacate a condemnation and requested attorney fees for litigation spawned from the misuse and improper use of the powers of the Department of Transportation was a "proper case" for the recovery of attorney fees. *DOT v. B & G Realty, Inc.*, 197 Ga. App. 613, 398 S.E.2d 762 (1990).

Actions based on insurer's bad faith refusal to pay insurance claim. — Claim for attorney fees and expenses of litigation under O.C.G.A. § 13-6-11 was not authorized in an action by an insured under O.C.G.A. § 33-4-6 (now subsection (a)) seeking penalties for the insurer's bad faith refusal to pay insurance proceeds. *Howell v. Southern Her-*

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itage Ins. Co., 214 Ga. App. 536, 448 S.E.2d 275 (1994); United Servs. Auto. Ass'n v. Carroll, 226 Ga. App. 144, 486 S.E.2d 613 (1997).

Claims for attorney fees and expenses are not authorized under O.C.G.A. § 13-6-11; the penalties contained in O.C.G.A. § 33-4-6 (now subsection (a)) are the exclusive remedies for an insurer's bad faith refusal to pay insurance proceeds. Colonial Oil Indus. Inc. v. Underwriters Subscribing to Policy Nos. T031504670 & T031504671, 910 F. Supp. 655 (S.D. Ga. 1995).

In an insured's suit asserting claims for breach of contract and bad faith breach of contract under O.C.G.A. §§ 9-2-20 and 33-4-6 in connection with an insurer's denial of the insured's claim for proceeds of a disability insurance policy, the parent corporation of the insurer, which administered the insurer's policies, was not liable upon the insured's claim for attorney fees and expenses under O.C.G.A. § 13-6-11 because even if the insured had succeeded on the insured's underlying claims against the parent, O.C.G.A. § 33-4-6 provides the exclusive remedy for fees and costs in cases involving bad faith refusal to pay insurance proceeds. Adams v. UNUM Life Ins. Co. of Am., 508 F. Supp. 2d 1302 (N.D. Ga. 2007).

Because the penalties contained in O.C.G.A. § 33-4-6 were the exclusive remedies for an insurer's bad faith refusal to pay insurance proceeds, attorney fees under O.C.G.A. § 13-6-11 were unavailable to an insured who prevailed on the insured's coverage claim before a jury. Johnston v. Companion Prop. & Cas. Ins. Co., No. 08-10969, 2009 U.S. App. LEXIS 5294 (11th Cir. Mar. 12, 2009) (Unpublished).

Contested insurance clause. — No award of attorney fees was authorized when litigant's position was anything less than genuine over a contested insurance clause's coverage. Georgia Baptist Children's Homes & Family Ministries, Inc. v. Essex Ins. Co., 207 Ga. App. 346, 427 S.E.2d 798, cert. denied, 263 Ga. 441, 435 S.E.2d 445 (1993).

Attorney fees properly denied when damages not shown in malpractice action. — When a client in a legal malpractice action failed to demonstrate that genuine issues of fact existed as to whether the attorney had

proximately caused the client any damages, the trial court did not err in granting the attorney summary judgment on the client's claims for punitive damages and for attorney fees under O.C.G.A. §§ 13-6-11 and 51-12-5.1. Amstead v. McFarland, 287 Ga. App. 135, 650 S.E.2d 737 (2007), cert. denied, 2007 Ga. LEXIS 769 (Ga. 2007).

Evidence sufficient to award attorney's fees by probate. — Beneficiaries of a will sued the decedent's grandchild for conversion of stock the beneficiaries alleged was intended to be part of the decedent's estate; the jury found by special verdict that the grandchild, with intent to commit fraud, converted the stock. As fraud was a form of bad faith, the beneficiaries were entitled to attorney fees under O.C.G.A. § 13-6-11. Bunch v. Byington, 292 Ga. App. 497, 664 S.E.2d 842 (2008).

Shareholders' suit. — After the shareholders' claims for breach of fiduciary duty and fraud against a bankrupt corporation, the corporation's board of directors, and two investor corporations were dismissed because the shareholders no longer owned any shares in the bankrupt corporation and therefore did not meet the ownership requirements of Fed. R. Civ. P. 23.1, the shareholders were not entitled to attorney's fees pursuant to O.C.G.A. § 13-6-11. Hantz v. Belyew, No. 1:05-CV-1012-JOF, 2005 U.S. Dist. LEXIS 41690 (N.D. Ga. Mar. 23, 2005).

Trial court did not err in declining to set off attorney fees from the total awarded to a corporation in its action against a former president alleging breach of fiduciary duty and misappropriation of corporate opportunity because a mutual release entered into between the president, the corporation, and joint tortfeasors specifically released the joint tortfeasors from future claims for attorney fees, but it excluded the president; there was no evidence in the record to suggest that the corporation received full satisfaction of its attorney fees through the settlement agreement with the joint tortfeasors. Brewer v. Insight Tech., Inc., 301 Ga. App. 694, 689 S.E.2d 330 (2009).

Attorney's fee award in conversion claim. — An award of attorney fees in favor of the plaintiff in a conversion action was not warranted, given bona fide dispute as to whether trailer in defendant's possession was in fact the property of the plaintiff. Allmond

v. Walker, 172 Ga. App. 870, 324 S.E.2d 812 (1984).

Assurance that property damages would be paid. — In an action to recover the cost of repairs to a plaintiff's automobile which was damaged while parked in defendant's facility at an airport, and for attorney fees, the evidence showed that the plaintiff was assured by defendant at the time the plaintiff reported the damage and for six months afterwards that the defendant would take care of the paint repairs, which was not done, thus, the plaintiff showed that the defendant acted in bad faith, or was stubbornly litigious, or put the plaintiff to unnecessary trouble or expense, and the trial court did not err in awarding attorney fees. *Parking Co. of Am. v. Sucan*, 195 Ga. App. 616, 394 S.E.2d 411 (1990).

Refusal to pay interest is not conversion. — When there was no independent, noncontractual duty which defendants could have violated by refusing to pay the interest on the plaintiff's escrow account, the defendants' refusal to pay to the plaintiff interest on the cash escrow account did not constitute the tort of conversion under Georgia law and the relationship was contractual which justified the setting aside of the jury's punitive damages award and reversing the jury's conclusion that the defendants' withholding of the accrued interest constituted the tort of conversion. *LaRoche Indus., Inc. v. AIG Risk Mgt., Inc.*, 959 F.2d 189 (11th Cir. 1992).

Home construction contracts. — O.C.G.A. § 13-6-11 did not apply to the award of attorney fees in an action by a contractor to recover the balance owing under a home construction contract that contained a provision governing attorney fees. *Layfield v. Southeastern Constr. Coordinators, Inc.*, 229 Ga. App. 71, 492 S.E.2d 921 (1997).

Sellers' bad faith in retaining earnest money. — Jury was authorized to find that there was no bona fide controversy, or that the defendants (sellers of certain property) acted in bad faith in that there was no contractual or equitable basis for the sellers to have retained the buyer's earnest money after the contract was rescinded. *New York Ins. Co. v. Willett*, 183 Ga. App. 767, 360 S.E.2d 37 (1987).

Expenses of litigation not recoverable in breach of warranty action. — Expenses of

litigation, including attorney fees and costs, are not proper elements of damage in suit for breach of warranty and are not recoverable. *State Mut. Ins. Co. v. McJenkin Ins. & Realty Co.*, 86 Ga. App. 442, 71 S.E.2d 670 (1952).

For application of section in breach of warranty action. — See *Smith v. Williams*, 117 Ga. 782, 45 S.E. 394, 97 Am. St. R. 220 (1903).

Attorney fees award in fraud claims. — Trial court did not err in granting a car dealer summary judgment against a customer's fraud claim as: (1) the customer's contention that the dealer knew of the alleged defects in a car sold to the customer at the time of the sale was specifically negated by affidavits submitted by the dealer's service and maintenance employees; and (2) even if the dealer knew of the car's defectiveness after the sale, this knowledge did not amount to either knowledge, or a reckless disregard of the car's defectiveness, at the time of the sale; hence, as a result, the trial court did not err in granting the dealer's motion for summary judgment on the customer's claims for attorney fees under O.C.G.A. § 13-6-11, costs, and punitive damages pursuant to O.C.G.A. § 51-12-5.1. *Morris v. Pugmire Lincoln Mercury, Inc.*, 283 Ga. App. 238, 641 S.E.2d 222 (2007).

Attorney fees not recoverable in commitment proceedings. — There is no statutory authority for the award of attorney fees to a patient who was ordered discharged in involuntary commitment proceedings under O.C.G.A. Ch. 3, T. 37. *Georgia Mental Health Inst. v. Brady*, 263 Ga. 591, 436 S.E.2d 219 (1993).

Section inapplicable to suit to foreclose mortgage. *Lowry Banking Co. v. Atlanta Piano Co.*, 95 Ga. 146, 22 S.E. 42 (1894).

Foreclosure proceedings are not ordinarily within purview of this statute. *Builders Supply Co. v. Pilgrim*, 115 Ga. App. 85, 153 S.E.2d 657 (1967) (see O.C.G.A. § 13-6-11).

Attorney fee awards in foreclosure proceedings. — Because there were no excess proceeds from the foreclosure sale to which a condominium association would have been entitled, and regardless of whether it was the owner of the condominium at the time of the foreclosure it was not entitled to an equitable accounting, the association was also properly denied attorney fees under

Application: Specific Examples (Cont'd)

O.C.G.A. § 13-6-11 resulting from the bank's failure to provide an equitable accounting. *Riverview Condo. Ass'n v. Ocwen Fed. Bank, FSB*, 285 Ga. App. 7, 645 S.E.2d 5 (2007), cert. denied, 2007 Ga. LEXIS 705 (Ga. 2007).

Attorney's fees in class action. — Landowners' belated claim for attorney fees could not be asserted in connection with their individual claim, which had already been decided by the appellate court; thus, once the trial court declined to certify the class action claim, nothing remained to which the claim for attorney fees could be attached, and the amendment therefore fell with the class action claim. *Duffy v. The Landings Ass'n*, 254 Ga. App. 506, 563 S.E.2d 174 (2002).

Insufficiency of damages award required reversal of attorney fees award. — Though a subcontractor successfully proved a breach of contract claim against a supplier, the damages award in the amount of \$160,000 was reversed on appeal as the subcontractor failed to present any evidence of anticipated expenses due to the loss of a construction project arising from the breach, and therefore the subcontractor's proof of lost profits was insufficient as a matter of law and required a new trial; further, because the damages award was reversed, the appellate court also reversed the award of attorney fees to the subcontractor since the award of attorney fees was contingent upon the damages award on the breach of contract claim. *Bldg. Materials Wholesale, Inc. v. Triad Drywall, LLC*, 287 Ga. App. 772, 653 S.E.2d 115 (2007).

Expert witness's suit against client for fee. — In a suit wherein an expert witness sued the former client for unpaid fees, the trial court properly awarded the expert witness attorney fees and expenses related to the suit to collect unpaid fees incurred as the evidence established that no bona fide controversy existed since the former client's attorney had the apparent authority to hire the expert witness. *Wilen v. Murray*, 292 Ga. App. 30, 663 S.E.2d 403 (2008).

Attorney's fees award not supported. — When there is a bona fide controversy and the evidence does not demand a verdict for either side and there is no evidence of bad

faith or stubborn litigiousness or unnecessary trouble and expense, a verdict for attorney fees is not supported. *Ideal Pool Corp. v. Champion*, 157 Ga. App. 380, 277 S.E.2d 753 (1981).

Award of attorney fees pursuant to O.C.G.A. § 13-6-11 was improper since the substantial uncertainty and disagreement between the parties led the plaintiff to seek a declaratory judgment as to whether a contract existed between the parties. *General Hosps. of Humana v. Jenkins*, 188 Ga. App. 825, 374 S.E.2d 739 (1988), cert. denied, 188 Ga. App. 911, 374 S.E.2d 739 (1989); *Wynn v. Arias*, 242 Ga. App. 712, 531 S.E.2d 126 (2000), overruled on other grounds, *Clearwater Constr. Co. v. McClung*, 261 Ga. App. 789, 584 S.E.2d 61 (2003).

Plaintiff did not show the bad faith or stubborn litigiousness on the part of defendant that would support an award of fees and costs, particularly since the defendant asserted a position that ultimately prevailed on a majority of the issues. *Krieger v. Walton County Bd. of Comm'rs*, 241 Ga. App. 373, 525 S.E.2d 147 (1999).

City was not entitled to recover additional payment for natural gas that the city had provided to a corporation's Georgia manufacturing plant: (1) the evidence showed that the city failed to exercise due diligence in billing the corporation and that the corporation was not involved in any way with the errors contained in the city's gas bills; (2) the city was not entitled to attorney's fees under O.C.G.A. § 13-6-11 merely because the corporation refused to pay the additional amount demanded by the city; and (3) the city did not present any evidence showing that the corporation acted in bad faith in making the contract, that the corporation had been stubbornly litigious, or that the corporation had caused the city unnecessary trouble and expense, any of which could be used as a basis for an attorney fee award under O.C.G.A. § 13-6-11. *City of Lawrenceville v. Ricoh Elecs., Inc.*, 370 F. Supp. 2d 1328 (N.D. Ga. Mar. 4, 2005).

When defendant entitled to judgment. — Since the defendant was entitled to judgment on the substantive count of plaintiff's complaint, it necessarily follows that the defendant was also entitled to judgment on the plaintiff's claim for attorney fees. *Arford v. Blalock*, 199 Ga. App. 434, 405 S.E.2d 698,

cert. denied, 199 Ga. App. 906, 405 S.E.2d 698 (1991), *aff'd sub nom. Wilensky v. Blalock*, 262 Ga. 95, 414 S.E.2d 1 (1992).

When there was no evidence of any complaints to defendant developers while a subdivision was being built or that the drainage system was designed with knowledge that the system would increase the runoff of storm-water or sediment onto plaintiffs' property, and when the developers complied with all requirements imposed by the county, plaintiffs' failure to comply with the county's request that the plaintiffs provide documentation of the plaintiffs' complaints and the findings of various governmental agencies as to plaintiffs' lack of damages supported the granting of summary judgment to the developers as to plaintiffs' claims for punitive damages and attorney fees. *Tyler v. Lincoln*, 236 Ga. App. 850, 513 S.E.2d 6 (1999).

Default judgment inappropriate. — Even assuming that the factual allegations in the complaint were true, plaintiff has not demonstrated that defendant acted in bad faith, has been stubbornly litigious, or has caused plaintiff unnecessary trouble and expense; thus, plaintiff's request for a default judgment on the issue of attorney's fees was properly denied. *Ragsdale v. Giamboi* (In re Sands), No. 03-66109, 2003 Bankr. LEXIS 2002 (Bankr. N.D. Ga. Feb. 3, 2003).

Default judgments. — Fact that judgment was entered by default does not make an award of attorney fees improper under O.C.G.A. § 13-6-11. *Fresh Floors, Inc. v. Forrest Cambridge Apts., LLC*, 257 Ga. App. 270, 570 S.E.2d 590 (2002).

Ten years of litigation justified attorney fee award. — Evidence of almost ten years of protracted litigation and appeals, coupled with the trial court's finding of fraud and bad faith, warranted an award of attorney fees. *Scriven v. Lister*, 235 Ga. App. 487, 510 S.E.2d 59 (1998).

Termination of contract after appeal in another case. — When the trial court found that defendant acted in bad faith, was stubbornly litigious, and caused plaintiff unnecessary trouble and expense because defendant waited until after the Supreme Court ruled on the plaintiff's appeal in another case before attempting to terminate the plaintiff's contract with defendant or otherwise attempting to renegotiate the contract terms to mitigate the potential damage to

plaintiff, since the Supreme Court's holding in the other case was by no means probable, the award for plaintiff's expenses of litigation in this action was improper. *DOT v. Arapaho Constr., Inc.*, 180 Ga. App. 341, 349 S.E.2d 196 (1986), *aff'd*, 257 Ga. 269, 357 S.E.2d 593 (1987).

Bad Faith, Fraud, and Deceit

Bad faith is a sufficient ground for award of attorneys' fees. *White, Weld & Co. v. Cowan*, 585 F.2d 136 (5th Cir. 1978).

Intention with which act is done determines whether act is in good or bad faith. *Atlanta Journal Co. v. Doyal*, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

Bad faith must arise from transaction that spawned lawsuit. — "Bad faith" referred to in O.C.G.A. § 13-6-11 must have arisen out of the transaction that spawned the lawsuit rather than out of the defendant's conduct in defending the case. *Salsbury Labs., Inc. v. Merieux Labs., Inc.*, 735 F. Supp. 1555 (M.D. Ga. 1989), *aff'd*, 908 F.2d 706 (11th Cir. 1990).

Bad faith relates to time prior to institution of suit. *Gordon v. Ogden*, 154 Ga. App. 641, 269 S.E.2d 499 (1980).

Language of this statute clearly points to bad faith prior to institution of action, rather than to motive with which particular suit is being defended. *Brooks v. Steele*, 139 Ga. App. 496, 229 S.E.2d 3 (1976) (see O.C.G.A. § 13-6-11).

Bad faith under O.C.G.A. § 13-6-11 is bad faith arising out of the transaction upon which the complaint is based and refers to a time prior to the institution of action. *Brannon Enters., Inc. v. Deaton*, 159 Ga. App. 685, 285 S.E.2d 58 (1981).

When appellee agreed to submit issue of attorney fees to jury under a bad faith theory only, appellant's conduct subsequent to formation and breach of alleged agreement in question was irrelevant. *Albert v. Albert*, 164 Ga. App. 783, 298 S.E.2d 612 (1982).

Element of bad faith that will support a claim for litigation expenses under O.C.G.A. § 13-6-11 must relate to the acts in a transaction itself prior to litigation, not to the conduct during or motive with which a party proceeds in the litigation. *Fresh Floors, Inc. v. Forrest Cambridge Apts., LLC*, 257 Ga. App. 270, 570 S.E.2d 590 (2002).

Bad Faith, Fraud, and Deceit (Cont'd)

Bad faith under which expenses of litigation are allowable means bad faith in entering contract in the first place. *Murray v. Americare-Medical Designs, Inc.*, 123 Ga. App. 557, 181 S.E.2d 871 (1971).

Bad faith in original cause of action. — Bad faith which would authorize recovery of attorney's fees as expenses of litigation is fraud or bad faith of defendant in transaction out of which cause of action arose. *Bankers Health & Life Ins. Co. v. Plumer*, 67 Ga. App. 720, 21 S.E.2d 515 (1942).

Bad faith which will authorize recovery of attorney's fees in action seeking damages and attorney's fees is bad faith in transaction out of which cause of action arose. *Ford Motor Credit Co. v. Hitchcock*, 116 Ga. App. 563, 158 S.E.2d 468 (1967).

"Bad faith" contemplated by O.C.G.A. § 13-6-11 is bad faith connected with the transaction and dealings out of which the cause of action arose, rather than bad faith in defending or resisting the claim after the cause of action has already arisen. *Brown v. Baker*, 197 Ga. App. 466, 398 S.E.2d 797 (1990).

Bad faith authorizing an award of attorney's fees in a contract action must relate to the conduct of entering the contract or to the transaction and dealings out of which the cause of action arose, which includes not only the negotiations and formulation of the contract but also performance of the contractual provisions. *Baxley Veneer & Clete Co. v. Maddox*, 198 Ga. App. 235, 401 S.E.2d 282 (1990), rev'd on other grounds, 261 Ga. 309, 404 S.E.2d 554 (1991).

Bad faith referred to in O.C.G.A. § 13-6-11 is not bad faith in refusing to pay but bad faith in the transaction out of which the cause of action arises. *Fine & Block v. Evans*, 201 Ga. App. 294, 411 S.E.2d 73 (1991).

Bad faith means bad faith in transaction which constitutes basis of action. *Grant v. Hart*, 197 Ga. 662, 30 S.E.2d 271 (1944); *Thibadeau Co. v. McMillan*, 132 Ga. App. 842, 209 S.E.2d 236 (1974), appeal dismissed, 233 Ga. 636, 213 S.E.2d 1 (1975); *Clark v. Aenchbacher*, 143 Ga. App. 282, 238 S.E.2d 442 (1977).

Bad faith means bad faith (such as fraud) in transaction out of which cause of action

arose. *Vacca v. Meetze*, 499 F. Supp. 1089 (S.D. Ga. 1980).

Presence or absence of bad faith on part of defendant lies solely in evidence of the defendant's conduct in dealings with plaintiff out of which suit arose, and not in plaintiff's ability to prove up plaintiff's damages, which can unquestionably be dependent on a spate of factors unrelated to defendant's moral culpability. *Georgia-Carolina Brick & Tile Co. v. Brown*, 153 Ga. App. 747, 266 S.E.2d 531 (1980).

Bad faith referred to, in actions sounding in tort, means bad faith in transaction out of which cause of action arose. *Atlanta Journal Co. v. Doyal*, 82 Ga. App. 321, 60 S.E.2d 802 (1950); *Knobeloch v. Mustascio*, 640 F. Supp. 124 (N.D. Ga. 1986); *Mallory v. Daniel Lumber Co.*, 191 Ga. App. 234, 381 S.E.2d 406 (1989); *City of Atlanta v. Murphy*, 194 Ga. App. 652, 391 S.E.2d 474 (1990).

Bad faith must have arisen from transaction, not defendant's defense of case. — Statutory bad faith necessary to establish a right to attorney fees must have arisen out of the transaction on which the cause of action is predicated rather than defendant's conduct in defending the case. *Allen v. Brackett*, 165 Ga. App. 415, 301 S.E.2d 486 (1983); *Cade v. Roberts*, 175 Ga. App. 800, 334 S.E.2d 379 (1985).

When bona fide controversy, bad faith damages not recoverable. — Bad faith damages are not recoverable under O.C.G.A. § 13-6-11 when there exists a bona fide controversy. *Hightower v. GMC*, 175 Ga. App. 112, 332 S.E.2d 336 (1985), aff'd, 255 Ga. 349, 338 S.E.2d 426 (1986), overruled on other grounds, *Pender v. Witcher*, 196 Ga. App. 856, 397 S.E.2d 193 (1990).

Bad faith may be found in absence of bona fide controversy. — When there was bad faith in a fraudulent transaction inducing the defendant bank to accept a warranty deed in lieu of foreclosure, attorney fees were authorized regardless of whether a bona fide controversy otherwise existed between the parties. *Kopp v. First Bank*, 235 Ga. App. 520, 509 S.E.2d 384 (1998).

Bad faith may be found despite existence of bona fide controversy. — Bona fide controversy within the contemplation of O.C.G.A. § 13-6-11 pertains solely to the issue of stubborn litigiousness or causing the plaintiff unnecessary trouble and expense.

Despite the existence of a bona fide controversy as to liability, a jury may find that defendant acted in the most atrocious bad faith in the defendant's dealing with the plaintiff. *Fidelity Nat'l Bank v. Kneller*, 194 Ga. App. 55, 390 S.E.2d 55 (1989); *Burlington Air Express, Inc. v. Georgia-Pacific Corp.*, 217 Ga. App. 312, 457 S.E.2d 219 (1995), cert. denied, 516 U.S. 989, 116 S. Ct. 520, 133 L. Ed. 2d 427 (1995).

If there is bad faith in the making or performance of a contract, attorney fees are authorized regardless of whether a bona fide controversy otherwise existed between the parties. *McDonald v. Winn*, 194 Ga. App. 459, 390 S.E.2d 890 (1990); *Walther v. Multicraft Constr. Co.*, 205 Ga. App. 815, 423 S.E.2d 725 (1992).

When evidence of bad faith in the transaction is presented, the existence of a bona fide ground for contesting liability is not dispositive of the claim for damages under O.C.G.A. § 13-6-11. *Windermere v. Bettes*, 211 Ga. App. 177, 438 S.E.2d 406 (1993).

Evidence that defendant acted in bad faith in the transaction and dealings out of which the cause of action arose authorized the jury's award of attorney fees, despite any bona fide dispute as to liability or damages. *Kemire, Inc. v. Williams Investigative & Sec. Servs., Inc.*, 215 Ga. App. 194, 450 S.E.2d 427 (1994); *DPLM, Ltd. v. J.H. Harvey Co.*, 241 Ga. App. 219, 526 S.E.2d 409 (1999).

Bona fide dispute without bad faith meant no attorney's fees. — Property owner sued a county alleging the county's approval of a neighbor's request for a conditional use permit was invalid. Although the owner's position was correct, the owner was not entitled to attorney's fees under O.C.G.A. § 13-6-11 because the parties had a bona fide dispute, the county's defense was reasonable, and the owner did not show that the county acted dishonestly or was motivated by sinister motive or ill will. *C & H Dev., LLC v. Franklin County*, 294 Ga. App. 792, 670 S.E.2d 491 (2008).

Defendant not chargeable absent bad faith. — Defendant is not chargeable with expenses of litigation unless the defendant has acted in bad faith as the constitutional right to be heard in the courts is granted to defendants as well as plaintiffs. *Pickett v. Chamblee Constr. Co.*, 124 Ga. App. 769, 186 S.E.2d 123 (1971).

When the trial court did not find bad faith or any other basis for an award of attorney fees, the award of expenses of litigation must fall. *Davis v. Davis*, 262 Ga. 420, 419 S.E.2d 913 (1992).

When there was no evidence from which a jury could find that a contract was made in bad faith or that the defendant breached the contract as a result of some sinister motive, the award of attorney's fees could not be sustained on the basis of bad faith. *Williams Tile & Marble Co. v. Ra-Lin & Assocs.*, 206 Ga. App. 750, 426 S.E.2d 598 (1992).

It was error for the auditor to find that plaintiff was entitled to an award of attorney's fees pursuant to O.C.G.A. § 13-6-11 since the auditor found that there was no bad faith and that a bona fide controversy existed. *AAA Pest Control, Inc. v. Murray*, 207 Ga. App. 631, 428 S.E.2d 657 (1993).

Trial court did not err in denying one partner's request for attorney fees and expenses of litigation pursuant to O.C.G.A. § 13-6-11 because the partner cited to no evidence showing that a second partner acted in bad faith; the record in the case demonstrated that a bona fide controversy existed between the parties. *Memar v. Jebrailli*, No. A10A0710, 2010 Ga. App. LEXIS 378 (Apr. 7, 2010).

Party sought to be charged acted in bad faith. — When a bona fide controversy exists, attorney's fees may be awarded under O.C.G.A. § 13-6-11 only when the party sought to be charged has acted in bad faith in the underlying transaction. *Latham v. Faulk*, 265 Ga. 107, 454 S.E.2d 136 (1995).

Award not limited to amount pertaining to particular issue. — An award of expenses of litigation pursuant to O.C.G.A. § 13-6-11 is not limited to an amount pertaining to a particular issue. A party acting in bad faith should pay the full price for losing. *McDonald v. Winn*, 194 Ga. App. 459, 390 S.E.2d 890 (1990).

Actions based on fraud and deceit. — When action is based on fraud and deceit, expenses of litigation may be recovered. *F.N. Roberts Pest Control Co. v. McDonald*, 132 Ga. App. 257, 208 S.E.2d 13 (1974).

Punitive damages are authorized when the evidence proves fraud was committed, and in such actions attorney fees may be recovered under O.C.G.A. § 13-6-11. *Carco Supply Co. v. Clem*, 194 Ga. App. 566, 391 S.E.2d 134 (1990).

Bad Faith, Fraud, and Deceit (Cont'd)

Attorney fees recoverable when contract procured through fraud and deceit. — Once a jury determines that defendant procured a contract through fraudulent and deceitful means, the jury is authorized to consider the matter of attorney fees as an expense of litigation. *F.N. Roberts Pest Control Co. v. McDonald*, 132 Ga. App. 257, 208 S.E.2d 13 (1974).

Double recovery of fees based on bad faith and breach of statutes prohibited. — Although an injured party could have recovered attorney fees for appellants' bad faith under O.C.G.A. § 13-6-11 or for appellants' breach of the beauty pageant statutes under O.C.G.A. § 10-1-835, the law prohibited a double recovery of attorney fees and expenses as damages when the tortfeasors alleged that the injured party cheated in a beauty pageant, resulting in the injured party being effectively barred from the pageant, and causing the injured party to be unable to find work as an adult entertainer. *Galardi v. Steele-Inman*, 259 Ga. App. 249, 576 S.E.2d 555 (2002).

Words "bad faith" not required in prayer for fees. — O.C.G.A. § 13-6-11 does not require the words "bad faith" to be included in the prayer for attorney's fees. *Salsbury Labs., Inc. v. Merieux Labs., Inc.*, 735 F. Supp. 1555 (M.D. Ga. 1989), *aff'd*, 908 F.2d 706 (11th Cir. 1990).

If there is any reasonable ground to contest a claim, there is no bad faith and it is error for court to permit jury to return a verdict for penalties and attorney fees. *First Nat'l Bank v. Wynne*, 149 Ga. App. 811, 256 S.E.2d 383 (1979).

When there is, as matter of law, reasonable defense, attorney fees are not recoverable. *Ebcso Gen. Agency v. Mitchell*, 186 Ga. App. 874, 368 S.E.2d 782, *cert. denied*, 186 Ga. App. 917, 368 S.E.2d 782 (1988).

Bad faith does not refer to defense. — Bad faith refers to transaction out of which the cause of action arose, rather than to motive with which defense is made. *Traders. Ins. Co. v. Mann*, 118 Ga. 381, 45 S.E. 426 (1903); *Shemwell v. Graham*, 166 F.2d 391 (5th Cir. 1948); *Adams v. Cowart*, 224 Ga. 210, 160 S.E.2d 805 (1968); *Pickett v. Chamblee Constr. Co.*, 124 Ga. App. 769, 186 S.E.2d 123 (1971); *G.E.C. Corp. v. Levy*,

126 Ga. App. 604, 191 S.E.2d 461 (1972); *Computer Communications Specialists, Inc. v. Hall*, 188 Ga. App. 545, 373 S.E.2d 630 (1988).

Bad faith refers to conduct of defendant in the defendant's dealings with plaintiff out of which suit arose, rather than defendant's conduct in defending suit. *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518 (5th Cir. 1974); *Southern Bell Tel. & Tel. Co. v. C & S Realty Co.*, 141 Ga. App. 216, 233 S.E.2d 9 (1977).

Bad faith has been consistently held by Georgia courts to refer to conduct of defendant in the defendant's dealings with plaintiff out of which suit arose, rather than defendant's conduct in defending suit. *Citizens & S. Nat'l Bank v. Bougas*, 149 Ga. App. 722, 256 S.E.2d 37 (1979), *rev'd in part* on other grounds, 245 Ga. 412, 265 S.E.2d 562 (1980).

In contract actions, bad faith refers to conduct of defendant out of which cause of action arose, not to defendant's conduct in defending the suit. *Raybestos-Manhattan, Inc. v. Friedman*, 156 Ga. App. 880, 275 S.E.2d 817 (1981).

Mere refusal to pay a disputed claim without suit is not sufficient to award attorney fees. See *Allen v. Brackett*, 165 Ga. App. 415, 301 S.E.2d 486 (1983).

Jury may allow attorney's fees if defendant has acted in bad faith in transaction out of which cause of action arose. *B-X Corp. v. Jeter*, 210 Ga. 250, 78 S.E.2d 790 (1953); *Scott v. Dudley*, 214 Ga. 565, 105 S.E.2d 752 (1958); *Moon v. Georgia Power Co.*, 127 Ga. App. 524, 194 S.E.2d 348 (1972); *Standard Oil Co. v. Mount Bethel United Methodist Church*, 230 Ga. 341, 196 S.E.2d 869 (1973); *Ford Motor Credit Co. v. Milline*, 137 Ga. App. 585, 224 S.E.2d 437 (1976); *Fratelli Gardino v. Caribbean Lumber Co.*, 447 F. Supp. 1337 (S.D. Ga. 1978), *aff'd in part* and *rev'd in part*, *Fratelli Gardino v. Caribbean Lumber Co.*, 587 F.2d 204 (5th Cir. 1979).

Contention that award in favor of party for attorney fees was unauthorized because the amount of party's judgment on the party's counterclaim was substantially less than the amount the party originally sought and because a bona fide controversy existed between the parties was without merit when attorney fees were sought on the ground that a party acted in bad faith. *Formica*

Corp. v. Rouse, 176 Ga. App. 548, 336 S.E.2d 383 (1985).

Great disparity between the damages sought and those actually awarded in a verdict may defeat an award of attorneys fees based on stubborn litigiousness under O.C.G.A. § 13-6-11, but not an award that is based on bad faith. Crocker v. Stevens, 210 Ga. App. 231, 435 S.E.2d 690 (1993), cert. denied, 511 U.S. 1053, 114 S. Ct. 1613, 128 L. Ed. 2d 340 (1994), overruled on other grounds, Kim v. Lim, 254 Ga. App. 627, 563 S.E.2d 485 (2002).

Every intentional tort invokes species of bad faith that entitles person wronged to recover expenses of litigation involving attorney's fees. Piedmont Cotton Mills, Inc. v. H.W. Ivey Constr. Co., 109 Ga. App. 876, 137 S.E.2d 528 (1964).

Disagreement as to terms not bad faith. — Disagreement as to certain terms and conditions of their contractual relationship is not sufficient to evidence any bad faith. Macon-Bibb County Water & Sewerage Auth. v. Tuttle/White Constructors, Inc., 530 F. Supp. 1048 (M.D. Ga. 1981).

Bad faith within meaning of O.C.G.A. § 33-4-6 not equivalent of that required by O.C.G.A. § 13-6-11. — Bad faith which authorizes recovery of attorney's fees under former Code 1933, §§ 56-706 and 56-1206 (see O.C.G.A. § 33-4-6), was not equivalent of having acted in bad faith under former Code 1933, § 20-1404 (see O.C.G.A. § 13-6-11). New York Life Ins. Co. v. Bradford, 57 Ga. App. 733, 196 S.E. 92 (1938).

Bad faith referred to in former Code 1933, §§ 56-706 and 56-1206 (see O.C.G.A. § 33-4-6) and former Code 1933, § 20-1404 (see O.C.G.A. § 13-6-11) was not the same. Canal Ins. Co. v. Lawson, 123 Ga. App. 376, 181 S.E.2d 91 (1971).

Refusal to pay, in bad faith, under former Code 1933, §§ 56-706 and 56-1206 (see O.C.G.A. § 33-4-6), governing insurance policies, was not legal equivalent of having acted in bad faith under former Code 1933, § 20-1404 (see O.C.G.A. § 13-6-11). Traders Ins. Co. v. Mann, 118 Ga. 381, 45 S.E. 426 (1903).

Evidence sufficient to award attorney's fees. — Former employee was properly awarded attorney's fees in a breach of contract suit for the former employer's failure to

pay the employee under a deferred compensation agreement because there was sufficient evidence showing that the denial of deferred compensation was not based on a good faith belief that the employee was terminated due to a corporate reorganization, rather than due to the employee's disability. Capital Health Mgmt. Group, Inc. v. Hartley, 301 Ga. App. 812, 689 S.E.2d 107 (2009).

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Mere failure of a defendant to pay a claim does not constitute bad faith; moreover, the refusal to pay a disputed claim is not the equivalent of stubborn litigiousness, nor will refusal to pay support a claim that defendant caused the plaintiff unnecessary trouble and expense. Beacon Indus., Inc. v. Vanderbunt Concrete, Ltd., 172 Ga. App. 573, 323 S.E.2d 871 (1984); Harrell v. Gomez, 174 Ga. App. 8, 329 S.E.2d 302 (1985); Annis v. Tomberlin & Shelnutt Assocs., 195 Ga. App. 27, 392 S.E.2d 717 (1990); Plemons v. Weaver, 243 Ga. App. 464, 533 S.E.2d 747 (2000); Wachovia Bank v. Reynolds, 244 Ga. App. 1, 533 S.E.2d 743 (2000); Artzner v. A & A Exterminators, Inc., 242 Ga. App. 766, 531 S.E.2d 200 (2000); Kraft v. Dalton, 249 Ga. App. 754, 549 S.E.2d 543 (2001).

Transactions out of which cause of action arose include performance of contract. — This court construes "transactions and dealings out of which cause of action arose" to mean not only negotiation and formulation of contract, but also included is performance of contractual provisions. Edwards-Warren Tire Co. v. Coble, 102 Ga. App. 106, 115 S.E.2d 852 (1960).

In a buyer's breach of contract claim against a seller, it was error to grant a directed verdict on the buyer's claim for attorney fees. The evidence that the seller breached the parties' contract by requiring the buyer to pay for the goods before inspecting the goods and that the seller further breached the contract by not allowing the buyer to thereafter inspect the parts, thereby unilaterally ceasing performance of the contractual obligations, constituted a sufficient basis upon which the jury could determine that the seller acted in bad faith under the contract. Energy & Process Corp.

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v. Jim Dally & Assocs., 291 Ga. App. 772, 662 S.E.2d 835 (2008).

Elements of bad faith which will authorize expenses of litigation in ex contractu action are those acts relative to conduct of entering into contract or to transaction and dealings out of which cause of action arose but do not have reference to motive with which defendant defends action after a cause of action has arisen. *Edwards-Warren Tire Co. v. Coble*, 102 Ga. App. 106, 115 S.E.2d 852 (1960); *Brooks v. Steele*, 139 Ga. App. 496, 229 S.E.2d 3 (1976); *Vitner v. Funk*, 182 Ga. App. 39, 354 S.E.2d 666 (1987).

Bad faith in carrying out contract, beyond refusal to pay debt, authorizes award. — While bad faith does not have reference to a simple refusal to pay a debt which results in requiring a party to employ counsel and institute legal action or to the motive with which the defendant defends the action, there may be bad faith in carrying out the provisions of the contract sufficient to support the award, and bad faith in a breach of contract, other than mere refusal to pay a just debt, may authorize the jury to award attorney fees, provided it is not prompted by an honest mistake as to one's rights or duties but by some interested or sinister motive. *Glen Restaurant, Inc. v. West*, 173 Ga. App. 204, 325 S.E.2d 781 (1984).

Evidence that defendant lenders employed sham documents in the course of the transaction with plaintiff borrower, and sought a far greater sum than plaintiff had received from a series of loans was sufficient to establish bad faith. *Crawford v. Crump*, 223 Ga. App. 119, 476 S.E.2d 855 (1996).

Breach of option contract and refusal to return consideration as constituting bad faith. — Allegations of petition which disclose that defendant not only breached terms of written option contract by demanding more money for subject property, but that the defendant also refused to return \$150.00 paid to the defendant as consideration for option contract, are sufficient to authorize conclusion that defendant was guilty of bad faith and presented a question for jury on issue of recovery of attorney's fees. *Yun-Kung Shen v. Bruce*, 113 Ga. App. 483, 148 S.E.2d 496 (1966).

Bad faith in sale of company. — Circumstances surrounding the sale of a business provided sufficient support of an award for attorney's fees since the jury was authorized to find that the seller was dishonest, and thus had acted in bad faith, in the seller's dealings in negotiating the sale of the company. *Shepherd v. Aaron Rents, Inc.*, 208 Ga. App. 139, 430 S.E.2d 67 (1993).

Claim cannot be predicated solely upon bad faith in carrying out obligations. — Since plaintiff's claim for attorney's fees in action for breach of contract was predicated solely upon defendant's bad faith in carrying out the defendant's obligations, and not for allegedly having been stubbornly litigious or having caused plaintiffs unnecessary trouble and expense, the trial judge did not err in granting defendant's motion for judgment n.o.v. as to attorney's fees. *Mutual Fed. Sav. & Loan Ass'n v. Johnson*, 124 Ga. App. 68, 183 S.E.2d 50 (1971).

Promise as to future event made with present intention not to perform as actionable fraud. — Although failure to perform a future act does not constitute actionable fraud under Georgia law, there exists an exception for promises as to future events made with present intention not to perform. *Vacca v. Meetze*, 499 F. Supp. 1089 (S.D. Ga. 1980).

Bad faith when defendant lacked intent to perform under contract. — Evidence may be sufficient to show that defendants have acted in bad faith in a transaction when it shows lack of intention by defendants to perform the defendants' obligation under a contract. *Spearman v. Flanders*, 143 Ga. App. 759, 240 S.E.2d 141 (1977).

No present intention of keeping contract is bad faith. — Evidence that defendant entered into contractual agreements with no present intention of keeping the contract was sufficient to authorize the charge to the jury and the recovery of attorney fees for bad faith. *Gaines v. Crompton & Knowles Corp.*, 190 Ga. App. 863, 380 S.E.2d 498, cert. denied, 190 Ga. App. 897, 380 S.E.2d 498 (1989).

Bad faith in violations of Fair Business Practices Act. — Trial court erred in granting summary judgment to an auto dealership in a purchaser's suit asserting fraud and violations of Georgia's Fair Business Practices Act, O.C.G.A. § 10-1-390 et

seq., with regard to the purchase of a vehicle as genuine issues of material fact existed as to each element, including whether the purchaser was entitled to attorney fees under O.C.G.A. §§ 10-1-399 and 13-6-11 since there was evidence from which the jury could find that the auto dealership acted in bad faith by offering a vehicle for sale that was not the more valuable model the dealership represented the vehicle to be; that the auto dealership caused the purchaser unnecessary trouble and expense; and that the dealership violated the Act. *Johnson v. GAPVT Motors, Inc.*, 292 Ga. App. 79, 663 S.E.2d 779 (2008).

Lessee did not act in bad faith. — In an action for a failure to surrender the premises on time and in proper condition, the trial court properly granted summary judgment to the lessee on the lessor's claim for attorney's fees because there was no evidence that the lessee acted in bad faith in causing the lessor's injury. *Lay Bros., Inc. v. Golden Pantry Food Stores, Inc.*, 273 Ga. App. 870, 616 S.E.2d 160 (2005).

Bad faith in real estate contract. — Sufficient evidence was presented that a home seller acted in bad faith in connection with the failed real estate deal in that: (1) the seller stated that the seller had no intention of selling the home to the buyers and that the seller would try to sell the home to someone else, in spite of the fact that the buyers were ready and able to complete the deal; and (2) despite this admission, and despite the seller's failure to timely complete the home, the seller still planned on keeping the buyers' \$20,000 in earnest money. *Bourke v. Webb*, 277 Ga. App. 749, 627 S.E.2d 454 (2006).

Bad faith in performance of construction contract. — In an action arising from plaintiffs' dissatisfaction with the construction of plaintiffs' new home, the evidence authorized the jury to find bad faith by the defendants in the performance of defendants' contract with the plaintiffs, regardless of whether the jury decided that one defendant had passively concealed certain construction defects. *Runion v. Hofer*, 245 Ga. App. 854, 538 S.E.2d 462 (2000).

Bad faith in contractor and subcontractor relationships. — General contractor refused to pay its subcontractor without explanation after the latter completed the work, the

general contractor's answer denied having a contract with the subcontractor or that the subcontractor had completed the work, but the general contractor admitted at trial that the subcontractor was entitled to payment, less a setoff in an amount the general contractor could not document. This evidence allowed the jury to find that the general contractor acted in bad faith, entitling the subcontractor to attorney's fees under O.C.G.A. § 13-6-11. *Roofers Edge, Inc. v. Std. Bldg. Co.*, 295 Ga. App. 294, 671 S.E.2d 310 (2008).

Bad faith of subcontractor. — There was sufficient bad faith on the part of a subcontractor who failed to substantially perform work, and on whose bid the contractor had relied upon when the contractor submitted the contractor's bid, that the award of litigation expenses to contractor was justified; it was within jury's province to award litigation costs. *SKB Indus., Inc. v. Insite*, 250 Ga. App. 574, 551 S.E.2d 380 (2001).

Bad faith to customer meant award against customer. — As a construction company customer engaged in bad faith when the customer ordered numerous changes and upgrades to a construction project but then the customer refused to pay for the changes, and further, when the customer attempted to coerce the continuation of the work through threats to the company president, the company was entitled to a jury award of attorney fees under O.C.G.A. § 13-6-11. *Chong v. Reebaa Constr. Co.*, 292 Ga. App. 750, 665 S.E.2d 435 (2008).

Lack of contract did not impact fee award. — In a business dispute, there was no merit to the argument of the defendants, a developer and a limited liability company, that the trial court erred in awarding attorney fees under O.C.G.A. § 13-6-11 because there was no contract between the parties. The statute was not restricted to actions for breach of contract, and the defendants did not show that the award was unsupported by any evidence. *Harbolt v. Pelletier*, 291 Ga. App. 582, 662 S.E.2d 355 (2008).

In an action for trespass and damage to trees, evidence that a power corporation exceeded a condemnation order by cutting trees outside the right-of-way was sufficient to support a jury finding of bad faith and the award of attorney fees. *Oglethorpe Power Corp. v. Sheriff*, 210 Ga. App. 299, 436 S.E.2d 14 (1993).

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In a declaratory judgment action brought by adjoining landowners against two neighbors regarding an easement, the trial court properly awarded the adjoining landowners attorney fees since the evidence supported the trial court's conclusion that the neighbors' blocking of the driveway easement by planting trees, which prevented the adjoining landowners from obtaining access to their lots, constituted a willful trespass entitling the landowners to recovery of attorney fees. *Mize v. McGarity*, 293 Ga. App. 714, 667 S.E.2d 695 (2008).

Despite contract provision, attorney fees awarded. — Even though contract between the Department of Transportation and a contractor provided that the Department was not liable for attorney fees, that did not preclude a finding by the jury that the contractor was entitled to attorney fees when the Department acted in bad faith. *DOT v. Dalton Paving & Constr., Inc.*, 227 Ga. App. 207, 489 S.E.2d 329 (1997).

Contract between client and realtor not in bad faith. — Summary judgment was properly denied on a broker's claim for attorney fees under O.C.G.A. § 13-6-11 because there was no evidence that the client made the contract, agreeing to pay commission on the sale of a home to the broker, in bad faith or that the client's breach was the result of a sinister motive as matter of law. *Steel Magnolias Realty, LLC v. Bleakley*, 276 Ga. App. 155, 622 S.E.2d 481 (2005).

Bad faith in denial of commissions. — Plaintiff's testimony that defendant company's management denied plaintiff's right to commissions and told plaintiff that plaintiff would have to sue to recover the commissions was sufficient to authorize attorney's fees based on defendant's bad faith refusal to perform under the contract. *Southern Water Techs., Inc. v. Kile*, 224 Ga. App. 717, 481 S.E.2d 826 (1997).

Bad faith of bank in repossession. — Trial court properly awarded attorney fees to the injured party under O.C.G.A. § 13-6-11 since there was evidence that the bank acted in bad faith in the wrongful repossession of the injured party's trailer when the bank failed to attempt to identify the trailer's owner prior to seizing the trailer. *Gateway*

Bank & Trust v. Timms, 259 Ga. App. 299, 577 S.E.2d 15 (2003).

Bad faith of estate administrator. — Fact that a personal representative prolonged administration of the estate so the personal representative could wrongfully have the estate's primary asset, a house, conveyed to the personal representative entitled the beneficiary to litigation expenses, including attorney fees, under O.C.G.A. §§ 9-15-14(b) and 13-6-11. *In re Estate of Zeigler*, 295 Ga. App. 156, 671 S.E.2d 218 (2008).

Bad faith not exhibited by trustee. — Trust beneficiaries were not entitled to attorney's fees pursuant to O.C.G.A. § 13-6-11 or O.C.G.A. § 53-12-193(a)(4), on the basis of bad faith, because the trustee's actions in failing to lease the trust property or otherwise generate income while debt for property taxes, insurance, and utilities continued to increase, although unreasonable, were not conclusively established to be in bad faith. *Davis v. Walker*, 288 Ga. App. 820, 655 S.E.2d 634 (2007).

Trespass. — Trespass, an intentional tort, will support a claim for litigation expenses under the theory that the intention evokes that "bad faith" necessary for recovery under O.C.G.A. § 13-6-11. *Tanner v. Gilleland*, 186 Ga. App. 377, 367 S.E.2d 257 (1988).

Court properly allowed the jury to enter an award for attorney fees and litigation expenses when the complaint averred and the jury found that the defendant was liable for committing the intentional tort of trespass. *KDS Properties, Inc. v. Sims*, 234 Ga. App. 395, 506 S.E.2d 903 (1998).

In a trespass action filed against owners of property by the holder of an easement across the owners' property, attorney fees were properly awarded to the holder under O.C.G.A. § 13-6-11 because the holder pled a claim for attorney fees and there was evidence that the owners participated in the repeated and knowing obstruction of the holder's easement and intrusion onto the holder's property. *Paine v. Nations*, 283 Ga. App. 167, 641 S.E.2d 180 (2006).

Bad faith in trespass and nuisance suit. — In a trespass and nuisance suit involving two landowning couples, because there was some evidence from which a jury could find that the second couple acted in bad faith in plugging an underground drainage pipe, it was error to grant summary judgment to the

second couple on the first couple's claim for attorney fees under O.C.G.A. § 13-6-11. *Merlino v. City of Atlanta*, 283 Ga. 186, 657 S.E.2d 859 (2008).

Bad faith in diversion of water. — When there was some evidence that defendant-developer intentionally diverted the flow of water onto plaintiff-homeowner's property, the trial court properly denied defendant's motion for directed verdict on the claim for attorney fees. *Ross v. Hagler*, 209 Ga. App. 201, 433 S.E.2d 124 (1993).

Company did not act in bad faith in employment contract. — Consultant was granted back wages as a matter of law because the consultant's inartfully-worded employment contract covered a rolling period that effectively continued the consultant's employment for six months after the consultant's date of termination; however, the consultant was not entitled to attorney fees under O.C.G.A. § 13-6-11 because the company did not refuse to pay in bad faith. *Tura v. White Oak Group, Inc.*, No. 1:07-CV-0379-JOF, 2008 U.S. Dist. LEXIS 77958 (N.D. Ga. Sept. 15, 2008).

Employer acted in bad faith. — Litigation expenses pursuant to O.C.G.A. § 13-6-11 were properly awarded to an employee alleging breach of an employment agreement when there was support for the jury's verdict that the employer acted in bad faith, despite the possible determination that there was a bona fide controversy; the evidence indicated that the employer refused to honor the employee's agreement, that the employee had provided 12 years of loyal service, that there was animosity between the employee and new management, and that the employer had indicated a desire to terminate the employee due to the employee's high salary. *ISS Int'l Serv. Sys. v. Widmer*, 264 Ga. App. 55, 589 S.E.2d 820 (2003).

Bad faith in misappropriating owner's intellectual property. — Copyright owner failed to state a claim for attorney's fees under O.C.G.A. § 13-6-11 to be resolved on summary judgment because there was some evidence to support the owner's claim that the customer acted with bad faith in breaching the parties' agreement and misappropriating the owner's intellectual property. *SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc.*, 455 F. Supp. 2d 1347 (N.D. Ga. 2006).

Tortfeasor's bad faith does not equal uninsured motorist insurer's bad faith. — Be-

cause an insured's bad faith claim was based upon a tortfeasor's conduct, the insured did not incur attorney's fees and expenses because of the bodily injury or property damage that the insured sustained; thus, pursuant to the plain language of O.C.G.A. § 33-7-11(b)(1)(D)(ii), the insured could not recover attorney's fees and expenses from the insured's uninsured motorist insurer under O.C.G.A. § 13-6-11. *Smith v. Stoddard*, 294 Ga. App. 679, 669 S.E.2d 712 (2008).

Litigation expenses were recoverable by an insurance company when it was established that the insurance contracts were entered into in bad faith or were procured by fraud. *Guarantee Trust Life Ins. Co. v. Wood*, 631 F. Supp. 15 (N.D. Ga. 1984).

Bad faith of insurer. — Evidence was sufficient to show that plaintiff insurer acted in bad faith by failing to verify the data which formed the basis of the premium charged defendant and failing to respond in any constructive fashion when defendant sought correction of erroneous premiums. *International Indem. Co. v. Regional Employer Serv., Inc.*, 239 Ga. App. 420, 520 S.E.2d 533, cert. denied, 1999 Ga. LEXIS 1019 (1999).

Insured's claim based on bad faith failed. — When the trial court found that defendant insurer was not liable to the insured since the plaintiff breached three separate conditions precedent in the policy, plaintiff's claim for bad faith penalties likewise failed. *Hill v. Safeco Ins. Co. of Am.*, 93 F. Supp. 2d 1375 (M.D. Ga. 1999).

Failure to comply with fire safety regulations was bad faith. — Evidence that a landlord failed to comply with fire safety regulations promulgated for the benefit of residents of an apartment who received injuries when forced to leap from the second story of a burning apartment building because the exits were not safe to use was sufficient to show "bad faith" justifying an award of litigation expenses. *Windermere v. Bettes*, 211 Ga. App. 177, 438 S.E.2d 406 (1993).

Bad faith of homeowners in dealing with home builder. — Appeals court upheld an attorney-fee award based on the bad faith exhibited by the home buyers' refusal to pay the \$40,000 final change order, even though the buyers admitted: (i) owing the buyers' home builder for additional allowance overages and change orders; and (ii) that

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out of the \$40,000 owed, the buyers could only point to \$800 for which the builder had failed to provide the buyers with a subcontractor invoice to verify the legitimacy of the charges. *Davis v. Whitford Props.*, 282 Ga. App. 143, 637 S.E.2d 849 (2006).

Legitimate award of damages for an intentional tort, such as trespass or intentional conversion, generally will support a claim for expenses under O.C.G.A. § 13-6-11 under the theory that the intention evokes that bad faith necessary for recovery under the statute. *Rossee Oil Co. v. BellSouth Telecommunications, Inc.*, 212 Ga. App. 235, 441 S.E.2d 464 (1994).

Award of damages for the intentional tort of conversion alone was sufficient to support plaintiff's claim for expenses under the "bad faith" prong of O.C.G.A. § 13-6-11. *Infinity Ins. Co. v. Martin*, 240 Ga. App. 609, 524 S.E.2d 294 (1999).

Bad faith may arise from intentional tort. — Store and the store's employees were not entitled to summary judgment on a parent's claim for expenses of litigation under O.C.G.A. § 13-6-11 in the parent's intentional tort action arising out of the employees' claim that the child stole from the store because summary judgment was not granted on all of the parent's claims and, if proven, the intentional tort claims would authorize damages under O.C.G.A. § 13-6-11 because every intentional tort invoked a species of bad faith that entitled a person wronged to recover the expenses of litigation, including attorney fees. *Todd v. Byrd*, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, *Ferrell v. Mikula*, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Bad faith not shown in negligence suit. — In a negligence suit, the defendants should have been granted a directed verdict as to the plaintiff's claim for litigation expenses under O.C.G.A. § 13-6-11. Because there was a bona fide controversy as to whether the plaintiff exercised ordinary care, a showing of bad faith on the defendants' part was required, and as there was no showing of any interested or sinister motive, dishonest purpose, moral obliquity, conscious wrongdoing, or any other species of bad faith, the plaintiff had not shown that the defendants

had acted in bad faith. *MARTA v. Mitchell*, 289 Ga. App. 1, 659 S.E.2d 605 (2007).

Wrongful death cases. — In a wrongful death case, since there was evidence to support a finding of bad faith on the part of the surviving spouse who represented the spouse's own interests at the same time the spouse represented the children's interests, the trial court did not err in denying the spouse's motion for a directed verdict as to the attorney fees. *Home Ins. Co. v. Wynn*, 229 Ga. App. 220, 493 S.E.2d 622 (1997).

Defendant's actual knowledge of defect in question. — Evidence amply authorized an award of litigation expenses on the basis of an automobile manufacturer's having acted in bad faith in the transaction out of which the cause of action arose; the manufacturer was shown to have actual knowledge before the sale of a defect in the manufacturer's product from which the manufacturer could have reasonably foreseen injury of the specific type sustained. *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984).

Driving while intoxicated may constitute "willful" misconduct and, therefore, "bad faith" under O.C.G.A. § 13-6-11. See *Knobeloch v. Mustascio*, 640 F. Supp. 124 (N.D. Ga. 1986).

Attorney's bad faith in refusing to return fee. — In a former client's suit for fraud, breach of contract, and other claims against a former attorney, who refused to return the retainer paid after being fired, the trial court erred by denying summary judgment to the attorney on the former client's claim for attorney fees and by deferring the matter for a later ruling since the trial court concluded that the record failed to show bad faith as required under O.C.G.A. § 13-6-11. *Nash v. Studdard*, 294 Ga. App. 845, 670 S.E.2d 508 (2008).

Bad faith in contract for medical services. — When plaintiff patient sued defendant manufacturer of a surgically implanted medical device, alleging breach of contract to pay for a third surgery to remove the device, the manufacturer's motion for summary judgment on the issue of the patient's ability to recover attorney fees under O.C.G.A. § 13-6-11 was denied because even though there was a bona fide controversy as to liability or amount of liability, the patient testified that after receiving the manufactur-

er's letter agreeing to pay for the third surgery, the manufacturer's representative directed the patient to check into a hospital for surgery as a "private patient," preventing the hospital from billing the patient's health insurance company, but that the manufacturer did not act on any of the manufacturer's obligations as set out in the letter until after the patient filed suit. *Trickett v. Advanced Neuromodulation Sys.*, 542 F. Supp. 2d 1338 (S.D. Ga. 2008).

Refusal to deliver truck title was bad faith.

— Jury's award of attorney fees was held proper when the jury was authorized to find that defendant's refusal to tender the title to a truck brought by the plaintiff was without foundation, was characterized by bad faith, and had resulted in unnecessary trouble and expense to the plaintiff, within the contemplation of O.C.G.A. § 13-6-11. *I.M.C. Motor Express, Inc. v. Cochran*, 180 Ga. App. 232, 348 S.E.2d 750 (1986).

"Plaintiff in counterclaim" action when main action alleged to be fraudulent.

— When the gravamen of defendant's counterclaim was that it was required to defend itself against an allegedly spurious claim, such a claim cannot be made as a counterclaim in the subject lawsuit and defendant could not avoid this rule of law merely by characterizing the defendant's claim as one based upon fraud. Therefore, defendant was not "plaintiff in counterclaim" and the defendant's claim for attorney fees and litigation expenses was not viable. *Barnes v. White County Bank*, 170 Ga. App. 681, 318 S.E.2d 74 (1984).

Bad faith in attorney's representation of client. — Evidence supported an award of attorney fees because the evidence presented by the client in a legal malpractice suit could authorize a jury to conclude that, despite owing the client a fiduciary duty, the attorney's persistent failure to adequately represent the client went beyond mere negligence and rose to the level of bad faith. *Brito v. Gomez Law Group, LLC*, 289 Ga. App. 625, 658 S.E.2d 178 (2008).

"So sue me" attitude not present. — Court erred in awarding attorney fees and litigation expenses to a court reporting service in their suit against an attorney for the payment of fees as there was no evidence that the attorney acted in bad faith in the transactions underlying the suit, and did not

exhibit a "so sue me" attitude, but instead advised the court reporters of a willingness to "work something out" long before a lawsuit was filed. *Free v. Lankford & Assocs., Inc.*, 284 Ga. App. 328, 643 S.E.2d 771 (2007), cert. denied, 2007 Ga. LEXIS 560 (Ga. 2007).

"Sue me" attitude justified attorney fees award to partially successful plaintiff.

— Trial court's award of attorney fees to the buyer in the buyer's action against the construction company for breach of warranty was affirmed despite the trial court having found against the buyer in the buyer's claims against the company's owners since the appellate court found evidence to support the trial court's finding that the company caused unnecessary trouble and expenses to the buyer by a "sue me" attitude regarding doing anything more than patch repairs; obtaining some but less than all of the relief sought was sufficient to authorize the award of attorney fees. *Clearwater Constr. Co. v. McClung*, 261 Ga. App. 789, 584 S.E.2d 61 (2003).

Forcing plaintiff to court when no defense exists.

— When no defense exists in an action, forcing a plaintiff to resort to the courts in order to collect an amount plainly constitutes the causing of "unnecessary trouble and expense" for purposes of O.C.G.A. § 13-6-11. *Sawgrass Bldrs., Inc. v. Realty Coop.*, 172 Ga. App. 324, 323 S.E.2d 243 (1984).

Seller of property who made an honest mistake in deciding that the seller was not obligated to pay a broker

for the broker's services did not act in bad faith, and the broker-plaintiff was not entitled to litigation expenses. *Coldwell Banker Com. Group, Inc. v. Nodvin*, 598 F. Supp. 853 (N.D. Ga. 1984), aff'd, 774 F.2d 1177 (11th Cir. 1985).

Attorney's fees awarded in error.

— Trial court erred in awarding attorney fees under O.C.G.A. § 13-6-11 to the carpet purchaser after the trial court found that an inference of bad faith could be drawn against the carpet supplier as the record showed an honest dispute over the parties' transaction involving the purchase and installation of carpeting, and did not show the bad faith related to the underlying transaction that was necessary to award attorney fees. *Lexmark Carpet Mills, Inc. v. Color Concepts, Inc.*, 261 Ga. App. 622, 583 S.E.2d 458 (2003).

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In a breach of contract action with regard to the installation of a landscape irrigation system, the trial court erred by awarding the irrigation company attorney fees based on the customer's alleged bad faith because bona fide controversies existed as to the nature of the parties' agreement in light of the modifications to the landscape design and also as to whether the customer breached any such agreement by failing to pay the balance in full without receiving an irrigation system to the customer's satisfaction. Because the record did not demand a finding that the customer breached the parties' agreement or otherwise owed the irrigation company the balance for the work performed and, in the absence of a finding of bad faith on the customer's part, the irrigation company was not entitled to attorney's fees under O.C.G.A. § 13-6-11 as a matter of law. *Christie v. Rainmaster Irrigation, Inc.*, 299 Ga. App. 383, 682 S.E.2d 687 (2009).

Attorney's fees not apportioned. — Attorney's fees and costs awarded pursuant to O.C.G.A. § 13-6-11 to a stockholder, in a suit against a corporation and the corporation's other owners, was vacated and remand was ordered for an evidentiary hearing in order to determine the amount attributable solely to the claims in which the stockholder prevailed; thus, insofar as *Ins. Co. of North America v. Allgood Elec. Co.*, 229 Ga. App. 715 (1997), *CSX Transp. v. West*, 240 Ga. App. 209 (1999), and *Lincoln v. Tyler*, 258 Ga. App. 374 (2002), conflicted with this premise, as those cases failed to require an apportionment of attorney fees based on bad faith, those cases were overruled. *Monterrey Mexican Rest. of Wise, Inc. v. Leon*, 282 Ga. App. 439, 638 S.E.2d 879 (2006).

Some evidence of bad faith. — In a suit against an employer by a former employee who claimed that the employer and the officers had the duty to tell the employee, as a minority shareholder, of a potential merger prior to the sale of the employee's stock, there was some evidence of a breach of fiduciary duty; thus, the trial court did not err in denying the employer's motion for a directed verdict as to attorney fees, as there

was some evidence of bad faith warranting attorney fees under O.C.G.A. § 13-6-11. *Flexible Prods. Co. v. Ervast*, 284 Ga. App. 178, 643 S.E.2d 560 (2007).

Evidence. — When there is some evidence supporting a finding of bad faith, an award of attorneys fees on that basis must be affirmed. *Crocker v. Stevens*, 210 Ga. App. 231, 435 S.E.2d 690 (1993), cert. denied, 511 U.S. 1053, 114 S. Ct. 1613, 128 L. Ed. 2d 340 (1994), overruled on other grounds, *Kim v. Lim*, 254 Ga. App. 627, 563 S.E.2d 485 (2002).

Trial court did not err in granting summary judgment to a bank and a credit union, on claims of conversion, civil conspiracy, and for attorney fees and punitive damages as: (1) no probative evidence existed that the buyer received delivery of the check, and thus, it never became a holder of the instrument at issue or entitled to enforce the instrument; (2) no evidence was presented that the bank and credit union acted in concert against the buyer; (3) no evidence of misconduct or bad faith on the part of the bank or the credit union was presented; but, the trial court properly found that a genuine issue of material fact existed as to whether the bank and the credit union were holders in due course and whether the check bore evidence of forgery or alteration so as to call into question the instrument's authenticity. *Hartsock v. Rich's Empls. Credit Union*, 279 Ga. App. 724, 632 S.E.2d 476 (2006).

Because sufficient evidence was presented to support a distributor's tortious interference with a contractual or business relationship claim alleged against a manufacturer, and because such was an intentional tort, demonstrating evidence of the manufacturer's bad faith, when coupled with other evidence of bad faith, an attorney-fee award under O.C.G.A. § 13-6-11 was authorized; thus, the trial court erred in setting the award aside in granting the manufacturer's motion for a judgment notwithstanding the verdict. *Fertility Tech. Res., Inc. v. Lifetek Med., Inc.*, 282 Ga. App. 148, 637 S.E.2d 844 (2006).

Attorney fees recoverable when breach done with ulterior motive. — Attorney fees are allowed when the defendant willfully breaches an agreement with express ulterior or sinister motives not prompted by an honest mistake as to the defendant's rights or

duties under the agreement. *St. Holmes v. St. Holmes*, 169 Ga. App. 283, 312 S.E.2d 370 (1983).

Evidence of bad faith sufficient to award attorney's fees. — When a city engineer found that methane gas was migrating from a landfill onto plaintiff's property, yet the city failed to take remedial measures to protect such property, it constituted evidence sufficient for a jury to conclude that the city acted in bad faith, and to award attorney fees. *City of Warner Robins v. Holt*, 220 Ga. App. 794, 470 S.E.2d 238 (1996).

Evidence that defendant refused to maintain drainage control around the defendant's rails despite the defendant's knowledge that plaintiff's property flooded as a result authorized finding that the defendant acted in bad faith by consciously refusing to take any action to alleviate the damage being caused to plaintiff's property. *CSX Transp., Inc. v. West*, 240 Ga. App. 209, 523 S.E.2d 63 (1999), overruled on other grounds by *Monterrey Mexican Rest. of Wise, Inc. v. Leon*, 282 Ga. App. 439, 638 S.E.2d 879 (2006).

Landowner was entitled to litigation expenses and attorney fees after a county damaged the landowner's trees, graded a path on the landowner's property, and dug ditches by the side of the path without ascertaining the owner of the property and in spite of the landowner's being notified that there would be no additional work, the county returned to the site to continue to widen the path; the county acted in bad faith and put the landowner to unnecessary trouble and expense thereby justifying the award. *Irwin County v. Owens*, 256 Ga. App. 359, 568 S.E.2d 578 (2002), overruled in part, *Shearin v. Wayne Davis & Co., P.C.*, 281 Ga. 385, 637 S.E.2d 679 (2006).

There was sufficient evidence that a city acted in bad faith by refusing to take any action to alleviate damage that the city knew or should have known was being caused by the city's sewer lines because: (1) the city was notified of raw sewage feces floating in a ravine across the street from the property; (2) the city received numerous complaints about an odor in the area; (3) the city's own samplings confirmed that the property was contaminated by unsafe levels of fecal coliform bacteria; and (4) the city's partial compliance with a Georgia Environmental

Protection Department order confirmed that the sewer system contained numerous cracks, openings, and separations. *City of Atlanta v. Landmark Envtl. Indus.*, 272 Ga. App. 732, 613 S.E.2d 131 (2005).

In a breach of contract action between a city and its general contractor arising out of a renovation project on property above and within an inert landfill, because the jury could find that the city acted in bad faith in the city's dealings with the general contractor on the issue of overhead costs, was stubbornly litigious, and caused the contractor unnecessary trouble and expense after the contractor encountered landfill materials within the depth of the contractor's excavation which caused the contractor to have to halt work, the court properly awarded attorney fees under O.C.G.A. § 13-6-11; thus, the city was properly denied a directed verdict and judgment notwithstanding the verdict as to this issue. *City of Lilburn v. Astra Group, Inc.*, 286 Ga. App. 568, 649 S.E.2d 813 (2007).

In a nuisance suit brought by a property owner against the City of Atlanta, which involved the city failing to properly maintain a storm pipe that traversed and served the property owner's land and resulted in extensive flooding of the land and the home, the trial court properly awarded the property owner bad faith attorney fees and costs in the amount of \$325,148 as there was sufficient evidence to support the trial court's finding that the city acted in bad faith based on the property owner complaining for over seven years about the flooding, sinkholes, and other problems; city workers observing the water in the property owner's basement and sinkholes in the yard; the recommendations that immediate action be taken, including dye testing and use of a closed-circuit camera, which the city ignored; and the city only taking care of the problem when the property owner brought suit. *City of Atlanta v. Hofrichter*, 291 Ga. App. 883, 663 S.E.2d 379 (2008).

Evidence that an appellant breached the parties' agreement by operating a rival business within their lessor's store while conspiring with the lessor to divert customers to the appellant and away from the appellee, and, once the appellee had been evicted, continued to operate the business from the store while retaining all of the profits to the

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exclusion of the appellee, justified an award of attorney fees to the appellee under O.C.G.A. § 13-6-11 due to the appellant's bad faith. *Asgharneya v. Hadavi*, 298 Ga. App. 693, 680 S.E.2d 866 (2009).

Bad faith award of attorney fees based on promissory estoppel. — As a factfinder could conclude from the apparently bitter nature of the dispute that the landlords' failure to perform some substantial portion of the landlord's alleged promises to the landlords' tenants was the result of bad faith, the tenants' claim for attorney fees expended on the tenants' promissory estoppel claim should not have been dismissed on summary judgment. *Brown v. Rader*, 299 Ga. App. 606, 683 S.E.2d 16 (2009).

Not every intentional tort results in attorney fee recovery. — While every intentional tort invokes a species of bad faith and entitles a person so wronged to recover the expenses of litigation including attorney fees, the evidence at issue did not demand a finding of bad faith where a conversion occurred, but when such was done in an attempt to reimburse the converting party for loans that party made to the corporation and recoup some of the costs the party expended; thus, the complaining party was not entitled to attorney's fees. *Multimedia Techs., Inc. v. Wilding*, 262 Ga. App. 576, 586 S.E.2d 74 (2003).

Effect of evidence of bad faith in entitlement to interest on unliquidated damages. — When the original complaint contained a prayer for recovery of expenses of litigation and the evidence in support of the claim was defendant's bad faith in the transaction, and when written notice in the form of a demand letter expressly offered to settle the entire core with all defendants for all damages, the amount of bad faith damages was correctly included in calculating the amount of the judgment for purposes of determining plaintiffs' entitlement to interest on unliquidated damages. *Windermere v. Bettes*, 211 Ga. App. 177, 438 S.E.2d 406 (1993).

Despite the award of a set-off, the fraud or bad faith of the defendant in the transaction out of which the cause of action arose remains available as grounds of award for attorney's fees. *Performance Mechanical Co.*

v. Heat Transf. Control Inc., 247 Ga. App. 436, 543 S.E.2d 808 (2000).

Arbitration award of attorney fees upheld when bad faith in transaction. — Trial court erred in vacating an arbitration award of attorney fees against a brokerage firm under O.C.G.A. § 13-6-11 when: (1) the arbitrators could have found that the pleading requirement was satisfied as the claim prayed for attorney fees and alleged that the firm acted in bad faith in the underlying transaction; (2) the award was silent as to which of the criteria under O.C.G.A. § 13-6-11 was found; (3) the firm failed to carry the firm's burden of refuting every rational basis for the award; and (4) the award of actual damages was consistent with a finding that the firm acted in bad faith in the underlying transaction. *Joyner v. Raymond James Fin. Servs.*, 268 Ga. App. 835, 602 S.E.2d 871 (2004).

Stubborn Litigiousness

"Stubborn litigiousness" does not in and of itself give rise to cause of action for damages but is instead a factor which may enable a plaintiff in a contract action to recover expenses of litigation. *Citibank v. Knowles*, 168 Ga. App. 664, 310 S.E.2d 18 (1983).

"Bona fide controversy" test relates to stubborn litigiousness and requires independent inquiry into bad faith. — "Bona fide controversy" test regarding an award of attorney fees relates to the issue of stubborn litigiousness. An independent inquiry into bad faith is necessary. *Ballenger Corp. v. Dresco Mechanical Contractors*, 156 Ga. App. 425, 274 S.E.2d 786 (1980).

Refusal to arbitrate is not stubborn litigiousness absent a mandatory arbitration clause in a contract. *Witty v. McNeal Agency, Inc.*, 239 Ga. App. 554, 521 S.E.2d 619 (1999).

When court finds no genuine dispute exists, the court may authorize the jury to award litigation expenses. *Palmer v. Howse*, 133 Ga. App. 619, 212 S.E.2d 2 (1974); *Harrison v. Ivie*, 143 Ga. App. 856, 240 S.E.2d 224 (1977).

Attorney's fees cannot be recovered if plaintiff's claim is fairly open to controversy. *Pickett v. Chamblee Constr. Co.*, 124 Ga. App. 769, 186 S.E.2d 123 (1971).

No recovery when bona fide claim exists. — Recovery of attorney fees for stubborn

litigiousness is not authorized when there is a bona fide controversy. *Bayliner Marine Corp. v. Prance*, 159 Ga. App. 456, 283 S.E.2d 676 (1981); *Forester v. McDuffie*, 189 Ga. App. 359, 375 S.E.2d 488 (1988); *Mallory v. Daniel Lumber Co.*, 191 Ga. App. 234, 381 S.E.2d 406 (1989); *Milam v. Attaway*, 195 Ga. App. 496, 393 S.E.2d 753 (1990).

If there is a bona fide controversy, there can be no stubborn litigiousness as a matter of law. *Trust Co. Bank v. Henderson*, 185 Ga. App. 367, 364 S.E.2d 289 (1987), *aff'd*, 258 Ga. 703, 373 S.E.2d 738 (1988).

Bona fide dispute as to part of a claim will preclude a finding of stubborn litigiousness. *Gwinnett County Bd. of Tax Assessors v. Network Publications, Inc.*, 208 Ga. App. 15, 429 S.E.2d 696 (1993); *Driggers v. Campbell*, 247 Ga. App. 300, 543 S.E.2d 787 (2000).

Trial court properly rejected a guardian's claim that a brokerage firm failed to raise a cognizable argument for vacatur of an arbitration award of attorney fees as the mere refusal to pay a disputed claim was not the equivalent of stubborn litigiousness or causing unnecessary trouble and expense as contemplated under O.C.G.A. § 13-6-11; the key was whether a bona fide controversy existed. *Joyner v. Raymond James Fin. Servs.*, 268 Ga. App. 835, 602 S.E.2d 871 (2004).

Borrower failed to show entitlement to litigation expenses for stubborn litigiousness against two banks under O.C.G.A. § 13-6-11 because a bona fide controversy existed between the parties and there was no evidence of bad faith on the part of the banks. *Cornelius v. Home Comings Fin. Network, Inc.*, No. 08-11044, 2008 U.S. App. LEXIS 19745 (11th Cir. Sept. 16, 2008) (Unpublished).

Existence of a genuine dispute or bona fide controversy precludes award of attorney's fees. *Eldon Indus., Inc. v. Paradies & Co.*, 397 F. Supp. 535 (N.D. Ga. 1975); *Anderson v. Golden*, 569 F. Supp. 122 (S.D. Ga. 1982); *Eastern Foods, Inc. v. Forman*, 202 Ga. App. 347, 415 S.E.2d 1 (1991).

Statute turns upon existence of bona fide controversy. *Beaudry Ford, Inc. v. Bonds*, 139 Ga. App. 230, 228 S.E.2d 208 (1976); *Eastern Foods, Inc. v. Forman*, 202 Ga. App. 347, 415 S.E.2d 1 (1991) (see O.C.G.A. § 13-6-11).

Recovery of attorney fees for stubborn

litigiousness is not authorized if bona fide controversy exists. *Nestle Co. v. J.H. Ewing & Sons*, 153 Ga. App. 328, 265 S.E.2d 61 (1980).

Bona fide controversy precludes award of fees. — When there is a bona fide controversy, which parties cannot adjust amicably, there should be no burdening of one with counsel fees of the other, unless there has been wanton or excessive indulgence in litigation. *Thomas v. Dumas*, 207 Ga. 161, 60 S.E.2d 356 (1950).

One may resist settlement of a claim without fear of future liability for attorney fees if resistance is predicated upon a bona fide controversy. *Delta Air Lines v. Isaacs*, 141 Ga. App. 209, 233 S.E.2d 212 (1977).

Question of whether attorney fees are authorized for stubborn litigiousness should focus on whether defendant's resistance of claim was bottomed on bona fide controversy or dispute since absence of such is the essence of the attorney fee award for stubborn litigiousness. *Georgia-Carolina Brick & Tile Co. v. Brown*, 153 Ga. App. 747, 266 S.E.2d 531 (1980); *Bigelow-Sanford, Inc. v. Gunny Corp.*, 649 F.2d 1060 (5th Cir. 1981).

Expenses not allowed. — Because plaintiff made no showing that the plaintiff asserted a viable counterclaim for relief independent of the plaintiff's claim of stubborn litigiousness and bad faith, expenses of litigation pursuant to O.C.G.A. § 13-6-11 were not available to plaintiff. *Alcovy Properties, Inc. v. MTW Inv. Co.*, 212 Ga. App. 102, 441 S.E.2d 288 (1994), appeal dismissed, 223 Ga. App. 230, 477 S.E.2d 395 (1996).

Expenses not allowed when zero damages awarded. — Litigation expenses are not available to defendant who prevailed on claim of stubborn litigiousness but was awarded zero damages. *Gardner v. Kinney*, 230 Ga. App. 771, 498 S.E.2d 312 (1998).

When defendant denies any liability, defendant cannot raise amount of damages as a genuine controversy. — When defendant steadfastly denies any liability to plaintiff and forces plaintiff to litigate, the defendant cannot raise amount of damages as a genuine controversy and an award of attorney fees to the plaintiff is proper. *Beaudry Ford, Inc. v. Bonds*, 139 Ga. App. 230, 228 S.E.2d 208 (1976).

When defendant disclaimed all liability prior to litigation, raising at trial of dispute

Stubborn Litigiousness (Cont'd)

as to amount of liability, without more, will not satisfy bona fide controversy requirement. *Delta Air Lines v. Isaacs*, 141 Ga. App. 209, 233 S.E.2d 212 (1977).

Great disparity between demand and verdict alone may defeat an award of attorney's fees when based upon theory of stubborn litigiousness. *General Refractories Co. v. Rogers*, 240 Ga. 228, 239 S.E.2d 795 (1977).

Disparity between damages sought and amount awarded. — Fact that a plaintiff receives less in damages than the plaintiff seeks does not mandate a finding of a bona fide controversy. *Morris v. Savannah Valley Realty, Inc.*, 233 Ga. App. 762, 505 S.E.2d 259 (1998).

Evidence supported award of attorney fees for defendant's stubbornly litigious behavior, since defendant was merely "stonewalling," or attempting to utilize the "so sue me" ploy. *Southern Ry. v. Crowe*, 186 Ga. App. 244, 366 S.E.2d 846 (1988); *Carpet Transp., Inc. v. Kenneth Poley Interiors, Inc.*, 219 Ga. App. 556, 466 S.E.2d 70 (1995).

Evidence that the seller of certain land, inter alia, asserted that the buyer had only purchased 10 acres of land when it was clear from the installment purchase contracts that 15 acres had been purchased, showed that the seller was stubbornly litigious regarding matters as to which there was no good faith controversy and such evidence supported the trial court's decision to award attorney's fees to the buyer under O.C.G.A. § 13-6-11 after the buyer prevailed on a claim for reformation of the installment contracts. *L.S. Land Co. v. Burns*, 275 Ga. 454, 569 S.E.2d 527 (2002).

When the adjacent landowner failed to stop the trespass and tree cutting by the two workers even after the property owners' request that the landowner do so, the landowner received payment for the trees cut but did not offer to give the money to the property owners who owned the trees, and failed to utilize an opportunity to resolve the matter before suit was filed, the evidence, supported an attorney fee award for the landowner's stubborn litigiousness. *Jones v. Geniza*, 257 Ga. App. 806, 572 S.E.2d 362 (2002).

Trial court was entitled to conclude that a debtor's contention that money loaned to

the debtor by the lenders was an investment in the debtor's venture to sell computers was specious, and that the debtor had been stubbornly litigious in refusing to repay the loan; thus, with some evidence authorizing the award of attorney fees, the appeals court refused to hold as a matter of law that there was a reasonable defense to the main claim. *Gray v. King*, 270 Ga. App. 855, 608 S.E.2d 320 (2004).

In a suit for specific performance and damages, the trial court properly awarded the plaintiff attorney fees under O.C.G.A. § 13-6-11 since the defendant repeatedly refused the plaintiff's demands to comply with the contract provision in question, forcing the plaintiff to resort to litigation to enforce the provision, and there was no evidence that the defendant misunderstood the provision; thus, there was some evidence that the defendant was stubbornly litigious. *Hibbard v. McMillan*, 284 Ga. App. 753, 645 S.E.2d 356 (2007).

An award of attorney fees entered against a home builder, pursuant to both O.C.G.A. §§ 13-6-11 and 13-11-8, was upheld on appeal because an award pursuant to the latter statute did not require a finding of bad faith, and evidence of the home builder's stubborn litigiousness and the unnecessary trouble and expense it caused the two contractors supported an award under the former statute. *Hampshire Homes, Inc. v. Espinosa Constr. Servs.*, 288 Ga. App. 718, 655 S.E.2d 316 (2007).

There was some evidence to support a finding of bad faith sufficient to recover attorney fees under circumstances in which there was evidence that a former employer was stubbornly litigious in refusing to pay a former employee the monies to which the employee was legally entitled under the parties' employment contract. *Ins. Indus. Consultants, LLC v. Alford*, 294 Ga. App. 747, 669 S.E.2d 724 (2008), cert. denied, No. S09C0465, 2009 Ga. LEXIS 200 (Ga. 2009).

In a case in which a lessee sought attorney's fees from a lessor pursuant to O.C.G.A. §§ 9-15-14 and 13-6-11, the lessor unsuccessfully appealed the district court's award of attorney's fees. Not only had the lessee submitted evidence to support the award of attorney's fees, but the district court found that the lessor had been stubbornly litigious and had asserted baseless claims and de-

fenses. *Cargill Ltd. v. Jennings*, No. 08-14484, 2009 U.S. App. LEXIS 1090 (11th Cir. Jan. 22, 2009) (Unpublished).

Attorney suing former client who was stubbornly litigious. — Attorney who sued a former client for unpaid attorney fees presented sufficient evidence on which the jury could conclude that the client was stubbornly litigious and award attorney fees on the evidence that the attorney sent the client bills for a number of years, the client never questioned the bills until after the attorney brought suit, and the client stated that the client's primary contention against the attorney was being abandoned when the attorney withdrew legal representation of the client and not the bill. However, the trial court erred in denying the client's motion for directed verdict as there was insufficient evidence to establish the value and reasonableness of the attorney fees which the attorney sought. *Patton v. Turnage*, 260 Ga. App. 744, 580 S.E.2d 604 (2003).

No stubborn litigiousness in dispute between attorney and client. — Because a genuine dispute precluded the recovery of attorney fees from the attorney by the client based upon the client's claim of stubborn litigiousness, summary judgment was reversed. *Brito v. Gomez Law Group, LLC*, 289 Ga. App. 625, 658 S.E.2d 178 (2008).

No stubborn litigiousness in contractor's suit. — Subcontractor's motion for summary judgment was granted on a general contractor's litigation expenses claim under O.C.G.A. § 13-6-11 to the extent it was based on stubborn litigiousness or unnecessary trouble because a bona fide controversy existed as to whether an oral contract existed and was breached. *Apac-Southeast, Inc. v. Coastal Caisson Corp.*, 514 F. Supp. 2d 1373 (N.D. Ga. 2007).

No stubborn litigiousness in contract for services. — When a bona fide controversy exists, a recovery is impermissible under O.C.G.A. § 13-6-11 unless there is evidence that the defendant acted in bad faith in the underlying transaction; if there is a bona fide controversy, the party could not have been stubbornly litigious as a matter of law. In a dispute over payment for services that an employment firm rendered to a company, when the company was successful in the company's defense of a breach of contract claim, and when a bona fide controversy was

litigated on a quantum meruit claim, attorney fees were improperly awarded to the employment firm and were reversed on appeal. *Nextel S. Corp. v. R.A. Clark Consulting*, 266 Ga. App. 85, 596 S.E.2d 416 (2004).

Stubborn litigiousness not shown. — In an action brought by the purchasers of a lot seeking to cancel the developer's security deed based upon alleged fraud, the trial court erred by denying the purchasers' motion for summary judgment with respect to the developer's counterclaim claim for attorney's fees, pursuant to O.C.G.A. § 13-6-11, as the developer could not recover on the developer's counterclaim for quiet title and the developer failed to set forth any facts showing that the purchasers had been stubbornly litigious. *Byers v. McGuire Props.*, 285 Ga. 530, 679 S.E.2d 1 (2009).

Summary judgment denied because issues of fact exist. — Summary judgment was properly denied on a broker's claim for attorney fees under O.C.G.A. § 13-6-11 because issues of fact existed as to whether the client was stubbornly litigious in the suit against the client, which sought to recover for the client's breach of contract in failing to abide by an agreement to pay the broker a commission on the sale of the home, in that there was a factual dispute as to the client's understanding of the obligations under the contract. *Steel Magnolias Realty, LLC v. Bleakley*, 276 Ga. App. 155, 622 S.E.2d 481 (2005).

Unnecessary Trouble and Expense

Trouble and expense contemplated by section is not that which is so associated with every suit. *Thomas v. Dumas*, 207 Ga. 161, 60 S.E.2d 356 (1950).

When there is no bad faith, there must be something more than being put to expense of a suit to authorize plaintiff to claim attorney's fees as part of plaintiff's damages. *D.H. Overmyer Co. v. Nelson-Brantley Glass Co.*, 119 Ga. App. 599, 168 S.E.2d 176 (1969); *Raybestos-Manhattan, Inc. v. Friedman*, 156 Ga. App. 880, 275 S.E.2d 817 (1981).

Forcing plaintiff to sue when no bona fide controversy exists causes unnecessary trouble and expense. — When no bona fide controversy exists, forcing plaintiff to resort to courts in order to collect is plainly causing the plaintiff unnecessary trouble and expense. *Buffalo Cab Co. v. Williams*, 126 Ga.

Unnecessary Trouble and Expense (Cont'd)

App. 522, 191 S.E.2d 317 (1972); *Altamaha Convalescent Ctr., Inc. v. Godwin*, 137 Ga. App. 394, 224 S.E.2d 76 (1976).

Forcing a plaintiff to sue when no bona fide controversy exists causes unnecessary trouble and expense and would authorize attorney fees and costs of litigation. *Rogers v. Georgia Ports Auth.*, 183 Ga. App. 325, 358 S.E.2d 855, cert. denied, 183 Ga. App. 906, 358 S.E.2d 855 (1987).

When no defense exists, forcing a plaintiff to resort to the courts in order to collect is plainly causing the plaintiff "unnecessary trouble and expense." *Clements v. Barnes*, 197 Ga. App. 120, 397 S.E.2d 560 (1990).

Statutory recovery of attorney fees for causing unnecessary trouble and expense is authorized if there exists no bona fide controversy or dispute regarding liability for the underlying cause of action. *Fresh Floors, Inc. v. Forrest Cambridge Apts., LLC*, 257 Ga. App. 270, 570 S.E.2d 590 (2002).

Effect of plaintiff's failure to move for protective order to avoid unnecessary expense or annoyance. — While numerous depositions may have been taken, and while some deponents, including plaintiff, were deposed on multiple occasions it was insufficient grounds for award of attorney's fees under O.C.G.A. § 13-6-11 when a motion for protective order under O.C.G.A. § 9-11-26(c) could otherwise have been made if plaintiff felt plaintiff was being subjected to unnecessary expense or annoyance. *Raybestos-Manhattan, Inc. v. Friedman*, 156 Ga. App. 880, 275 S.E.2d 817 (1981).

Bona fide dispute. — Trial court improperly denied a railroad's motion for a judgment notwithstanding the verdict as to the imposition of attorney fees and litigation expenses against the railroad for unnecessary trouble and expense under O.C.G.A. § 13-6-11 since there was a bona fide dispute as to causation and damages and since there was no finding of bad faith. *Ga. N.E.R.R. v. Lusk*, 258 Ga. App. 742, 574 S.E.2d 810 (2002).

Because there was evidence showing a bona fide controversy between a corporation and an accounting firm as the firm allegedly acted negligently and in breach of contract

in failing to follow generally accepted accounting principals, there was a bona fide controversy in the case, and thus, the corporation was not entitled to attorneys fees pursuant to O.C.G.A. § 13-6-11. *TSG Water Res., Inc. v. D'Alba & Donovan Certified Pub. Accountants, P.C.*, 366 F. Supp. 2d 1212 (S.D. Ga. 2004), aff'd in part, rev'd in part, 260 Fed. Appx. 191 (11th Cir. Ga. 2007).

Attorney fees not recoverable given existence of genuine dispute. — With the evidence showing a genuine dispute, attorney fees were not authorized for prosecuting the breach of contract claim because the trial court based the award on the court's finding that the truck rebuilding company had been stubbornly litigious and had caused the truck owner unnecessary trouble and expense. However, the evidence did authorize an award of attorney fees to the truck owner for prosecuting the claim to recover for the loss of value to the vehicle as it was uncontroverted that during the pendency of the bailment there was destruction or deterioration to the truck; the truck rebuilding company's assertion that the owner owed the company money was not a viable defense for the company's failure to keep the truck safe. *4WD Parts Ctr., Inc. v. Mackendrick*, 260 Ga. App. 340, 579 S.E.2d 772 (2003).

Failure to describe property properly. — When a sales agreement did not properly describe the property being sold, the agreement was void and unenforceable as a matter of law; because the buyer was forced to litigate, the buyer was entitled to attorney's fees pursuant to O.C.G.A. § 13-6-11. *White v. Plumbing Distributions*, 262 Ga. App. 228, 585 S.E.2d 135 (2003).

Burdensome discovery. — Since the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, contains remedies available to a party litigant when the litigant feels the litigant has been the subject of burdensome discovery, allowance of attorney fees pursuant to O.C.G.A. § 13-6-11 based upon a party's conduct in the course of litigation is wholly improper. *Padgett v. Moran*, 167 Ga. App. 244, 306 S.E.2d 96 (1983).

Effect of Refusal to Pay Debt

Mere refusal to pay disputed claim is not equivalent of stubborn litigiousness. *State Mut. Ins. Co. v. McJenkin Ins. & Realty Co.*, 86 Ga. App. 442, 71 S.E.2d 670 (1952);

Murphy v. Morse, 96 Ga. App. 513, 100 S.E.2d 623 (1957); D.H. Overmyer Co. v. Nelson-Brantley Glass Co., 119 Ga. App. 599, 168 S.E.2d 176 (1969); Sam Finley, Inc. v. Pilcher, Livingston & Wallace, Inc., 314 F. Supp. 654 (S.D. Ga. 1970); First Nat'l Bank v. Wynne, 149 Ga. App. 811, 256 S.E.2d 383 (1979); McDevitt & Street Co. v. K-C Air Conditioning Serv., Inc., 203 Ga. App. 640, 418 S.E.2d 87, cert. denied, 203 Ga. App. 906, 418 S.E.2d 87 (1992).

Bad faith is not implied by mere refusal to pay disputed claim. Nor, ordinarily, will simple refusal to pay a debt, which results in requiring a party to employ counsel and institute legal action, imply bad faith or authorize expenses of litigation; nor a refusal to pay when there is an honest dispute. Edwards-Warren Tire Co. v. Coble, 102 Ga. App. 106, 115 S.E.2d 852 (1960).

Statute does not allow recovery for mere refusal to pay. G.E.C. Corp. v. Levy, 126 Ga. App. 604, 191 S.E.2d 461 (1972) (see O.C.G.A. § 13-6-11).

Mere refusal to pay debt will not support award of attorney fees, and is not equivalent of stubborn litigiousness. Palmer v. Howse, 133 Ga. App. 619, 212 S.E.2d 2 (1974); Brannon Enters., Inc. v. Deaton, 159 Ga. App. 685, 285 S.E.2d 58 (1981); Associated Software Consultants Org., Inc. v. Wysocki, 177 Ga. App. 135, 338 S.E.2d 679 (1985); Evans v. Willis, 212 Ga. App. 335, 441 S.E.2d 770 (1994).

Mere refusal to pay amount due and payable is not equivalent to stubborn litigiousness if claim is disputed. Altamaha Convalescent Ctr., Inc. v. Godwin, 137 Ga. App. 394, 224 S.E.2d 76 (1976).

Although expenses of litigation are allowable in contract actions when defendant has been stubbornly litigious, mere refusal to pay disputed claim does not warrant award of such expenses. Spurlock v. Commercial Banking Co., 138 Ga. App. 892, 227 S.E.2d 790 (1976), *aff'd in part, rev'd in part*, 238 Ga. 218, 232 S.E.2d 53 (1977).

Mere refusal to pay does not alone amount to bad faith, or causing unnecessary trouble and expense, and a defense of action is not of itself stubborn litigiousness. Brooks v. Steele, 139 Ga. App. 496, 229 S.E.2d 3 (1976).

When there is a bona fide controversy the law does not allow recovery for mere refusal

to pay. Southern Bell Tel. & Tel. Co. v. C & S Realty Co., 141 Ga. App. 216, 233 S.E.2d 9 (1977), overruled on other grounds, Georgia-Carolina Brick & Tile Co. v. Brown, 153 Ga. App. 747, 266 S.E.2d 531 (1980).

Attorney fees are expressly prohibited for mere refusal to pay, but rather are grounded in defendant's having acted in bad faith in transaction and dealings out of which cause of action arose. Georgia-Carolina Brick & Tile Co. v. Brown, 153 Ga. App. 747, 266 S.E.2d 531 (1980).

Refusal to pay a disputed claim is not equivalent to stubborn litigiousness, nor will it support a claim that plaintiff caused defendant unnecessary trouble and expense. Gordon v. Ogden, 154 Ga. App. 641, 269 S.E.2d 499 (1980).

Mere failure to pay a claim is not bad faith. Raybestos-Manhattan, Inc. v. Friedman, 156 Ga. App. 880, 275 S.E.2d 817 (1981).

Mere refusal to pay a just debt, standing alone, was insufficient to support an award of attorney fees under O.C.G.A. § 13-6-11; but the refusal may be sufficient when the refusal is not prompted by an honest mistake as to one's rights or duties but by some interested or sinister motive. Bryan v. Brown Childs Realty Co., 252 Ga. App. 502, 556 S.E.2d 554 (2001).

Mere failure of defendants to pay a claim does not rise to the level of bad faith for purposes of O.C.G.A. § 13-6-11, and a refusal to pay a disputed claim does not constitute stubborn litigiousness, nor will it support a claim that defendants caused the plaintiff unnecessary trouble and expense. Powell Co. v. McGarey Group, LLC, 508 F. Supp. 2d 1202 (N.D. Ga. Mar. 28, 2007).

Key to test is bona fide controversy not just refusal to pay. — Mere refusal to pay a disputed claim is not the equivalent of stubborn litigiousness or causing unnecessary trouble and expense. Rather, the key to the test is whether there is a "bona fide controversy." When none exists, forcing a plaintiff to resort to the courts in order to collect is plainly causing the plaintiff to go to unnecessary trouble and expense. Franchise Enters., Inc. v. Ridgeway, 157 Ga. App. 458, 278 S.E.2d 33 (1981).

Mere refusal to pay will not support award of attorney fees in ex contractu case. Brooks v. Steele, 139 Ga. App. 496, 229 S.E.2d 3 (1976).

Effect of Refusal to Pay Debt (Cont'd)

Bad faith refusal to pay not ground for recovery. — Refusal to pay, in bad faith, is not legal equivalent of acting in bad faith and bad faith in refusing to pay is not ground for such damages. *Edwards-Warren Tire Co. v. Coble*, 102 Ga. App. 106, 115 S.E.2d 852 (1960).

Expenses of litigation are not allowed for bad faith in refusing to pay. *Lovell v. Frankum*, 145 Ga. 106, 88 S.E. 569 (1916); *Shell Petro. Corp. v. Jackson*, 47 Ga. App. 667, 171 S.E. 171 (1933).

Refusal to pay in bad faith means a frivolous and unfounded denial of liability. *First Nat'l Bank v. Wynne*, 149 Ga. App. 811, 256 S.E.2d 383 (1979).

Interested or sinister motive justifies attorney fee award. — Refusal to pay a debt may be sufficient to support an award of attorney fees when the refusal is not prompted by an honest mistake as to one's rights or duties but by some interested or sinister motive, and when no defense exists, a defendant who forces a plaintiff to resort to the courts in order to collect a debt is plainly causing plaintiff unnecessary trouble and expense, justifying an attorney fee award. *Fresh Floors, Inc. v. Forrest Cambridge Apts., LLC*, 257 Ga. App. 270, 570 S.E.2d 590 (2002).

Attorney fees were properly awarded to an attorney in the attorney's action against a client to recover sums owed to the attorney under a contingency fee agreement with the client; the evidence was sufficient to support a jury finding that the client's refusal to pay the fees was not prompted by an honest mistake but by some interested or sinister motive or an attempt to defeat the clear intent of the contingency fee agreement. *Am. Computer Tech., Inc. v. Hardwick*, 274 Ga. App. 62, 616 S.E.2d 838 (2005).

Bad faith refusal with no bona fide controversy justifies award. — When the only explanation offered by defendants for the defendant's refusal to pay at least some portion of plaintiff's bill was that the plaintiff's/architect's plans proved too costly to implement, and when there existed no bona fide controversy as to defendant's liability, an award of attorney's fees to plaintiff was authorized by O.C.G.A. § 13-6-11. *Matthews v. Neal, Greene & Clark*, 177 Ga. App. 26, 338 S.E.2d 496 (1985).

After plaintiff mulch seller prevailed in the seller's suit on account against defendants, two individuals doing business as a company (company), who failed to pay for certain plastic mulch that was delivered by the seller, there was no basis to reverse the jury's award to the seller of attorney fees and litigation expenses under O.C.G.A. § 13-6-11 as the testimony of one of the individuals that the invoice from the seller was not initially paid because of a lack of funds provided some evidence to support the award and the appellate court did not say as a matter of law that the company had a reasonable defense to the suit or that a bona fide dispute existed. *McLeod v. Robbins Ass'n*, 260 Ga. App. 347, 579 S.E.2d 748 (2003).

Bona fide dispute as to claim for specific performance. — When a purchaser sues to recover damages for breach of contract or, in the alternative, to obtain specific performance, and when there is no bona fide dispute as to the existence of the indebtedness, but there is a bona fide dispute as to the claim for specific performance, it cannot be said that the seller has been stubbornly litigious in defending the suit. *Gaston v. Mullins*, 168 Ga. App. 371, 309 S.E.2d 166 (1983).

Pleadings and Practice

Plaintiff must make out a proper case for litigation expenses, which must be supported by evidence. *Davis v. Fomon*, 144 Ga. App. 14, 240 S.E.2d 581 (1977).

Proof of costs and reasonableness. — An award of attorney fees is unauthorized if the applicant fails to prove the actual costs of the attorney and the reasonableness of the costs. *Fiat Auto U.S.A., Inc. v. Hollums*, 185 Ga. App. 113, 363 S.E.2d 312 (1987); *Crosby v. DeMeyer*, 229 Ga. App. 672, 494 S.E.2d 568 (1998); *Cannon Air Transp. Servs., Inc. v. Stevens Aviation, Inc.*, 249 Ga. App. 514, 548 S.E.2d 485 (2001).

Damages in the nature of expenses of litigation must be especially pleaded and prayed for. *Davis v. Macon Tel. Publishing Co.*, 93 Ga. App. 633, 92 S.E.2d 619 (1956); *Carroll v. Johnson*, 144 Ga. App. 750, 242 S.E.2d 296 (1978).

Must plead for recovery of fees. — Although trial judge might have been authorized to find that party was being stubbornly

litigious and to award attorney's fees for defense of a series of baseless suits when other party failed to allege stubborn litigiousness and pray for award of attorney's fees, such an award was clearly erroneous. *Rowell v. Rowell*, 212 Ga. 584, 94 S.E.2d 425 (1956).

The "specially pleaded" and prayed-for award of attorney fees in the case of two cross-claiming codefendants constituted actual damages under the express terms of O.C.G.A. § 13-6-11 and supported awards of punitive damages. *Privitera v. Addison*, 190 Ga. App. 102, 378 S.E.2d 312, cert. denied, 190 Ga. App. 898, 378 S.E.2d 312 (1989).

Awards under O.C.G.A. § 13-6-11 must be prayed for in the complaint and must be awarded by the factfinder. *Williams v. Binion*, 227 Ga. App. 893, 490 S.E.2d 217 (1997).

Customer's claim for attorney fees in an action seeking reimbursement for improperly charged 9-1-1 phone service fees failed because the customer failed to specially plead for attorney fees and for the costs of litigation as required by O.C.G.A. § 13-6-11. *Daniels v. Price Communications Wireless, Inc.*, 254 Ga. App. 559, 562 S.E.2d 844 (2002).

Because appellant failed to plead damages specially pursuant to O.C.G.A. § 13-6-11 and did not litigate the issue of bad faith damages, the appellant was not entitled to recover attorney's fees pursuant to the statute. *Pipe Solutions, Inc. v. Inglis*, 291 Ga. App. 328, 661 S.E.2d 683 (2008).

Plaintiffs in a medical malpractice and contract case were not entitled to attorney's fees because they did not specifically plead O.C.G.A. § 13-6-11 and did not allege any bad faith by a doctor and clinic. Further, claims for fees under O.C.G.A. § 9-11-68 were properly dismissed on directed verdict because the statute was not in effect at the time the complaint was filed. *Morrison v. Mann*, No. 07-11294, 2008 U.S. App. LEXIS 6772 (11th Cir. Mar. 26, 2008) (Unpublished).

Plaintiffs could not recover attorney's fees as an element of damages under the plaintiffs' breach of contract claim because the plaintiffs failed to specifically plead the request for fees in accordance with O.C.G.A. § 13-6-11 and Fed. R. Civ. P. 9(g) as special damages and generalized language request-

ing any and all other legal and equitable relief was not sufficient. *Peery v. Serenity Behavioral Health Sys.*, No. CV106-172, 2009 U.S. Dist. LEXIS 38201 (S.D. Ga. May 6, 2009).

Implicit prayer for litigation expenses. — Although defendant's amended counterclaim adding a party may not have asserted a claim for attorney fees against such party under O.C.G.A. § 13-6-11 by citation, it asked for the award of attorney fees in the defendant's prayer as to a count for tortious interference with contract, which was an implicit prayer for litigation expenses. *Witty v. McNeal Agency, Inc.*, 239 Ga. App. 554, 521 S.E.2d 619 (1999).

General prayer for relief not sufficient to state claim for attorney fees. — General prayer for "such other just and equitable relief as this court may deem proper and necessary" was not sufficient to state a claim for attorney fees, as pursuant to O.C.G.A. § 13-6-11, recovery of such expenses is permitted only when the plaintiff has specially pleaded and made prayer therefor. *Preferred Risk Ins. Co. v. Boykin*, 174 Ga. App. 269, 329 S.E.2d 900, cert. denied, 254 Ga. 349, 331 S.E.2d 879 (1985); *DOT v. Georgia Television Co.*, 244 Ga. App. 750, 536 S.E.2d 773 (2000).

Failure to comply with the ante litem notice requirement of O.C.G.A. § 36-33-5 precluded plaintiff's ability under O.C.G.A. § 13-6-11 to sue for money damages in the form of attorney fees and costs of litigation. *Dover v. City of Jackson*, 246 Ga. App. 524, 541 S.E.2d 92 (2000).

Construed with § 14-2-1604(c). — When attorney fees were awarded as costs under O.C.G.A. § 14-2-1604(c), and not damages under O.C.G.A. § 13-6-11, the award was directly appealable. *Motor Whse., Inc. v. Richard*, 235 Ga. App. 835, 510 S.E.2d 600 (1998).

Plaintiff must set out facts in petition justifying prayer for attorney's fees. — No cause of action was set out in the paragraphs of plaintiff's amendment which sought a recovery of \$500.00 as attorney's fees when the plaintiff did not set out any facts showing that the defendant had acted in bad faith or been stubbornly litigious and caused the plaintiff unnecessary trouble and expense. *Roberts v. Scott*, 212 Ga. 87, 90 S.E.2d 413 (1955).

Pleadings and Practice (Cont'd)

Failure to present evidence of attorney fees. — In a case involving a home buyer's fraudulent conveyance and negligent construction claims against a corporation, given the buyer's failure to present required evidence on the buyer's attorney fee claim under O.C.G.A. § 13-6-11, there was no error in the trial court's refusal to submit the issue to the jury and in directing a verdict on this claim. *Sims v. GT Architecture Contrs. Corp.*, 292 Ga. App. 94, 663 S.E.2d 797 (2008).

General allegation that defendant acted in bad faith will not authorize recovery of expenses. *Lampkin v. Garwood*, 122 Ga. 407, 50 S.E. 171 (1905).

Failure to set forth facts justifying award. — In two companies' suit for conversion, fraud, breach of fiduciary duty, and several other related claims against a former director, the trial court properly granted the companies' motion for summary judgment on the former director's counterclaim seeking attorney fees as the former director failed to set forth any facts showing that the companies acted in bad faith, had been stubbornly litigious, or had caused the former director any unnecessary trouble or expense in the defense of the former director's remaining independent counterclaims in the action. *Sampson v. Haywire Ventures, Inc.*, 293 Ga. App. 779, 668 S.E.2d 286 (2008).

Discrepancy between amount of compensatory damages awarded and ad damnum of complaint will not necessarily defeat submission of the issue of attorney fees to the jury. *Camp v. Jordan*, 168 Ga. App. 339, 309 S.E.2d 384 (1983).

Georgia law does not allow attorney's fees under O.C.G.A. § 13-6-11 when the amount recoverable is considerably less than the amount sought, because this indicates the existence of a genuine dispute. *Anderson v. Golden*, 569 F. Supp. 122 (S.D. Ga. 1982).

When plaintiffs were awarded damages under only one of six counts initially sought, but were awarded attorneys fees and expenses based on the plaintiff's proof of the lump sum amount incurred to work on all six counts of the complaint, the case had to be remanded with direction to limit the

award of fees to the amount based upon the prevailing claim. *United Cos. Lending Corp. v. Peacock*, 267 Ga. 145, 475 S.E.2d 601 (1996).

Award vacated due to grant of new trial. — In a direct action brought by a medical practice limited liability company member against another, the award of attorney fees and expenses in favor of the exiting member was vacated because a new trial was warranted on a conversion claim due to insufficient evidence, and a successful litigant is only entitled to recover attorney fees and expenses for that portion of the fees and expenses which are allocable to the attorney's efforts to prosecute a successful claim against a defendant. *Internal Med. Alliance, LLC v. Budell*, 290 Ga. App. 231, 659 S.E.2d 668 (2008).

No basis for fees and costs because award of attorney fees and expenses of litigation was ancillary and plaintiff did not successfully recover on any claim. — Trial court did not err by granting a power company's motion for a directed verdict on the issue of attorney fees under O.C.G.A. § 13-6-11 in a property owner's negligence suit as, pretermitted whether any evidence of bad faith existed, reversal was not required, because the property owner could not show any harm regarding the trial court's decision not to submit the issue to the jury since an award of attorney fees and expenses of litigation under § 13-6-11 was ancillary and, because the property owner did not successfully recover on any claim against the power company, the property owner was not entitled to recover fees pursuant to § 13-6-11. Accordingly, the property owner could show no harm and no basis for reversal arising from the grant of a directed verdict to the power company on the issue of attorney fees. *Lee v. Ga. Power Co.*, 296 Ga. App. 719, 675 S.E.2d 465 (2009).

Waiver of objection to award of fees. — Builder waived the builder's objection to a verdict form, which allowed a jury to award attorneys' fees to home buyers even though the buyers did not recover any actual damages on their counterclaim against the builder, because the builder participated in the drafting of the verdict form and failed to object to the form while the jury was still present. *Benchmark Builders, Inc. v. Schultz*,

302 Ga. App. 888, 691 S.E.2d 916 (2010).

Evidentiary Issues

Expert testimony required. — Under O.C.G.A. § 13-6-11, the amount of the award of attorney fees as damages is a jury question that cannot be decided on summary judgment because the questions of reasonableness and necessity of the expenses of litigation and attorney fees are matters for expert opinion. *American Medical Transp. Group, Inc. v. Glo-An, Inc.*, 235 Ga. App. 464, 509 S.E.2d 738 (1998).

It is only necessary for the plaintiff to show that one of the conditions, i.e., bad faith or stubbornly litigious, existed to recover fees and costs. *ADP-Financial Computer Servs., Inc. v. First Nat'l Bank*, 703 F.2d 1261 (11th Cir. 1983).

Contingency fee contracts as evidence of value of attorney's services. — Injured party who sued a corporation after the injured person fell while shopping in a store the corporation owned provided enough evidence that the contingency fee the injured person agreed to pay an attorney was a valid indicator of the value of the attorney's services, and the trial court did not err when the court denied the corporation's motion for a directed verdict on the customer's claim seeking attorney's fees under O.C.G.A. § 13-6-11. *Home Depot U.S.A., Inc. v. Tvrdeich*, 268 Ga. App. 579, 602 S.E.2d 297 (2004).

Plaintiff's failure to demonstrate that a bona fide controversy existed regarding plaintiff's obligation to pay for legal services rendered by plaintiff warranted presentation to the jury of the issue of attorney fees. *Owens v. McGee & Oxford*, 238 Ga. App. 497, 518 S.E.2d 699 (1999).

Proof of expenses of litigation is required. See *Johnson & Shahan v. East Tenn., Va. & Ga. Ry.*, 90 Ga. 810, 17 S.E. 121 (1893).

An attorney cannot recover for professional services without proof of their value. *First Bank v. Dollar*, 159 Ga. App. 815, 285 S.E.2d 203 (1981).

Expenses must be reasonable. — An award for litigation expenses under O.C.G.A. § 13-6-11 must be supported by evidence that the expenses were reasonable. *Eways v. Georgia R.R. Bank*, 806 F.2d 991 (11th Cir. 1986).

Before an award can be made under

O.C.G.A. § 13-6-11, the requesting party must provide the court with evidence which demonstrates the expenses submitted were reasonably incurred. *Great Am. Ins. Co. v. International Ins. Co.*, 753 F. Supp. 357 (M.D. Ga. 1990).

Insufficient evidence was offered to support the amount of attorney fees awarded to defendant as no testimony was offered as to the reasonableness of those fees and plaintiff was denied the opportunity to challenge the amount and the reasonableness of the fees. *Kwickie/Flash Foods, Inc. v. Lakeside Petro., Inc.*, 256 Ga. App. 556, 568 S.E.2d 816 (2002).

Proof of what was paid for professional services is not sufficient proof of their value. *Allen v. Harris*, 113 Ga. 107, 38 S.E. 322 (1901).

Evidence of offer to compromise action for sought damages is admissible when expenses of litigation are sought. See *Selma, R. & D.R.R. v. Fleming*, 48 Ga. 514 (1873); *Western & A.R.R. v. Smith*, 15 Ga. App. 289, 82 S.E. 906 (1914).

Appropriate testimony as to reasonable attorney fees. — While plaintiff's attorney is competent to testify as to the attorney's opinion on reasonable fees, there is no prohibition on more objective expert testimony with regard to attorney fees under former Code 1933, § 38-1710 (see O.C.G.A. § 24-9-67). *Altamaha Convalescent Ctr., Inc. v. Godwin*, 137 Ga. App. 394, 224 S.E.2d 76 (1976).

Despite the fact that a lender in a loan dispute testified as to the lender's attorney's hourly rate, the number of hours spent by the attorney on depositions and trial preparation, and the amount of the fees, absent testimony by any witness as to the reasonableness of the fees, even testimony from their own attorney, the attorney-fee award was vacated for lack of sufficient evidence and remand was ordered for an evidentiary hearing on the matter. *Gray v. King*, 270 Ga. App. 855, 608 S.E.2d 320 (2004).

Despite the fact that a construction contractor was found to have acted in bad faith, had been stubbornly litigious, and caused the city unnecessary trouble and expense in refusing to return a duplicate payment to the city, the award of attorney fees under O.C.G.A. § 13-6-11 to the city was reversed, as the contractor was erroneously denied the

Evidentiary Issues (Cont'd)

opportunity to inquire about the reasonableness of the attorney fees. *D & H Constr. Co. v. City of Woodstock*, 284 Ga. App. 314, 643 S.E.2d 826 (2007).

Appropriate testimony required as to fees attributable to prevailing claims. — Action awarding attorney fees and litigation expenses to the customer was remanded with directions to the trial court to conduct an evidentiary hearing on the issue to allow the customer to establish the amount of the customer's attorney fees that were attributable to the customer's successful negligence construction claim since, at trial, the customer merely proved the "lump sum" amount of attorney fees and expenses of litigation incurred in working on the entire case rather than that portion on which the customer prevailed. *Premier Cabinets, Inc. v. Bulat*, 261 Ga. App. 578, 583 S.E.2d 235 (2003).

Billing document not hearsay. — Exhibit, in the form of a billing document, summarizing an injured party's attorney fees and litigation expenses admitted to support the injured party's claim under O.C.G.A. § 13-6-11 was not hearsay since the injured party's attorney authored the exhibit, testified, and was cross-examined. The driver's claim that the exhibit made no attempt to differentiate between those fees incurred on the liability issue and those incurred on the property damage issue was rejected as the driver was awarded summary judgment based on the driver's offer to pay the total amount for property damage that the injured party claimed, which was not the same as prevailing on a separate claim. *Daniel v. Smith*, 266 Ga. App. 637, 597 S.E.2d 432 (2004).

Party's testimony as to "approximate" cost of legal fees is insufficient. See *First Bank v. Dollar*, 159 Ga. App. 815, 285 S.E.2d 203 (1981).

Fee award based on guesswork improper. — Because the attorney offered no billing records or any other evidence describing, with any particularity, how the time was spent, the award of \$6,000 for attorney fees was improperly based on guesswork. *4WD Parts Ctr., Inc. v. Mackendrick*, 260 Ga. App. 340, 579 S.E.2d 772 (2003).

Damages stricken for failure to provide evidence of litigation expenses. — When the

trial court finds bad faith on the part of the defendant, and this finding is supported by the evidence but no evidence is presented as to the amount of litigation expenses incurred, these damages must be stricken from the award. *Wahnschaff Corp. v. O.E. Clark Paper Box Co.*, 166 Ga. App. 242, 304 S.E.2d 91 (1983); *Sheppard v. Sheppard*, 229 Ga. App. 494, 494 S.E.2d 240 (1997).

Award of attorney's fees should be affirmed if there is any evidence to support the award unless it can be said as a matter of law that there was a reasonable defense. *Ken-Mar Constr. Co. v. Bowen*, 245 Ga. 676, 266 S.E.2d 796 (1980); *Fuller v. Moister*, 248 Ga. 287, 282 S.E.2d 889 (1981); *Wisembaker v. Warren*, 196 Ga. App. 551, 396 S.E.2d 528 (1990); *Gist v. Ferguson Constr. Co.*, 197 Ga. App. 625, 398 S.E.2d 862 (1990).

When the award of attorney fees is supported by the evidence, the appellate court will not disturb the award. *Franchise Enters., Inc. v. Ridgeway*, 157 Ga. App. 458, 278 S.E.2d 33 (1981); *Griffiths v. Phenix Supply Co.*, 192 Ga. App. 651, 385 S.E.2d 789 (1989).

Award of attorney fees is to be affirmed if there is any evidence to support the award. *A.P.S.S., Inc. v. Clary & Assocs.*, 178 Ga. App. 131, 342 S.E.2d 375 (1986).

Standard of review of an award of attorney fees under O.C.G.A. § 13-6-11 is whether there is any evidence to support the award. *Spring Lake Property Owners Ass'n v. Peacock*, 260 Ga. 80, 390 S.E.2d 31 (1990).

Amount of fee award. — In breach of contract action brought by attorney to recover legal fees from a client, remand for evidentiary hearing on amount of attorney fee award under O.C.G.A. § 13-6-11 was required; although there was evidence of the client's bad faith in that parties' contract plainly required client to pay one-third of any cash settlement, which client never offered to do, attorney's trial counsel had offered only generalized and approximated proffer of time spent on the breach of contract case, there was a lack of billing records or other evidence showing precisely how trial counsel's time was spent, and there was no evidence as to reasonableness of trial counsel's fees. *Hardnett v. Ogundele*, 291 Ga. App. 241, 661 S.E.2d 627 (2008).

Evidence that plaintiff could not get response from insurer properly admitted. —

Evidence that the plaintiff, in attempting to discuss the plaintiff's claims arising out of an automobile collision, could not get a response from the defendant, the plaintiff's insurer, did not show "negotiations and offers of compromise or settlement," which are not proper evidence under O.C.G.A. § 24-3-37, but was properly admitted under O.C.G.A. § 13-6-11 to show that the defendant acted in bad faith, or was stubbornly litigious, or put the plaintiff to unnecessary trouble or expense. *U-Haul Co. v. Ford*, 171 Ga. App. 744, 320 S.E.2d 868 (1984).

In an action for damages sustained in an automobile collision, the plaintiff, in support of the plaintiff's claim under O.C.G.A. § 13-6-11, was entitled to show that the defendant, acting through the defendant's claims service agent, had no defense on the issue of liability for property damage, yet refused to discuss this claim, even though the existence of liability insurance could be inferred through the introduction of such evidence. *U-Haul Co. v. Ford*, 171 Ga. App. 744, 320 S.E.2d 868 (1984).

Award affirmed if finding supported by any evidence. — An award of litigation expenses, based on an express finding that the defendant acted in bad faith, must be affirmed if there is any evidence to support that finding. *Jim Ellis Atl., Inc. v. McAlister*, 198 Ga. App. 94, 400 S.E.2d 389 (1990).

Award vacated if statutory basis and reasonableness not provided. — Trial court erred in awarding attorney fees to a publisher, absent a statutory basis for the award and evidence as to the reasonableness of the award; hence, the award was vacated and remand was ordered for the trial court to hold an evidentiary hearing on the amount and reasonableness of the fees. *In re Serpentfoot*, 285 Ga. App. 325, 646 S.E.2d 267 (2007), cert. denied, 2007 Ga. LEXIS 661 (Ga. 2007).

Unresolved costs warranted new trial. — When no evidence was presented from which the jury could determine what portion of the total amount of attorney time and litigation expenses incurred was attributable to defendant's counterclaim against plaintiff, the trial court erred in denying plaintiff's motion for new trial on the issue of attorney fees. *Professional Consulting Servs. of Ga., Inc. v. Ibrahim*, 206 Ga. App. 663, 426 S.E.2d 376 (1992).

When there was no evidence of the percentage contingency being charged by law firms, the amount of attorney fees awarded was nearly one-and-one-half times the amount of the damages awarded, and no recovery of fees attributable to punitive damages claims could be had, the award of attorney fees was vacated and the case remanded for an evidentiary hearing on the amount of reasonable fees. *First Union Nat'l Bank v. Davies-Elliott, Inc.*, 215 Ga. App. 498, 452 S.E.2d 132 (1994).

Record supported award of attorney's fees. — See *Ale-8-One of Am., Inc. v. Graphicolor Servs., Inc.*, 166 Ga. App. 506, 305 S.E.2d 14 (1983); *I.M.C. Motor Express, Inc. v. Cochran*, 180 Ga. App. 232, 348 S.E.2d 750 (1986); *Anderson v. Chatham*, 190 Ga. App. 559, 379 S.E.2d 793 (1989); *Southern Medical Corp. v. Willis*, 194 Ga. App. 773, 391 S.E.2d 803 (1990); *Myers v. Myers*, 195 Ga. App. 529, 394 S.E.2d 374 (1990); *Pope v. Witter*, 205 Ga. App. 101, 421 S.E.2d 725, cert. denied, 205 Ga. App. 901, 421 S.E.2d 725 (1992); *Young v. A.L. Anthony Grading Co.*, 225 Ga. App. 592, 484 S.E.2d 318 (1997); *Sass v. First Nat'l Bank*, 228 Ga. App. 7, 491 S.E.2d 76 (1997). *Wheat Enters., Inc. v. Redi-Floors, Inc.*, 231 Ga. App. 853, 501 S.E.2d 30 (1998); *Tattersall Club Corp. v. White*, 232 Ga. App. 307, 501 S.E.2d 851 (1998); *Goodman v. Frolik & Co.*, 233 Ga. App. 376, 504 S.E.2d 223 (1998); *Plaza Properties, Ltd. v. Prime Bus. Invs., Inc.*, 240 Ga. App. 639, 524 S.E.2d 306 (1999), aff'd, 273 Ga. 97, 538 S.E.2d 51 (2000); *Parks v. Breedlove*, 241 Ga. App. 72, 526 S.E.2d 137 (1999); *Graves v. Diambrose*, 243 Ga. App. 802, 534 S.E.2d 490 (2000); *Ryland Group, Inc. v. Daley*, 245 Ga. App. 496, 537 S.E.2d 732 (2000).

Evidence improperly excluded in contract action. — In a breach of contract action, the court improperly granted an asphalt company's motion in limine excluding evidence of attorney's fees sought by the Georgia Department of Transportation (DOT) under O.C.G.A. § 13-6-11; the trial court erred in concluding that the DOT could not recover such fees incurred in developing testing evidence that was excluded as a jury would not be required to pro-rate fees between various aspects of a cause of action. *DOT v. Douglas Asphalt Co.*, 297 Ga. App. 470, 677 S.E.2d 699 (2009), appeal dismissed, 297 Ga.

Evidentiary Issues (Cont'd)

App. 511, 677 S.E.2d 728 (2009).

Existence of contract. — O.C.G.A. § 13-6-11 does not specifically require that allowable litigation expenses be incurred pursuant to an existing oral or written contract. *KDS Properties, Inc. v. Sims*, 234 Ga. App. 395, 506 S.E.2d 903 (1998).

When no ruling invoked, no question for review and no jurisdiction. — When the trial court lacked jurisdiction to decide a lessee's motion for clarification as an out-of-term motion to reconsider the original order and such was insufficient to extend the time to file timely a notice of appeal as to such order, the appeals court lacked jurisdiction to consider the appeal; thus, the trial court's clarification order declaring the court's original order granting summary judgment to the lessee on the lessee's specific performance claim, but denying the lessee's breach of contract and attorney-fee claim, and denying the lessor's motion for partial summary judgment on the lessor's claim for reasonable rents was vacated. *Masters v. Clark*, 269 Ga. App. 537, 604 S.E.2d 556 (2004), appeal dismissed, *Clark v. Masters*, 297 Ga. App. 794, 678 S.E.2d 538 (2009).

Some evidence. — When a party seeking attorney-fees has engaged in bad faith or stubborn litigiousness, or has caused unnecessary trouble and expense, such factor may be considered by the trial court and will, either standing alone, or in conjunction with other operative facts, constitute some evidence to support denial of the request for attorney fees. *Crotty v. Crotty*, 219 Ga. App. 408, 465 S.E.2d 517 (1995).

Jury-Court Determinations

Intent of O.C.G.A. § 13-6-11, as shown by the words, "the jury may allow them," is to leave the matter of expenses to the jury trying the case. *Brannon Enters., Inc. v. Deaton*, 159 Ga. App. 685, 285 S.E.2d 58 (1981); *J.M. Clayton Co. v. Martin*, 177 Ga. App. 228, 339 S.E.2d 280 (1985); *Jamison v. West*, 191 Ga. App. 431, 382 S.E.2d 170 (1989).

Question of attorney fees under O.C.G.A. § 13-6-11 is question for jury. See *Citizens & S. Trust Co. v. Hicks*, 216 Ga. App. 338, 454 S.E.2d 207 (1995).

Under O.C.G.A. § 13-6-11, the amount of

the award of attorney fees as damages is a jury question that cannot be decided on summary judgment because the questions of reasonableness and necessity of the expenses of litigation and attorney fees are matters for expert opinion. *American Medical Transp. Group, Inc. v. Glo-An, Inc.*, 235 Ga. App. 464, 509 S.E.2d 738 (1998); *Young v. Turner Heritage Homes, Inc.*, 241 Ga. App. 400, 526 S.E.2d 82 (1999).

In a nuisance suit wherein the plaintiff homeowners received a verdict in the plaintiff's favor as against the City of Atlanta with regard to recurrent flooding in a neighborhood, the trial court did not abuse the trial court's discretion by denying the homeowners' motion for a new trial based on the jury's failure to award the homeowners attorney fees and litigation expenses as well as damages for the relocation costs the homeowners incurred as a result of being displaced; whether the homeowners met any of the preconditions for an award of attorney fees and litigation expenses set forth in O.C.G.A. § 13-6-11 was solely a question for the jury, and even though the jury did not award the homeowners damages for relocation expenses, the damages may have been included within the awards for the loss of the use and enjoyment of the homes. *City of Atlanta v. Broadnax*, 285 Ga. App. 430, 646 S.E.2d 279 (2007), cert. denied, 2007 Ga. LEXIS 615, 648 (Ga. 2007).

Trial court erred in granting summary judgment to a property owner on heirs' claim for attorney fees under O.C.G.A. § 13-6-11 because that issue was for the jury. *Davis v. Overall*, 301 Ga. App. 4, 686 S.E.2d 839 (2009).

No right to have attorney fee issue decided by jury. — O.C.G.A. § 13-6-11 did not apply in a suit in which defendants sought attorney's fees and expenses after a derivative action brought by former shareholders under diversity jurisdiction was dismissed on the merits because, under United States Court of Appeals for the Eleventh Circuit precedent, defendants had no right to a trial by jury on the issue of attorney's fees. *Hantz v. Belyew*, No. 1:05-CV-1012-JOF, 2006 U.S. Dist. LEXIS 82019 (N.D. Ga. Nov. 8, 2006).

If there is a bona fide controversy between the parties as to liability, the issue of costs cannot be submitted to a jury. *Thompson Enters., Inc. v. Coskrey*, 168 Ga. App. 181, 308 S.E.2d 399 (1983).

When a bona fide controversy clearly exists between the parties, there is not "any evidence" to support an award for expenses of litigation. *Gunnin v. Parker*, 194 Ga. App. 426, 390 S.E.2d 596, cert. denied, 194 Ga. App. 911, 390 S.E.2d 596 (1989).

Error to submit issue to jury when case involves bona fide dispute. — In a personal injury suit, it was error to submit the issue of litigation expenses under O.C.G.A. § 13-6-11 to the jury; a bona fide controversy existed as to whether a collision was caused by the negligence of the first driver, the second driver, or both; a bona fide dispute and a reasonable defense precluded an award under the statute. *White v. Scott*, 284 Ga. App. 87, 643 S.E.2d 356 (2007).

It is for jury determination as to whether or not there is a bona fide controversy so as to deny attorney fees. *Jackson v. Brinegar, Inc.*, 165 Ga. App. 432, 301 S.E.2d 493 (1983).

Evidence of one enumerated ground sends question to jury. — Evidence of one of the enumerated elements in O.C.G.A. § 13-6-11 will send the question of recovery of fees and costs to the jury. The award of attorney's fees is a question exclusively for the jury once evidence of a requisite element is produced. *Brown v. Joiner Int'l, Inc.*, 523 F. Supp. 333 (S.D. Ga. 1981).

Questions of bad faith, stubborn litigiousness, and expense are generally questions for the jury. *Gorin v. FPA 2*, 184 Ga. App. 239, 361 S.E.2d 193, cert. denied, 184 Ga. App. 909, 361 S.E.2d 193 (1987); *American Family Life Assurance Co. v. United States Fire Co.*, 885 F.2d 826 (11th Cir. 1989); *Manderson & Assocs. v. Gore*, 193 Ga. App. 723, 389 S.E.2d 251, cert. denied, 193 Ga. App. 910, 389 S.E.2d 251 (1989); *Jim Anderson & Co. v. Partraining Corp.*, 216 Ga. App. 344, 454 S.E.2d 210 (1995).

Questions of bad faith, stubborn litigiousness, and expense are generally questions for the factfinder. *Rossee Oil Co. v. BellSouth Telecommunications, Inc.*, 212 Ga. App. 235, 441 S.E.2d 464 (1994).

Whether plaintiff is entitled to recover expenses of litigation is solely a question for jury. *Pritchett v. Rainey*, 131 Ga. App. 521, 206 S.E.2d 726 (1974).

Question as to whether or not plaintiff in a particular case is entitled to recover ex-

penses of litigation is solely a matter for jury to determine from evidence. *Parks v. Parks*, 89 Ga. App. 725, 80 S.E.2d 837 (1954).

When trial court decides that there is an issue for the jury as to defendant's fraud respecting one issue, and jury decides for plaintiff on this issue, it is error for the trial court to direct a verdict against plaintiff as to punitive damages and attorney's fees. *Champion v. Martin*, 124 Ga. App. 275, 183 S.E.2d 571 (1971).

Question of attorney fees under O.C.G.A. § 13-6-11 is a question for the jury. *Spring Lake Property Owners Ass'n v. Peacock*, 260 Ga. 80, 390 S.E.2d 31 (1990); *Deloitte, Haskins & Sells v. Green*, 198 Ga. App. 849, 403 S.E.2d 818, cert. denied, 198 Ga. App. 897, 403 S.E.2d 818 (1991); *Lewis v. Rogers*, 201 Ga. App. 899, 412 S.E.2d 632 (1991).

Issue of attorney fees under O.C.G.A. § 13-6-11 is a question for the jury and an award will be upheld if any evidence is presented to support the award. *Arford v. Blalock*, 199 Ga. App. 434, 405 S.E.2d 698, cert. denied, 199 Ga. App. 906, 405 S.E.2d 698 (1991), aff'd sub nom. *Wilensky v. Blalock*, 262 Ga. 95, 414 S.E.2d 1 (1992).

Mere inclusion of a request for attorney's fees, when the plaintiff's other claims are exclusively equitable in nature, does not entitle the defendant to a jury trial pursuant to the seventh amendment. *Wheless v. Gelzer*, 765 F. Supp. 741 (N.D. Ga. 1991).

Court may not direct jury to find any sum as attorney's fees. — Intent of the law, as indicated by the words, "the jury may allow them," is to leave matter of expenses of litigation to jury trying the case. Consequently, a court errs in directing a jury to find any sum for attorney's fees. *Taylor v. Estes*, 85 Ga. App. 716, 70 S.E.2d 82 (1952).

Trial judge, when sitting as trier of fact, may award litigation expenses. *Derrickson v. Kristal*, 148 Ga. App. 320, 251 S.E.2d 170 (1978).

Failure to make findings of fact and conclusions of law to support award of attorney fees. — In civil contempt action, the trial court erred in failing to make express findings of fact and conclusions of law as to the statutory basis for the award of attorney fees or the conduct that would authorize the award, and the record contained insufficient evidence of the reasonableness of the attorney fees incurred by the corporation and its owner due to the former employee's viola-

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tion of an injunction prohibiting the employee from contacting the corporation's customers and using the corporation's name to conduct business on the employee's website. *Parland v. Millennium Constr. Servs., LLC*, 276 Ga. App. 590, 623 S.E.2d 670 (2005).

O.C.G.A. § 13-6-11 did not permit an award of attorney fees and litigation expenses for proceedings before the appellate courts as the statute's purpose was not to ensure that a winning plaintiff was made whole. *Brown, P.E., Inc. v. Kent*, 274 Ga. 849, 561 S.E.2d 89 (2002).

While attorney fees could be awarded to an attorney's client for the attorney's breach of a fiduciary duty to attorney's client in failing to adequately supervise the attorney's non-legal staff, only those attorney fees attributable to the client's breach of fiduciary duty claim could be awarded; therefore, when the jury made a lump sum award of attorney fees to the client, the appellate court remanded the case to the trial court for a determination of what amount of the attorney fee award was attributable to the breach of fiduciary verdict claim rather than the client's other non-prevailing claims. *Joel v. Chastain*, 254 Ga. App. 592, 561 S.E.2d 746 (2002).

Since the adjoining property owners did not prove their attorney fees as attributable to each of the claims on which the owners were awarded damages and the jury awarded punitive damages to the owners without particularity upon all counts, the award of attorney fees and punitive damages to the adjoining property owners had to be reversed as to both issues, and the cause had to be remanded for a new trial on both issues. *D. G. Jenkins Homes, Inc. v. Wood*, 261 Ga. App. 322, 582 S.E.2d 478 (2003).

Trial court may not direct verdict on issue of expenses of litigation. — In suits where expenses of litigation might be recovered as part of damages, it is error for trial court to direct a verdict therefor. The matter of such expenses is left solely to jury. *Tab Sales, Inc. v. D & D Distribs., Inc.*, 153 Ga. App. 779, 266 S.E.2d 558 (1980).

Trial court may not strike jury-awarded attorney fees when evidence supported award. — When jury awarded plaintiff fees,

the court's entering a j.n.o.v. striking the attorney fees was error since there was evidence of bad faith on the part of defendants. *Powell v. Watson*, 190 Ga. App. 375, 378 S.E.2d 867, cert. denied, 190 Ga. App. 898, 378 S.E.2d 867 (1989).

When evidence warrants award of fees, failure to direct verdict for defendant not error. — When, from the evidence admitted in court, the jury is warranted in finding that the defendant has been stubbornly litigious and has caused plaintiff unnecessary trouble and expense, the trial court does not err in failing to direct a verdict in favor of the defendant on the issue of entitlement to attorney fees and expenses. *Assaf v. Coker*, 157 Ga. App. 432, 278 S.E.2d 82 (1981).

Jury shall determine questions of bad faith, stubborn litigiousness, and causing unnecessary trouble. *Emery v. Atlanta Real Estate Exch.*, 88 Ga. 321, 14 S.E. 556 (1891).

Pro-rating fees not required. — Jury may award attorney fees under O.C.G.A. § 13-6-11 if there is no bona fide controversy as to liability, even if there is a bona fide controversy as to damages. Once the threshold for awarding the plaintiff expenses of litigation as compensation for a defendant's stubborn litigiousness or causing unnecessary trouble or expense was reached, there was no authority for requiring the jury to pro-rate fees between various aspects of a discrete cause of action. *Daniel v. Smith*, 266 Ga. App. 637, 597 S.E.2d 432 (2004).

Jury to determine fees in suit for fraud and deceit. — In suit for fraud and deceit, plaintiff is entitled to have submitted to jury the matter of allowance of attorney's fees. *McMichen v. Martin Burks Chevrolet, Inc.*, 128 Ga. App. 482, 197 S.E.2d 395 (1973).

In action for fraud and deceit, jury to determine whether attorney fees are warranted. — In action by buyer against seller for fraud and deceit, it is for jury to determine if evidence warrants imposition of punitive damages and attorney fees. *Hill Aircraft & Leasing Corp. v. Flanders*, 143 Ga. App. 504, 239 S.E.2d 155 (1977).

When fraud and deceit are alleged, a plaintiff in Georgia is permitted to submit attorney's fee question to jury. *Shingleton v. Armor Velvet Corp.*, 621 F.2d 180 (5th Cir. 1980).

When plaintiff produces evidence of bad faith in breaching contract, jury may award

attorney fees. — When plaintiff produces some evidence of bad faith in breaching contract, recovery of attorney fees may be submitted to jury as an additional element of damages for plaintiffs. *A.W. Easter Constr. Co. v. White*, 137 Ga. App. 465, 224 S.E.2d 112 (1976).

Since a court should not vacate an award under O.C.G.A. § 13-6-11 unless there was absolutely no evidence to support the award, when the jury was authorized to find the requisite bad faith with respect to a contract theory and award fees on that basis alone and the jury found that defendants acted in bad faith with respect to the defendants' underlying dealing with the plaintiff, then the jury verdict awarding attorneys' fees was upheld. *LaRoche Indus., Inc. v. AIG Risk Mgt., Inc.*, 959 F.2d 189 (11th Cir. 1992).

Jury determined defendants acted with bad faith. — Summary judgment against plaintiff on plaintiff's claim for attorney fees under O.C.G.A. § 13-6-11 was error when, even though there was a bona fide controversy, a jury could have decided that defendants acted with bad faith. *Stargate Software Int'l, Inc. v. Rumph*, 224 Ga. App. 873, 482 S.E.2d 498 (1997).

Jury can determine bad faith even though bona fide controversy shown. — Even though the existence of a prior appeal demonstrated a "bona fide controversy" under O.C.G.A. § 13-6-11, that did not preclude the jury's consideration of whether the defendant demonstrated bad faith in the defendant's dealing with the plaintiff, authorizing the award of attorney fees. *First Union Nat'l Bank v. Davies-Elliott, Inc.*, 215 Ga. App. 498, 452 S.E.2d 132 (1994).

Subcontractor's motion for summary judgment was denied on a general contractor's litigation expenses claim under O.C.G.A. § 13-6-11 to the extent the claim was based on bad faith because the question of whether a contract existed and the subcontractor breached the contract in bad faith remained for a jury to decide, and the jury could determine both that there was a contract and that the subcontractor breached the contract for an interested motive such as scheduling or financial problems. *Apac-Southeast, Inc. v. Coastal Caisson Corp.*, 514 F. Supp. 2d 1373 (N.D. Ga. 2007).

Bad faith is for jury determination. — Because a corporation adduced evidence

from which a jury could find that the corporation's competitor, the competitor's majority shareholder, and a newly formed company liable for procuring a breach of fiduciary duty, and because acting purposefully, with malice and the intent to injure, was an essential element of this tort, defendants were not entitled to judgment as a matter of law on the corporation's malice claims seeking punitive damages and attorney fees; moreover, the question of bad faith was one for the jury to determine. *Insight Tech., Inc. v. FreightCheck, LLC*, 280 Ga. App. 19, 633 S.E.2d 373 (2006).

Jury considerations in determining amount to award as attorney's fees. — Jury in awarding attorney's fees may consider experience and expertise of counsel, amount of time involved in rendering services, and rate of compensation allowed in similar cases, among other things. *F.N. Roberts Pest Control Co. v. McDonald*, 132 Ga. App. 257, 208 S.E.2d 13 (1974).

Summary adjudication only in rare cases. — Only in the rare case when there was absolutely no evidence to support the award of expenses of litigation would the trial court be authorized to grant summary judgment on such issues. *American Medical Transp. Group, Inc. v. Glo-An, Inc.*, 235 Ga. App. 464, 509 S.E.2d 738 (1998).

Trial court could grant summary judgment on availability of attorney's fees, but question of punitive damages was for jury. — Tenant whose former landlord cashed a check for property taxes that the tenant mailed to the landlord by mistake was entitled to summary judgment on a claim for conversion and bad faith attorney's fees under O.C.G.A. § 13-6-11; however, under O.C.G.A. § 51-12-5.1(d), the question of whether punitive damages should be awarded and the amount thereof was for a jury. *Covington Square Assocs., LLC v. Ingles Mkts., Inc.*, 300 Ga. App. 740, 686 S.E.2d 359 (2009).

Summary judgment for fees properly denied. — Summary judgment was denied to a former employer and its acquirer on a former employee's claim for attorney's fees and expenses for bad faith litigation pursuant to O.C.G.A. § 13-6-11 arising out of defendants' failure to permit the employee to exercise stock options because there was a fact issue for the jury since the employee

Jury-Court Determinations (Cont'd)

contended that defendants forced the employee to resort to litigation to enforce an agreement and that, in doing so, the defendant's acted in bad faith, demonstrated litigiousness, and caused the employee undue expense. *Lucius v. Micro Gen. Corp.*, No. 1:03-CV-1270-TWT, 2004 U.S. Dist. LEXIS 14112 (N.D. Ga. Apr. 8, 2004).

Jury Instructions

Jury charge must specify provisions authorizing attorney fees. — When a party seeks recovery of attorney fees from an opponent pursuant to the provisions of O.C.G.A. § 13-6-11, the court's charge to the jury must specify the provisions of the section which would authorize a jury verdict or attorney fees. *Spivey v. Rogers*, 173 Ga. App. 233, 326 S.E.2d 227 (1984).

Because the party pursuing attorney's fees and expenses under O.C.G.A. § 13-6-11 did not submit a jury charge under the statute, no error resulted in the jury's failure to award attorney's fees and expenses under the theory presented. *Gold Kist, Inc. v. Base Mfg.*, 289 Ga. App. 690, 658 S.E.2d 228 (2008).

Failure to instruct harmless error. — While O.C.G.A. § 13-6-11 appears in the contracts section of the code, it is universally applied when the underlying suit is not in contract; however, when the underlying claims in a case should not have been allowed to go to the jury, the refusal to charge the jury on awarding attorney fees under O.C.G.A. § 13-6-11 was harmless error. *Bacon v. Volvo Serv. Ctr., Inc.*, 266 Ga. App. 543, 597 S.E.2d 440 (2004).

Jury is authorized to consider damages despite absence of specific instructions. — Where, when trial court gave the court's general charge to the jury on liability and damages, the trial court gave no instructions regarding the recoverability of attorney's fees pursuant to O.C.G.A. § 13-6-11, when despite this absence of specific instructions, the jury nevertheless included in the jury's verdict an award to appellees of attorney's fees, and when at the time that verdict was returned, defendants did not object to its inclusion of an award of attorney's fees and the jury was dispersed, the award of attorney fees was correct despite the absence of spe-

cific instructions by the trial court; since the recoverability of damages is dependent upon the applicable law and evidence, and not upon the instructions of the trial court, since defendants did not contest the sufficiency of the evidence to authorize the \$8,008.08 verdict in attorney's fees, and since defendants failed to object to the verdict at the time the verdict was returned, the award of attorney's fees was sustained. *Ring v. Williams*, 192 Ga. App. 329, 384 S.E.2d 914 (1989).

Failure to object to jury instruction on attorney fees for stubborn litigiousness. — In an action in which a widow sued an insurer for failing to pay benefits under a life insurance policy, and the jury found the insurer was not guilty of bad faith in the insurer's refusal to pay these benefits but that the insurer was stubbornly litigious, the insurer's argument on appeal that the jury was not authorized to award attorney fees for stubborn litigiousness was not preserved for appeal because the insurer did not present that argument to the trial court and did not object to a jury instruction on awarding attorney fees for stubborn litigiousness. *Cherokee Nat'l Life Ins. Co. v. Eason*, 276 Ga. App. 183, 622 S.E.2d 883 (2005).

Evidence sufficient to support instruction on bad faith. — When the trial court instructed the jury that expenses of litigation may be allowed under the three conditions enumerated by the trial court (encompassing the provisions of O.C.G.A. § 13-6-11), that it was necessary to show one of the three conditions existed in order to recover attorney fees, but that any one of the three may authorize such damages, and the evidence adduced at trial showed that defendant obtained a writ of possession by swearing that plaintiffs had failed to pay monies due the defendant which instead were shown to be due to third parties (namely, the finance company and the lot manager of the mobile home park) and that defendant, together with the other defendants, first emptied plaintiffs' mobile home of the home's belongings and then drove off taking some of plaintiffs' belongings with the defendants, and leaving the rest to be taken by unknown third parties, this evidence was sufficient to support the trial court's charge to the jury on the issue of attorney fees under O.C.G.A. § 13-6-11, particularly the bad faith section of that statute. *Sanders v. Hughes*, 183 Ga.

App. 601, 359 S.E.2d 396, cert. denied, 183 Ga. App. 907, 359 S.E.2d 396 (1987).

Jury instruction on bad faith. — Jury was properly charged on bad faith as an avenue for attorney fees pursuant to O.C.G.A. § 13-6-11 as a pretrial order did not exclude bad faith as an avenue of recovery; the trial court did not err in charging the jury that the jury could award attorney fees if the defendants had acted in bad faith, had been stubbornly litigious, or had caused the client unnecessary trouble and expense. As the trial court did not err in charging on bad

faith, the trial court did not compound the error or commit reversible error by charging the jury that “where a jury (was) authorized to find fraud, it (was) authorized to find bad faith.” *Gerschick v. Pounds*, 281 Ga. App. 531, 636 S.E.2d 663 (2006), cert. denied, 2007 Ga. LEXIS 95 (Ga. 2007).

No error in instructions. — Trial court did not err in giving a charge paraphrasing O.C.G.A. § 13-6-11 since the charge was warranted by the evidence. *Kent v. Brown*, 238 Ga. App. 607, 518 S.E.2d 737 (1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Costs, § 1 et seq. 22 Am. Jur. 2d, Damages, §§ 147 et seq.

C.J.S. — 25 C.J.S., Damages, § 68, et seq.

ALR. — Right to recover attorneys’ fees for wrongful attachment, 25 ALR 579; 65 ALR2d 1426.

Recovery in action of deceit for fraudulently inducing contract of expense of other litigation incident to contract, 41 ALR 1156.

Attorneys’ fees as element of damages allowable in action on injunction bond, 164 ALR 1088.

Right to recover attorneys’ fees for wrongful attachment, 65 ALR2d 1426.

What constitutes “trial,” “final trial,” or “final hearing” under statute authorizing allowance of attorneys’ fees as costs on such proceeding, 100 ALR2d 397.

Attorneys’ fees incurred in litigation with third person as damages in action for breach of contract, 4 ALR3d 270.

Attorneys’ fees or other expenses of litigation as element in measuring exemplary or punitive damages, 30 ALR3d 1443.

Punitive damages for wrongful seizure of chattel by one claiming security interest, 35 ALR3d 1016.

Dismissal of plaintiff’s action as entitling defendant to recover attorneys’ fees or costs as “prevailing party” or “successful party,” 66 ALR3d 1087.

Construction and application of state statute or rule subjecting party making untrue allegations or denials to payment of costs or attorney’s fees, 68 ALR3d 209.

Validity of statute allowing attorney’s fee to successful claimant but not to defendant, or vice-versa, 73 ALR3d 515.

Allowance of counsel fees in taxpayer’s action in state court, 89 ALR3d 690.

Measure and elements of damages for breach of contract to lend money, 4 ALR4th 682.

13-6-12. Effect of tender or deposit in court before trial upon recovery of costs.

If the defendant in an action for breach of contract, before trial, tenders to the plaintiff or deposits in court as much as or more than he finally recovers, no costs shall be recovered accruing subsequent to the tender or deposit. (Orig. Code 1863, § 2887; Code 1868, § 2895; Code 1873, § 2946; Code 1882, § 2946; Civil Code 1895, § 3801; Civil Code 1910, § 4397; Code 1933, § 20-1409.)

Cross references. — Deposits in court generally, § 9-11-67.

Law reviews. — For annual survey of law

of contracts, see 38 Mercer L. Rev. 107 (1986).

JUDICIAL DECISIONS

Cited in Pausch v. Guerrard, 67 Ga. 319 (1881); Sutton v. Southern Ry., 101 Ga. 776, 29 S.E. 53 (1897); Glenn v. Western Union Tel. Co., 1 Ga. App. 821, 58 S.E. 83 (1907); Williams v. Rome Ry. & Light Co., 4 Ga. App. 372, 61 S.E. 495 (1908); Atlantic C.L.R.R. v. Thomas, 14 Ga. App. 619, 82 S.E. 299 (1914); Harris v. Black, 143 Ga. 497, 85 S.E.

742 (1915); Twin City Lumber Co. v. Daniels, 22 Ga. App. 578, 96 S.E. 437 (1918); Jeter v. Davis, 33 Ga. App. 733, 127 S.E. 898 (1925); Graham Bros. Constr. Co. v. C.W. Matthews Contracting Co., 159 Ga. App. 546, 284 S.E.2d 282 (1981); A.P.S.S., Inc. v. Clary & Assocs., 178 Ga. App. 131, 342 S.E.2d 375 (1986).

13-6-13. Recovery of interest upon damages.

In all cases where an amount ascertained would be the damages at the time of the breach, it may be increased by the addition of legal interest from that time until the recovery. (Orig. Code 1863, § 2886; Code 1868, § 2894; Code 1873, § 2945; Code 1882, § 2945; Civil Code 1895, § 3800; Civil Code 1910, § 4396; Code 1933, § 20-1408.)

Cross references. — Effect of deposit in court on determination of interest, § 9-11-67.

JUDICIAL DECISIONS

Recovery for breach of contract may be awarded interest for two periods: (1) fact finder may within the finder's discretion in a proper case award interest from date of breach on unliquidated claim; and (2) claimant is entitled to interest from date claim becomes liquidated as a matter of law. Norair Eng'r Corp. v. Saint Joseph's Hosp., 147 Ga. App. 595, 249 S.E.2d 642 (1978) but see Black v. Automatic Sprinkler Co., 35 Ga. App. 8, 131 S.E. 543 (1926).

Whether interest from time of breach shall be added to damages is within discretion of jury. Black v. Automatic Sprinkler Co., 35 Ga. App. 8, 131 S.E. 543 (1926); but see Norair Eng'r Corp. v. Saint Joseph's Hosp., 147 Ga. App. 595, 249 S.E.2d 642 (1978).

Prejudgment interest on damages exceeded recovery amount authorized by evidence. — Pursuant to instructions from trial court, while jury was authorized under O.C.G.A. § 13-6-13 to increase the \$24,698.39 in breach of contract damages by adding prejudgment legal interest to damages at the rate of seven percent per annum simple interest from the date of the breach, jury's general verdict on the breach of con-

tract claim in amount of \$42,690.05 was in excess of any recovery authorized by the evidence; as a result, judgment entered on the verdict had to be reversed and the case remanded for new trial. Chacon v. Holcombe, 290 Ga. App. 767, 660 S.E.2d 851 (2008).

Prejudgment interest is generally allowed only on liquidated claims. United States ex rel. Ga. Elec. Supply Co. v. United States Fid. & Guar. Co., 656 F.2d 993 (5th Cir. 1981).

In a suit against an insurer under a policy covering oriental rugs, when several of the insured's rugs sustained water damage and others were stolen, because damages for the water damage claim were not liquidated, the trial court did not err in denying an award of prejudgment interest on that claim; however, inasmuch as the theft claim was for liquidated damages, the court erred in not awarding prejudgment interest on that claim. Holloway v. State Farm Fire & Cas. Co., 245 Ga. App. 319, 537 S.E.2d 121 (2000).

Prejudgment interest for unliquidated damages in breach of contract action is governed by this statute. United States ex rel. Delta Metals, Inc. v. R.M. Wells Co., 497

F. Supp. 541 (S.D. Ga. 1980) (see O.C.G.A. § 13-6-13).

There is no error in allowing prejudgment interest in breach of contract cases to be found by the jury as a separate item of the award, even where the damages are not liquidated. *Braner v. Southern Trust Ins. Co.*, 255 Ga. 117, 335 S.E.2d 547 (1985); *Bishop Contracting Co. v. North Ga. Equip. Co.*, 203 Ga. App. 655, 417 S.E.2d 400, cert. denied, 203 Ga. App. 905, 417 S.E.2d 400 (1992).

Prejudgment interest may be obtained in action for unliquidated damages. — O.C.G.A. § 13-6-13 allows for prejudgment interest to be awarded by a jury even on unliquidated claims. However, a prerequisite to the award of prejudgment interest is that the jury's finding of damages be the same as the amount of damages at the time of the breach. For interest to be permitted on an unliquidated claim, there must be a monetary loss which "immediately and necessarily" flows to the injured party. *Malta Constr. Co. v. Henningson, Durham & Richardson, Inc.*, 716 F. Supp. 1466 (N.D. Ga. 1989), aff'd, 927 F.2d 614 (11th Cir. 1991).

Prejudgment interest award was proper. — Trial court did not err in denying defendant's motion for a directed verdict on the issue of prejudgment interest where the court's charge on prejudgment interest as given was an accurate and complete statement of the law and where entry of judgment based on the findings of the jury as to the amount of interest calculated from the exhibits in evidence was proper. *Bishop Contracting Co. v. North Ga. Equip. Co.*, 203 Ga. App. 655, 417 S.E.2d 400, cert. denied, 203 Ga. App. 905, 417 S.E.2d 400 (1992).

Award of prejudgment interest was proper in a hospital's breach of contract action, wherein it was awarded judgment in its favor on a claim for recovery of monies due that had been loaned to a doctor who did not repay the full sum; pursuant to O.C.G.A. §§ 7-4-15 and 13-6-13, where the balance was a liquidated amount, as here, the court was authorized to award prejudgment interest. *Walker v. Gwinnett Hosp. Sys.*, 263 Ga. App. 554, 588 S.E.2d 441 (2003).

Summary judgment for a city for \$2,885,827 damages, plus pre-judgment interest under O.C.G.A. § 13-6-13, was proper on the city's claim against a county and its

tax commissioner for breach of an agreement under which the county was required to collect the city's taxes and remit them to the city, but instead withheld \$2,885,827 for a tax refund obligation owed by the county. *Ferdinand v. City of E. Point*, 301 Ga. App. 333, 687 S.E.2d 617 (2009).

Prejudgment interest award not required. — Although O.C.G.A. § 13-6-13 authorizes a separate award of prejudgment interest, the law does not require such an award. *T & R Custom, Inc. v. Liberty Mut. Ins. Co.*, 227 Ga. App. 144, 488 S.E.2d 705 (1997).

Award of prejudgment interest is for jury's discretion. — Award of prejudgment interest under O.C.G.A. § 13-6-13 is a matter for the jury's discretion. *American Family Life Assurance Co. v. United States Fire Co.*, 885 F.2d 826 (11th Cir. 1989).

In cases involving unliquidated damages, allowance of interest is within jury's discretion. — It is error for trial judge in a case involving unliquidated damages to instruct jury that plaintiff is entitled to interest, since in such a case allowance of interest is a matter within jury's discretion. *Smith v. Maples*, 114 Ga. App. 529, 151 S.E.2d 815 (1966) but see *Eastern Fed. Corp. v. Avco-Embassy Pictures Corp.*, 331 F. Supp. 1253 (N.D. Ga. 1971).

Although it is reversible error for judge to instruct jury that the jury must award interest in actions for unliquidated damages arising from breach of contract, a jury may, in the jury's discretion, increase immediate amount of damages found by an allowance of interest. *Norair Eng'r Corp. v. Saint Joseph's Hosp.*, 147 Ga. App. 595, 249 S.E.2d 642 (1978).

When damages are unliquidated, the Georgia Court of Appeals has apparently relegated award of prejudgment interest to discretion of jury. *United States ex rel. Delta Metals, Inc. v. R.M. Wells Co.*, 497 F. Supp. 541 (S.D. Ga. 1980).

Increasing damages by allowing interest. — In action for breach of contract, where damages are not liquidated, interest is not recoverable as such; but jury in the jury's discretion may increase immediate amount of damages found by an allowance of interest. *Bennett v. Tucker & Pennington*, 32 Ga. App. 288, 123 S.E. 165 (1924); *United States ex rel. Delta Metals, Inc. v. R.M. Wells Co.*, 497 F. Supp. 541 (S.D. Ga. 1980).

Jury instructions. — Court does not err in instructing the jury that the jury may award interest from the time of the theft of a bailed good until trial when the jury finds that the sum awarded is a liquidated sum. *Wheels & Brakes, Inc. v. Capital Ford Truck Sales, Inc.*, 167 Ga. App. 532, 307 S.E.2d 13 (1983).

Trial court did not err in charging the jury regarding interest since the jury in the court's discretion could increase the immediate amount of damages found by an allowance of interest. *Pulte Home Corp. v. Woodland Nursery & Landscapes, Inc.*, 230 Ga. App. 455, 496 S.E.2d 546 (1998).

Prejudgment interest may not be obtained in breach of contract action for unliquidated damages. *Eastern Fed. Corp. v. Avco-Embassy Pictures Corp.*, 331 F. Supp. 1253 (N.D. Ga. 1971).

Section applicable to breach of warranty actions. *Snowden v. Waterman & Co.*, 110 Ga. 99, 35 S.E. 309 (1900).

Section applied to action for unpaid wages. *Ansley v. Jordan*, 61 Ga. 482 (1878).

In an action for breach of contract to recover unpaid wages, when the amount of wages due was contested by the employer, recovery of pre-judgment interest by the employee was governed by O.C.G.A. § 13-6-13. *Surgijet, Inc. v. Hicks*, 236 Ga. App. 80, 511 S.E.2d 194 (1999).

It was not necessary for an employee to have made a demand for the payment of the salary claimed and to have been denied payment for the employee to be entitled to recover pre-judgment interest. *Surgijet, Inc. v. Hicks*, 236 Ga. App. 80, 511 S.E.2d 194 (1999).

An action for unpaid sales commissions under an employment contract was not based on a commercial account and the trial court erred in charging the jury that the jury could award prejudgment interest at the rate of 1.5 percent a month. *Southern Water Techs., Inc. v. Kile*, 224 Ga. App. 717, 481 S.E.2d 826 (1997).

Section applicable where bailee refuses to deliver property bailed. *Garrard v. Dawson*, 49 Ga. 434 (1873).

Application of section to tort actions. — See *Western & A.R.R. v. Brown*, 102 Ga. 13, 29 S.E. 130 (1897).

Prejudgment interest not authorized in tort action. — Suit to recover the down payment made under a purchase agreement

that was rescinded for fraud was a tort action; thus, the trial court erred in awarding interest under O.C.G.A. § 13-6-13. *H & H Subs, Inc. v. Lim*, 223 Ga. App. 656, 478 S.E.2d 632 (1996).

The fair rule to be applied in awarding interest in building contracts is to ascertain the stated debt due at a certain time and deduct therefrom a reasonable amount for remedying defects. The former should bear interest from date it is ascertained or demanded; the latter should bear interest only from time dispute is resolved, even if it is at trial. *J.A. Jones Constr. Co. v. Greenbriar Shopping Ctr.*, 332 F. Supp. 1336 (N.D. Ga. 1971), *aff'd*, 461 F.2d 1269 (5th Cir. 1972).

Cited in *Blalock v. Phillips*, 38 Ga. 216 (1868); *Newton Mfg. Co. v. White*, 53 Ga. 395 (1874); *Tifton T. & G. Ry. v. Butler*, 4 Ga. App. 191, 60 S.E. 1087 (1908); *Whitlock v. Mozley & Co.*, 142 Ga. 305, 82 S.E. 886 (1914); *Happ Bros. Co. v. Hunter Mfg. & Comm'n Co.*, 145 Ga. 836, 90 S.E. 61 (1916); *Farm Prods. Co. v. Eubanks*, 29 Ga. App. 604, 116 S.E. 327 (1923); *Callaway v. Barmore*, 32 Ga. App. 665, 124 S.E. 382 (1924); *Benton v. Roberts*, 41 Ga. App. 189, 152 S.E. 141 (1930); *Southern Cotton Oil Co. v. Raines*, 171 Ga. 154, 155 S.E. 484 (1930); *Atlanta C.L.R.R. v. Tifton Produce Co.*, 179 Ga. 624, 176 S.E. 624 (1934); *Merchants Ins. Co. v. Lilgeomont, Inc.*, 84 F.2d 685 (5th Cir. 1936); *Powell v. Bussell*, 64 Ga. App. 42, 12 S.E.2d 152 (1940); *State Hwy. Dep't v. Knox-Rivers Constr. Co.*, 117 Ga. App. 453, 160 S.E.2d 641 (1968); *Norair Eng'r Corp. v. Erickson's, Inc.*, 152 Ga. App. 489, 263 S.E.2d 165 (1979); *Horne v. Drachman*, 247 Ga. 802, 280 S.E.2d 338 (1981); *Williamson v. Bank Bldg. & Equip. Corp. of Am.*, 162 Ga. App. 295, 291 S.E.2d 124 (1982); *Gregory v. Townsend Roofing Co.*, 163 Ga. App. 836, 296 S.E.2d 154 (1982); *Reahard v. Ivester*, 188 Ga. App. 17, 371 S.E.2d 905 (1988); *Typo-Repro Servs., Inc. v. Bishop*, 188 Ga. App. 576, 373 S.E.2d 758 (1988); *Vulcan Life Ins. Co. v. Davenport*, 191 Ga. App. 79, 380 S.E.2d 751 (1989); *Stratton Indus., Inc. v. Northwest Ga. Bank*, 191 Ga. App. 683, 382 S.E.2d 721 (1989); *Jim Ellis Atl., Inc. v. McAlister*, 198 Ga. App. 94, 400 S.E.2d 389 (1990); *Lofty v. Fuller*, 223 Ga. App. 95, 477 S.E.2d 30 (1996); *Westchester Specialty Ins. Servs., Inc. v. United States Fire Ins.*, (11th Cir. 1997); *Colonial Bank v. Boulder*

Bankcard Processing, Inc., 254 Ga. App. 686, 563 S.E.2d 492 (2002).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, § 154 et seq. 45 Am. Jur. 2d, Interest and Usury, §§ 1, 34, 40, 339 et seq., 344, 345.

C.J.S. — 25 C.J.S., Damages, §§ 1, 2, 10 et seq., 80 et seq., 154 et seq., 235 et seq., 350.

ALR. — Reduction of claim under contract as affecting right to interest, 3 ALR 809; 89 ALR 678.

Rate of exchange to be taken into account in assessing damages for breach of contract, 50 ALR 1273; 105 ALR 640.

Rights as between vendor and vendee under land contract in respect of interest, 75 ALR 316; 25 ALR2d 951.

Rate of interest after maturity on contract naming rate but not employing term “until paid,” or similar phrase, 75 ALR 399.

Interest on recovery for period before judgment in action for money loss caused by fraud or duress, 171 ALR 816.

Interest as element of damages recoverable in action for breach of contract for the sale of a commodity, 4 ALR2d 1388.

Rights as between vendor and vendee under land contract in respect of interest, 25 ALR2d 951.

Measure and elements of sublessee’s damages recoverable from sublessor for latter’s failure to exercise option to renew his lease, 94 ALR2d 1345.

Measure of damages for breach of contract to will property, 65 ALR3d 632.

13-6-14. Number of actions for breach of contract.

If a contract is entire, only one action may be maintained for a breach thereof; but, if it is severable or if the breaches occur at successive periods in an entire contract, an action will lie for each breach; but all the breaches occurring up to the commencement of the action must be included therein. (Orig. Code 1863, § 2880; Code 1868, § 2888; Code 1873, § 2939; Code 1882, § 2939; Civil Code 1895, § 3793; Civil Code 1910, § 4389; Code 1933, § 20-1401.)

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General Consideration

Principle underlying section is that both law and equity abhor a multiplicity of suits. Seaboard Air-Line Ry. v. Hamilton, 16 Ga. App. 646, 85 S.E. 942 (1915).

Last clause of former Code 1868, § 2888 (see O.C.G.A. § 13-6-19) was based on doctrine of former recovery, in accordance with former Code 1868, §§ 2846, 2847 and 3426 (see O.C.G.A. § 9-2-44). Porter v. Lively & McElroy, 45 Ga. 159 (1872).

All rights of parties accruing under contract must be litigated and adjudicated in one action. Chappell v. F.A.D. Andrea, Inc., 47 Ga. App. 816, 171 S.E. 582 (1933).

There cannot be subsequent actions for breaches which have already occurred, though they were not included in the first suit. Willingham v. Buckeye Cotton Oil Co., 13 Ga. App. 253, 79 S.E. 496 (1913).

There cannot be subsequent actions for breaches occurring prior to commencement of first suit on a contract, though the

General Consideration (Cont'd)

breaches were not included in the first suit. *Chappell v. F.A.D. Andrea, Inc.*, 47 Ga. App. 816, 171 S.E. 582 (1933).

All breaches up to commencement of first action are conclusively presumed included in such suit. — All breaches of contract up to commencement of former action and amount due to plaintiff therefor are conclusively presumed to have been included in such suit. *Evans v. Collier*, 79 Ga. 319, 4 S.E. 266 (1887).

Judgment rendered in litigation arising under contract is conclusive of all accrued rights of parties arising under contract, whether those rights were actually inquired into or not; and such judgment may, in a subsequent suit between parties under same contract, be pleaded as *res adjudicata*. *Missouri State Life Ins. Co. v. Pilcher*, 179 Ga. 231, 175 S.E. 586 (1934); *World Mut. Health & Accident Ins. Co. v. Thurmond*, 112 Ga. App. 393, 145 S.E.2d 252 (1965).

Principal and interest must be recovered in same action. — A single cause of action cannot be split up and tried by piecemeal so as to recover principal sum in one suit, and interest in another. *Central Bank & Trust Corp. v. State*, 139 Ga. 54, 76 S.E. 587 (1912).

Statute inapplicable when separate parties sue same defendant on same contract. — Statute is inapplicable as a defense when two separate parties, each in that party's own right, bring actions against the same defendant on identical contract. *A.R. Hudson Realty, Inc. v. Hood*, 151 Ga. App. 778, 262 S.E.2d 189 (1979) (see O.C.G.A. § 13-6-14).

Cited in *Wallace v. Tumlin & Stegall*, 42 Ga. 462 (1871); *Evans v. Collier*, 79 Ga. 319, 4 S.E. 266 (1887); *Timmons v. Citizens Bank*, 11 Ga. App. 69, 74 S.E. 798 (1912); *Central Bank & Trust Corp. v. State*, 139 Ga. 54, 76 S.E. 587 (1912); *Neill v. Hill*, 32 Ga. App. 381, 123 S.E. 30 (1924); *Oliver v. Hall County Mem. Hosp.*, 65 Ga. App. 59, 15 S.E.2d 257 (1941); *Stanton v. Gailey*, 72 Ga. App. 292, 33 S.E.2d 747 (1945); *Waller v. Morris*, 78 Ga. App. 821, 52 S.E.2d 583 (1949); *Piedmont Life Ins. Co. v. Bell*, 103 Ga. App. 225, 119 S.E.2d 63 (1961); *Spindel v. National Homes Corp.*, 110 Ga. App. 12, 137 S.E.2d 724 (1964); *Hartford Accident & Indem. Co. v. Grant*, 116 Ga. App. 661, 158 S.E.2d 703 (1967); *Williamson v. C & S*

Realty Co., 130 Ga. App. 592, 203 S.E.2d 906 (1974); *Ragan v. Smith*, 188 Ga. App. 770, 374 S.E.2d 559 (1988); *Harvey v. J. H. Harvey Co.*, 256 Ga. App. 333, 568 S.E.2d 553 (2002).

Entire Contracts

What is an entire contract. — An entire contract is one requiring full performance of promise by plaintiff as condition precedent to performance by defendant. *Broxton v. Nelson*, 103 Ga. 327, 30 S.E. 38, 68 Am. St. R. 97 (1898).

Contract requiring delivery of an entire amount of bottles by a certain date is an entire contract. *Smith v. Harrison*, 26 Ga. App. 325, 106 S.E. 191 (1921).

When notes are made by plaintiff, maturing at different dates, each constitutes a separate contract. *Thomas v. Richards*, 124 Ga. 942, 53 S.E. 400 (1906).

Contract to support for life is a continuing contract, recovery under which is based on expectancy. *Lowe v. Slocum*, 25 Ga. App. 464, 103 S.E. 719 (1920).

Application

Application to suits on running open accounts. — See *Gower v. Ozmer*, 55 Ga. App. 81, 189 S.E. 540 (1936).

Section applicable when defendant pleads a matter in recoupment. *Desvergers v. Willis*, 58 Ga. 388 (1877).

Statute of limitations. — When the court found that a disputed commissions agreement was a divisible installment contract, the six-year statute of limitations started when the first breach of the commissions agreement occurred. *Baker v. Brannen/Goddard Co.*, 274 Ga. 745, 559 S.E.2d 450 (2002).

Trial court properly determined that the statute of limitations on a class of retirees' claims against the Teachers Retirement System of Georgia, alleging that the retirees did not receive the proper payments, accrued on a payment-by-payment basis because the System had a duty to calculate the retirees' benefits each month; all of the breaches that occurred between six years prior to the filing of the complaint and the commencement of the action had to be included pursuant to O.C.G.A. § 13-6-14. *Teachers Ret. Sys. v. Plymel*, 296 Ga. App. 839, 676 S.E.2d 234 (2009).

Both parties must consent before plaintiff may bring separate actions on an entire contract. *Johnson v. Klassett*, 9 Ga. App. 733, 72 S.E. 174 (1911).

Plaintiff cannot recover for installments falling due after filing of action. *Whitley Constr. Co. v. Whitley*, 134 Ga. App. 245, 213 S.E.2d 909 (1975).

Lacking a valid and enforceable acceleration clause in the lease, the lessor could not recover for installments falling due after the filing of the action. *Richfield Capital Corp. v. Federal Sign Div. of Fed. Signal Corp.*, 222 Ga. App. 757, 476 S.E.2d 26 (1996).

Employee can sue for due and unpaid salary installments before expiration of employment contract. — Regardless of whether employment contract payable in monthly installments was entire or severable, an employee can maintain action for due and unpaid installments before expiration of contract period. *Sunshine v. Ben F. Levis, Inc.*, 86 Ga. App. 746, 72 S.E.2d 485 (1952).

Employee wrongfully discharged can recover. — If a servant is employed for five months at a specified rate per month, payable monthly, and pending employment the servant is wrongfully discharged, the servant may, at the servant's option, sue at end of each month, and recovery for one month will be no bar to suit at end of next month. *Isaacs v. Davies*, 68 Ga. 169 (1881).

Allegation that creditor reserves right to bring second action for balance of entire contract is ineffective. — Mere allegation in petition in action on part of an entire contract that creditor reserves right to bring a second action for the balance is a nullity. *Atlanta Elevator Co. v. Fulton Bag & Cotton Mills*, 106 Ga. 427, 32 S.E. 541 (1899).

Debtor's failure to pay full amount initially will not entitle creditor to bring second action. *Atlanta Elevator Co. v. Fulton Bag & Cotton Mills*, 106 Ga. 427, 32 S.E. 541 (1899).

Effect of voluntary dismissal of suit in reliance on settlement. — Plaintiff is not concluded by settlement as to claims upon which action is predicated when first action did not proceed to judgment but was voluntarily dismissed by plaintiff in reliance on such settlement. *World Mut. Health & Accident Ins. Co. v. Thurmond*, 112 Ga. App. 393, 145 S.E.2d 252 (1965).

Failure to furnish shipping instructions amounts to breach. *Battle v. Smith*, 28 Ga. App. 760, 113 S.E. 235, cert. denied, 28 Ga. App. 819 (1922).

Pleadings and Practice

Pleadings need not be amended to recover installments falling due between filing and judgment. — Although it would be feasible in some circumstances to amend the complaint so as to allow recovery of all installment payments due as of the date of judgment, there appears to be no reason to require amendment of pleadings to obtain recovery of installments which became due between filing date and final judgment. *Whitley Constr. Co. v. Whitley*, 134 Ga. App. 245, 213 S.E.2d 909 (1975).

Pleadings may be supplemented to seek installments. — In an action by a landlord against a tenant who vacated property prior to expiration of the lease, the trial court did not abuse the court's discretion in allowing the landlord to supplement the landlord's pleadings so as to seek rent falling due after suit was commenced. *Thimble Square, Inc. v. Frost*, 221 Ga. App. 379, 471 S.E.2d 305 (1996).

Former Civil Code 1895, § 3793 did not entitle creditor to split action on an entire contract into several, so that the creditor may sue in a justice court. *Broxton v. Nelson*, 103 Ga. 327, 30 S.E. 38, 68 Am. St. R. 97 (1898); *Willingham v. Buckeye Cotton Oil Co.*, 13 Ga. App. 253, 79 S.E. 496 (1913).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 88 et seq., 351 et seq. 51 Am. Jur. 2d, Limitation of Actions, § 28.

C.J.S. — 17A C.J.S., Contracts, § 608. 25 C.J.S., Damages, §§ 4, 5. 54 C.J.S., Limitations of Actions, §§ 86, 87.

ALR. — Provision in land contract for pecuniary forfeiture or penalty upon default of the purchaser as affecting the vendor's right to maintain an action for the purchase price, 32 ALR 617.

Different benefits or claims of benefit

under a policy of insurance as constituting a single cause of action or separate causes, 69 ALR 889; 159 ALR 563.

Liability for procuring breach of contract, 84 ALR 43; 26 ALR2d 1227.

Employer's breach of agreement regarding discharge or restoration after layoff of employee not employed for a fixed term, as creating a single cause of action, or repeated causes of action, as regards statute of limitation or the right to bring successive actions, 142 ALR 797.

Party who insisted that contract be performed notwithstanding total breach or repudiation by other party as entitled to change his position and decline to perform on his own part, where other party did not proceed with performance or otherwise alter his position in reliance on a supposition of performance, 143 ALR 489.

Acceptance by building or construction contractor of payments under his contract as a waiver of right of action upon implied warranty as to conditions affecting cost, 173 ALR 308.

Rights and remedies where broker or

agent, employed to purchase personal property, buys it for himself, 20 ALR2d 1140.

Building or construction contract providing for installment or "progress" payments as entire or divisible, 22 ALR2d 1343.

Liability for procuring breach of contract, 26 ALR2d 1227.

Measure or basis of attorney's recovery on express contract fixing noncontingent fees, where he is discharged without cause or fault on his part, 54 ALR2d 604.

Effect of attempt to terminate employment or agency contract upon shorter notice than that stipulated in contract, 96 ALR2d 272.

Liability for interference with invalid or unenforceable contract, 96 ALR3d 1294.

Measure and elements of damages for breach of contract to lend money, 4 ALR4th 682.

Recovery based on tort-feasor's profits in action for procuring breach of contract, 5 ALR4th 1276.

Punitive damages for interference with contract or business relationship, 44 ALR4th 1078.

13-6-15. Damages for writing bad checks.

(a) Notwithstanding any criminal sanctions which may apply, any person who makes, utters, draws, or delivers any check, draft, or order upon any bank, depository, person, firm, or corporation for the payment of money, which drawee refuses to honor the instrument for lack of funds or credit in the account from which to pay the instrument or because the maker has no account with the drawee, and who fails to pay the same amount in cash to the payee named in the instrument within ten days after a written demand therefor, as provided in subsection (c) of this Code section, has been delivered to the maker by certified mail, or statutory overnight delivery shall be liable to the payee, in addition to the amount owing upon such check, draft, or order, for damages of double the amount so owing, but in no case more than \$500.00, and any court costs incurred by the payee in taking the action. In addition to delivery of notice as provided for herein, notice may be given by first-class mail to the address printed on the check given by the maker at the time of issuance or, in the case of a draft or order, to the last known address. If the question of sufficiency of notice becomes an issue, when notice is by first-class mail, the sender of the purported notice shall give an affidavit, under oath, that notice was made as provided for herein and there shall be a rebuttable presumption that proper notice was given.

(b) The payee may charge the maker of the check, draft, or order a service charge not to exceed \$30.00 or 5 percent of the face amount of the

instrument, whichever is greater, plus the amount of any fees charged to the holder of the instrument by a bank or financial institution as a result of the instrument not being honored, when making written demand for payment.

(c) Before any recovery under subsection (a) of this Code section may be claimed, a written demand in substantially the form which follows shall be sent by certified mail, statutory overnight delivery, or first-class mail supported by an affidavit of service to the address printed or written on the check given by the maker at the time of issuance of the check or, in the case of a draft or order, to the last known address, the notice to be deemed conclusive ten days following the date the affidavit is executed, to the maker of the instrument at the address shown on the instrument:

“You are hereby notified that a check or instrument numbered _____, issued by you on _____ (date), drawn upon _____ (name of bank), and payable to _____, has been dishonored. Pursuant to Georgia law, you have ten days from receipt of this notice to tender payment of the full amount of the check or instrument plus a service charge of \$30.00 or 5 percent of the face amount of the check or instrument, whichever is greater, plus the amount of any fees charged to the holder of the instrument by a bank or financial institution as a result of the instrument not being honored, the total amount due being \$_____. Unless this amount is paid in full within the ten-day period, the holder of the check or instrument may file a civil suit against you for two times the amount of the check or instrument, but in no case more than \$500.00, in addition to the payment of the check or instrument plus any court costs incurred by the payee in taking the action.”

(d) For purposes of this Code section, the holder of the dishonored check, draft, or order shall file the action in the county where the defendant resides.

(e) It shall be an affirmative defense, in addition to other defenses, to an action under this Code section if it is found that:

(1) Full satisfaction of the amount of the check or instrument plus the applicable service charge and any fees charged to the holder of the instrument by a bank or financial institution as a result of the instrument not being honored was made prior to the commencement of the action;

(2) The bank or depository erred in dishonoring the check or instrument; or

(3) The acceptor of the check or instrument knew at the time of acceptance that there were insufficient funds on deposit in the bank or depository with which to cause the check or instrument to be honored.

(f) In an action under this Code section, the court or jury may, however, waive all or part of the double damages upon finding that the defendant's

failure to satisfy the dishonored check or instrument was due to the defendant receiving a dishonored check or instrument written to the defendant by another party.

(g) Subsequent to the commencement of the civil action under this Code section, but prior to the hearing, the defendant may tender to the plaintiff as satisfaction of the claim an amount of money equal to the sum of the amount of the dishonored check, service charges on the check, any fees charged to the holder of the instrument by a bank or financial institution as a result of the instrument not being honored, and any court costs incurred by the plaintiff in taking the action.

(h) In an action under this Code section, if the court or jury determines that the failure of the defendant to satisfy the dishonored check was due to economic hardship, the court or jury has the discretion to waive all or part of the double damages. However, if the court or jury waives all or part of the double damages, the court or jury shall render judgment against the defendant in the amount of the dishonored check plus service charges on the check plus any fees charged to the holder of the instrument by a bank or financial institution as a result of the instrument not being honored and any court costs incurred by the plaintiff in taking the action. (Code 1981, § 13-6-15, enacted by Ga. L. 1987, p. 817, § 1; Ga. L. 1991, p. 1299, §§ 2, 3; Ga. L. 1993, p. 465, § 1; Ga. L. 1997, p. 552, § 1; Ga. L. 1999, p. 775, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2003, p. 479, § 1.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Law reviews. — For annual survey article on business associations, see 50 Mercer L. Rev. 171 (1998).

JUDICIAL DECISIONS

Construction. — O.C.G.A. § 13-6-15 should be construed in *para materia* with O.C.G.A. § 11-3-402(c), as amended. *Peterson v. Holtrachem, Inc.*, 239 Ga. App. 838, 521 S.E.2d 648 (1999).

Personal liability of corporate officer. — President of a corporation was personally liable for writing a bad check, even assuming that the president signed the check in a representative capacity and did not know there were insufficient funds to cover the check. *Kolodkin v. Cohen*, 230 Ga. App. 384, 496 S.E.2d 515 (1998), but see *Peterson v. Holtrachem*, 239 Ga. App. 838, 521 S.E.2d 648 (1999).

Enforcement of drawer and signer obligations. — Trial court did not err in granting a bank summary judgment on the bank's

claims against an automobile seller for enforcement of drawer and signer obligations under the Georgia Uniform Commercial Code (UCC), O.C.G.A. § 11-3-414(b), and for a violation of the bad check statute, O.C.G.A. § 13-6-15, because there was no genuine issue of material fact over whether the seller was the drawer and signer of the check; the seller admitted that the seller's representative was the actual signatory of the check and that the representative possessed authority to sign checks on the seller's behalf. *Consumer Solutions Fin. Servs. v. Heritage Bank*, 300 Ga. App. 272, 684 S.E.2d 682 (2009).

Cited in *Hall v. Harris*, 239 Ga. App. 812, 521 S.E.2d 638 (1999).

CHAPTER 7

SETOFF AND RECOUPMENT

Sec.		Sec.	
13-7-1.	Nature of setoff generally.		tive share in estate against judgment against legatee or owner of share.
13-7-2.	Nature of recoupment generally.		
13-7-3.	Setoff and recoupment distinguished.	13-7-10.	Allowance of setoff of value of improvements against claim for mesne profits.
13-7-4.	Limitations as to claims or demands for setoff generally.	13-7-11.	Allowance of setoff of debt not due against claim of nonresident or insolvent plaintiff.
13-7-5.	Setoff of demands between parties to suits.	13-7-12.	Grounds for allowance of recoupment generally.
13-7-6.	Setoff of claims or demands against beneficiaries of suits.	13-7-13.	Actions in which recoupment may be pleaded; procedure where damages of defendant exceed damages of plaintiff.
13-7-7.	Allowance of setoff against original payee in action by holder or transferee of negotiable instrument received under dishonor.	13-7-14.	Effect of conflict between this chapter and Chapter 11 of Title 9.
13-7-8.	Allowance of setoff of debt of testator or intestate against representative of estate.		
13-7-9.	Allowance of setoff of distribu-		

Law reviews. — For comment on *Heard v. Melin*, 107 Ga. App. 772, 131 S.E.2d 131 (1963), see 26 Ga. B.J. 197 (1963).

JUDICIAL DECISIONS

Right of setoff did not originally exist at common law, and before enactment of this chapter was cognizable only in a court of equity. *Robinson v. Lindsey*, 184 Ga. 684, 192 S.E. 910 (1937).

OPINIONS OF THE ATTORNEY GENERAL

Holding public employee's final paycheck until state-owned property in employee's possession is returned. — Treasurer and disbursing officer of Department of Public Safety can hold employee's final paycheck until all state-owned property possessed by employee has been turned in to department. 1970 Op. Att'y Gen. No. 70-145.

RESEARCH REFERENCES

ALR. — Counterclaim or set-off as affecting rule as to part payment of a liquidated and undisputed debt, 4 ALR 474; 53 ALR 768.

outstanding title as against vendor, 40 ALR 1078.

Setting up counterclaim, set-off, or recoupment in reply, 42 ALR 564.

Right of purchaser to acquire and assert Character of claims available by way of

setoff, counterclaim, or recoupment in action on construction contract, 46 ALR 393.

Counterclaim or setoff as affecting rule as to part payment of a liquidated and undisputed debt, 53 ALR 768.

Judgment as a contract within statute in relation to setoff or counterclaim, 55 ALR 469.

Cause of action in tort as counterclaim in action on contract, 68 ALR 451.

Setoff as between claims by or against bankrupt or insolvent and claims by or against trustee in bankruptcy, receiver, assignee, or trustee in insolvency, arising from transaction after bankruptcy or insolvency, 71 ALR 804; 128 ALR 809.

Right to setoff, as against claim for rent accruing subsequent to assignment by lessor or sublessor, claim existing against assignor at time of assignment, 78 ALR 824.

Breach of executory contract occurring after assignment of a right thereunder as subject of recoupment against assignee, 87 ALR 187.

Right of one partner in action at law against him by another partner on a per-

sonal claim to set up by counterclaim or otherwise claim arising out of partnership transactions, 93 ALR 293.

Contractual waiver of right of set-off or counterclaim, 98 ALR 602.

Right of endorser of commercial paper to setoff amount which he is obliged to pay thereon against independent indebtedness to insolvent maker or other person antecedently liable, where debt is assigned after making but prior to maturity of paper, 117 ALR 900.

Setoff as between claims by or against bankrupt or insolvent and claims by or against trustee in bankruptcy, receiver, assignee, or trustee in insolvency, arising from transaction after bankruptcy or insolvency, 128 ALR 809.

Overpayments of dividends on preferred stock as deductible in payment of dividends for later years, 10 ALR2d 241.

Tort claim against which period of statute of limitations has run as subject of setoff, counterclaim, cross bill, or cross action in tort action arising out of same accident or incident, 72 ALR3d 1065.

13-7-1. Nature of setoff generally.

Setoff does not operate as a denial of the plaintiff's claim; rather it allows the defendant to set off a debt owed him by the plaintiff against the claim of the plaintiff. (Orig. Code 1863, § 2840; Code 1868, § 2848; Code 1873, § 2899; Code 1882, § 2899; Civil Code 1895, § 3745; Civil Code 1910, § 4339; Code 1933, § 20-1301.)

Cross references. — Applicability of statute of limitation to setoff, § 9-3-6. Counterclaim and cross-claim, § 9-11-13. Effect of counterclaim exceeding opposing claim under Civil Practice Act, § 9-11-13. Joinder of claims and remedies under Civil Practice Act, § 9-11-18. Setoff of judgment, § 9-13-75. Equitable setoff, § 23-2-76.

Law reviews. — For article, "Appeals, Interlocutory and Discretionary Applications, and Post-Judgment Motions in the Georgia Courts: The Current Practice and the Need for Reform Legislation," see 44 Mercer L. Rev. 17 (1992).

JUDICIAL DECISIONS

Setoff as not defeating plaintiff's claim, regardless of legal or equitable nature of setoff. — Existence of valid right of setoff does not operate to defeat plaintiff's claim, although it might preclude plaintiff's recovery of any actual damages, and this is true regardless of the assertion of the setoff as a

legal right or an equitable right. *National City Bank v. Busbin*, 175 Ga. App. 103, 332 S.E.2d 678 (1985).

Setoff as counterclaims, not defense. — When defendant asserts a setoff of mutual demands existing at the time of commencement of the action, the setoff must be as-

serted as a counterclaim rather than a defense. *National City Bank v. Busbin*, 175 Ga. App. 103, 332 S.E.2d 678 (1985).

In general, parties to a suit are entitled to set off mutual demands existing at the time of the commencement of the suit, but such a set off must be asserted as a counterclaim rather than a defense, since it does not operate as a denial of the plaintiff's claim, but merely allows the defendant to set off a debt owed the defendant by the plaintiff against that claim. *Stewart v. Stewart*, 236 Ga. App. 348, 511 S.E.2d 919 (1999).

Right of setoff in cases other than those covered by O.C.G.A. Ch. 7, T. 13 is an equitable right. — Right to set off one legal demand against another, other than in cases covered by former Code 1933, § 20-1301 et seq. (see O.C.G.A. Ch. 7, T. 13), was an equitable right, which was not and had never been recognized by a court of law in this state, except in obedience to a statute, and therefore it can be asserted only in a court having jurisdiction in equity matters. *Gormley ex rel. Citizens Bank v. Chance*, 55 Ga. App. 838, 191 S.E. 701 (1937).

City court has no jurisdiction to entertain a plea setting up an equitable setoff, or equitable right of setoff, for simple reason that to entertain such a plea it is necessary for court, not only to recognize an equitable right, but to give affirmative relief as a result of such recognition. *Gormley ex rel. Citizens Bank v. Chance*, 55 Ga. App. 838, 191 S.E. 701 (1937).

If demands are mutual and of same nature, setoff need not arise between same parties. — Right of setoff, under former Code 1933, §§ 20-1301, 20-1302, and 20-1303 (see O.C.G.A. §§ 13-7-1, 13-7-4, and 13-7-5), if demands were mutual and of the same nature, was not limited to mutual dealings, and need not arise between same parties. Thus, a transferred chose in action, which can be sued on in name of assignee, may be used as a setoff. *Wood v. Keysville Lumber Co.*, 49 Ga. App. 799, 175 S.E. 923 (1934).

Right to setoff may be waived. — See *Solid Waste Mgt. Auth. v. Transwaste Servs., Inc.*, 247 Ga. App. 29, 543 S.E.2d 98 (2000).

Under former Code 1933, §§ 20-1301, 20-1302, and 20-1303 (see O.C.G.A. §§ 13-7-1, 13-7-4, and 13-7-5), any mutual demand between parties existing at com-

mencement of suit may be set off, and except as provided in former Code 1933, § 20-1305 (see O.C.G.A. § 13-7-7), the debts may be separated and distinct and need not have arisen in mutual dealings. *Reynolds v. Speer*, 38 Ga. App. 570, 144 S.E. 358 (1928).

Transferred chose in action, actionable in name of assignee, may be used as a setoff. *Cox v. Stowers*, 204 Ga. 595, 50 S.E.2d 339 (1948).

Setoff is not available as a defense by affidavit of illegality to foreclosure of chattel mortgage. *Arnold v. Carter*, 125 Ga. 319, 54 S.E. 177 (1906).

In proceeding to foreclose bill of sale retaining title to secure debt, the debtor may, by affidavit of illegality, avail oneself of any defense which the debtor might set up in an ordinary suit upon demand secured by a mortgage, and which goes to show that amount claimed is not due and owing; and, while the debtor is thus permitted to avail oneself of a valid defense by way of recoupment, one is not entitled to plead defense of setoff in such a summary proceeding, since the latter defense is not one which goes to justice of plaintiff's demand. *Atlas Auto Fin. Co. v. Atkins*, 79 Ga. App. 91, 53 S.E.2d 171 (1949).

Mortgagor-mortgagee obligations. — When a note and a deed to secure debt is owed by the mortgagor to the mortgagees, who are tenants in common (i.e., a husband "and/or" his wife), while a subsequent judgment arising out of an action on the building contract is owed by one of the mortgagees to the mortgagor, these debts can be said to be "mutual" and can be set off against each other in a bankruptcy proceeding by the judgment debtor-mortgagee. *Straughair v. Palmieri*, 31 Bankr. 111 (Bankr. N.D. Ga. 1983).

No recoupment by tenant. — In an action seeking a writ of possession for a mobile home, because the mobile home's tenants expressly waived any recourse against their bankrupt lender arising from a prior judgment, based on a voluntary settlement with the bankrupt lender accepting a general unsecured claim, the tenants could not later assert any right of recoupment; as a result, the trial court did not err in granting summary judgment as to said claim against the tenants and in favor of a successor lender. *Hill v. Green Tree Servicing, LLC*, 280 Ga. App. 151, 633 S.E.2d 451 (2006).

Setoff is a form of action subject to statute of limitations. *Lowe v. Rawson*, 43 Ga. 374 (1871).

Evidence necessary to establish claim of setoff. — To establish a claim of setoff, the law requires the same evidence as if defendant had originally sued plaintiffs on the claim. *B.J. Wilson & Co. v. Walker*, 46 Ga. 319 (1872).

Setoff available to extent of wrongfully discharged employee's mitigation of employee's losses. — Discharged servant is bound to use due diligence to prevent servant's loss from being more than necessary, and to that end must seek employment in similar business and derive such income from it as the servant reasonably can, which is to be deducted in fixing damage to be recovered; the burden, however, of showing that the servant did obtain employment, or could have obtained employment by due diligence, is on the other party. *Russell v. Hughes*, 244 Ga. 634, 261 S.E.2d 584 (1979).

Setoff arising from installation contract permitted in action on related sales contract. — When plaintiff agreed to sell and also to install a lighting plant, setoff for improper installation will be allowed whether contract to install was part of contract of sale or was a separate contract. *Colt Co. v. Hiland*, 35 Ga. App. 550, 134 S.E. 142 (1926).

Provisions are adhered to by allowing set-off of payments made after alimony decree and judgment, but law cannot apply as to payments made on oral contract before alimony judgment and not set up in pleadings at time of alimony trial. Payments made before alimony judgment are *res judicata* so far as record of proceeding to recover past due payments on alimony judgment. *Meza v. Van Deventer*, 97 Ga. App. 738, 104 S.E.2d 478 (1958).

Debts due widow by estate cannot be set off against heirs unless estate's representa-

tive is a party. — Debts due widow by estate of her deceased husband are not based on a course of dealing with an heir, or heirs, of his estate, and cannot form basis of action by widow against other heir, or heirs, without making legal representative of estate of deceased a party thereto; since items relied upon by defendant to support her contention that her answer contains proper matters for setoff are not such demands as could have been maintained by defendant in direct proceeding against plaintiff, equity will not sanction a proceeding to accomplish indirectly that which the law prohibits. *Cox v. Stowers*, 204 Ga. 595, 50 S.E.2d 339 (1948).

Setoff inapplicable when no claim that plaintiff owed defendants. — It was error to exclude certain evidence as to damages on the ground that defendants had not asserted a setoff or recoupment counterclaim. The case did not involve setoff or recoupment under O.C.G.A. §§ 13-7-1 and 13-7-2, as there was no claim that plaintiff owed any debt to defendants or breached a cross-obligation or independent covenant. *Automated Print, Inc. v. Edgar*, 288 Ga. App. 326, 654 S.E.2d 413 (2007).

Cited in *Mordecai v. Stewart*, 37 Ga. 364 (1867); *Horton v. Pintchunck*, 110 Ga. 355, 35 S.E. 663 (1900); *Hecht v. Snook & Austin Furn. Co.*, 114 Ga. 921, 41 S.E. 74 (1902); *Ellis v. Dudley*, 19 Ga. App. 566, 91 S.E. 904 (1917); *Mashburn Drug Co. v. Valdosta Drug Co.*, 53 Ga. App. 88, 184 S.E. 903 (1936); *National Sur. Corp. v. Algernon Blair, Inc.*, 114 Ga. App. 30, 150 S.E.2d 256 (1966); *Pickett v. Chamblee Constr. Co.*, 124 Ga. App. 769, 186 S.E.2d 123 (1971); *Chapman v. Aetna Fin. Co.*, 615 F.2d 361 (5th Cir. 1980); *Horne v. Drachman*, 247 Ga. 802, 280 S.E.2d 338 (1981); *J.R. Mabbett & Son v. Ripley*, 185 Ga. App. 601, 365 S.E.2d 155 (1988); *Imex Int'l v. Wires Eng'g*, 261 Ga. App. 329, 583 S.E.2d 117 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Counterclaim, Recoupment, and Setoff, §§ 1 et seq., 17, 131, 149. 59 Am. Jur. 2d, Parties, §§ 3, 4, 281 et seq., 285, 286, 289, 290, 292.

C.J.S. — 80 C.J.S., Set-Off and Counterclaim, § 1 et seq.

ALR. — Right of set-off as between pro-

ceeds of life insurance and indebtedness of insured to insurer, 101 ALR 1517.

Fractional interest in debt as subject of setoff, 139 ALR 1328.

Spouse's right to set off debt owed by other spouse against accrued spousal or child support payments, 11 ALR5th 259.

13-7-2. Nature of recoupment generally.

Recoupment is a right of the defendant to have a deduction from the amount of the plaintiff's damages for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the contract upon which suit is brought. (Orig. Code 1863, § 2850; Code 1868, § 2858; Code 1873, § 2909; Code 1882, § 2909; Civil Code 1895, § 3756; Civil Code 1910, § 4350; Code 1933, § 20-1311.)

Cross references. — Counterclaim and cross claim, § 9-11-13. Effect of counterclaim exceeding opposing claim under Civil Practice Act, § 9-11-13. Joinder of claims and remedies under Civil Practice Act, § 9-11-18.

Law reviews. — For survey article on construction law for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 85 (2003).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION APPLICATION PLEADINGS AND PRACTICE

General Consideration

Doctrine of recoupment is but an improvement upon old doctrine of failure of consideration. *Toole v. Brownlow & Sons Co.*, 151 Ga. App. 292, 259 S.E.2d 691 (1979).

Recoupment goes to show that amount claimed is not due plaintiff. *Weaver v. Roberson*, 134 Ga. 149, 67 S.E. 662 (1910).

Recoupment sums up grievances on each side, strikes balance, and gives judgment for difference. — Recoupment looks through the whole contract, treating the contract as an entirety, and regarding things done and stipulated to be done on each side as consideration for things done and stipulated to be done on the other; and when plaintiff seeks redress for breach of stipulations in plaintiff's favor, it sums up grievances on each side, strikes a balance, and gives plaintiff a judgment for only such difference as may be found in plaintiff's favor. *Mashburn Drug Co. v. Valdosta Drug Co.*, 53 Ga. App. 88, 184 S.E. 903, rev'd on other grounds, 183 Ga. 471, 188 S.E. 694 (1936); *Atlas Auto Fin. Co. v. Atkins*, 79 Ga. App. 91, 53 S.E.2d 171 (1949); *Toole v. Brownlow & Sons Co.*, 151 Ga. App. 292, 259 S.E.2d 691 (1979).

Distinction between recoupment and set-off. — Ordinarily the difference between

recoupment and setoff is of little importance. The scheme of the Code is to recoup where both parties rely on the same contract, and set off where they urge different contracts. *Byrom v. Ringe*, 83 Ga. App. 234, 63 S.E.2d 235 (1951).

When a defendant claims a right to a deduction from the plaintiff's damages for breach of a cross obligation arising from the same contract, the proper remedy is recoupment, not setoff. *Johnson v. Raatz*, 200 Ga. App. 289, 407 S.E.2d 489 (1991).

Plea of recoupment is confined to contract sued upon by plaintiff, including any cross-obligation or independent covenant arising out of that contract. A plea of setoff is not so confined, but is a defense which goes not to justice of plaintiff's demand, but which sets up a demand against plaintiff, and which includes all mutual debts and liabilities. *Bibb Basket Co. v. Eufaula Bank & Trust Co.*, 42 Ga. App. 394, 156 S.E. 310 (1930).

Recoupment not allowed as to matters contained in a contract separate from one sued upon. *Copeland v. White*, 17 Ga. App. 565, 87 S.E. 846 (1916).

Defendant's remedy for breach by plaintiff is recoupment, not nonpayment. — Late performance may constitute breach of contract by plaintiff, but remedy for breach is

General Consideration (Cont'd)

not nonpayment; it is recoupment or what is now a counterclaim. *Sasser & Co. v. Griffin*, 133 Ga. App. 83, 210 S.E.2d 34 (1974).

Causes of action ex delicto cannot be set off against suit proceeding ex contractu, except in some special instances. — While damages resulting from the plaintiff's breach of a contract sued on may be set off by plea of recoupment, still this right of setoff is not broad enough to include damages alleged to have arisen from plaintiff's wrongful act in connection with a transaction legally distinct from contract sued on, even though closely connected with it in point of time. *Aetna Ins. Co. v. Lunsford*, 179 Ga. 716, 177 S.E. 727 (1934).

Burden of proof in plea of recoupment.

— When plaintiff has made out a prima facie case by proof of delivery and acceptance of goods, defendant has burden of proving facts set up under defendant's plea of recoupment, and damage thereby. *Gem Knitting Mills v. Empire Printing & Box Co.*, 3 Ga. App. 709, 60 S.E. 365 (1908); *Phillips v. Lindsey*, 31 Ga. App. 479, 120 S.E. 923 (1923).

No right to recoupment established.

— Trial court was authorized to conclude that the buyers were not entitled to recover on the buyers' recoupment claim made in the context of the sellers' suit on three promissory notes; a management agreement was a sham, and the evidence showed that no money was paid thereunder; further, money paid as a downpayment on a business sale contract and additional money paid to one of the sellers in return for services were voluntarily paid, and the evidence did not demand a finding of an overpayment or payment on account of fraud, accident, or mistake. *Park v. Fortune Ptnr., Inc.*, 279 Ga. App. 268, 630 S.E.2d 871 (2006).

Cited in *Taylor v. Hardin*, 38 Ga. 577 (1869); *Latimer v. Lane*, 45 Ga. 474 (1872); *Griffin v. Lawton & Willingham*, 54 Ga. 104 (1875); *Western Union Tel. Co. v. Taylor*, 84 Ga. 408, 11 S.E. 396, 8 L.R.A. 189 (1890); *Arnold v. Carter*, 125 Ga. 319, 54 S.E. 177 (1906); *Weaver v. Roberson*, 134 Ga. 149, 67 S.E. 662 (1910); *Wood & Bro. v. Jones & Son*, 10 Ga. App. 735, 73 S.E. 1099 (1912); *Atlantic Coast Line R.R. v. A. T. Snodgrass & Co.*, 14 Ga. App. 668, 82 S.E. 153 (1914); *Bowers*

v. Williams, 17 Ga. App. 779, 88 S.E. 703 (1916); *Park v. Carmichael*, 20 Ga. App. 36, 92 S.E. 397 (1917); *Woodall v. Exposition Cotton Mills*, 31 Ga. App. 269, 120 S.E. 423 (1923); *Georgia Lumber Co. v. Johnson-Battle Lumber Co.*, 31 Ga. App. 290, 120 S.E. 604 (1923); *Shehane v. Eberhart*, 33 Ga. App. 23, 125 S.E. 506 (1924); *Southern Exch. Bank v. Langston*, 33 Ga. App. 477, 127 S.E. 230 (1925); *Porter v. Davey Tree Expert Co.*, 34 Ga. App. 355, 129 S.E. 557 (1925); *Frey v. Harry L. Winter, Inc.*, 166 Ga. 453, 143 S.E. 902 (1928); *Archibald Hdwe. Co. v. Gifford*, 44 Ga. App. 837, 163 S.E. 254 (1932); *Jordan Realty Co. v. Chambers Lumber Co.*, 176 Ga. 624, 168 S.E. 601 (1933); *Helton v. Taylor*, 58 Ga. App. 630, 199 S.E. 580 (1938); *Middleton v. Pruden*, 191 Ga. 893, 14 S.E.2d 82 (1941); *Chemetron Corp. v. Southern Nitrogen Co.*, 102 Ga. App. 577, 117 S.E.2d 180 (1960); *H.W. Ivey Constr. Co. v. Southwest Steel Prods.*, 111 Ga. App. 527, 142 S.E.2d 394 (1965); *Moore v. Todd*, 223 Ga. 702, 157 S.E.2d 587 (1967); *Windjammer Assocs. v. Hodge*, 153 Ga. App. 758, 266 S.E.2d 540 (1980); *Chapman v. Aetna Fin. Co.*, 615 F.2d 361 (5th Cir. 1980); *Atlanta Window Co. v. Haskell Assocs.*, 162 Ga. App. 789, 293 S.E.2d 51 (1982); *Tempo Mgt., Inc. v. Lewis*, 210 Ga. App. 390, 436 S.E.2d 98 (1993); *Johnston v. Conasauga Radiology, P.C.*, 249 Ga. App. 791, 549 S.E.2d 778 (2001); *Imex Int'l v. Wires Eng'g*, 261 Ga. App. 329, 583 S.E.2d 117 (2003); *Natale v. The Home Depot U.S.A. (In re Krause, Inc.)*, No. 00 B 71919(N.D. ILL.), 2005 Bankr. LEXIS 1404 (Bankr. N.D. Ga. July 11, 2005).

Application**Pledgor may recoup against pledgee.**

Bennett v. Tucker & Pennington, 32 Ga. App. 288, 123 S.E. 165 (1924).

Recoupment allowed for damage to principal caused by violation of instructions by factor. *Wood & Bro. v. Jones & Son*, 10 Ga. App. 735, 73 S.E. 1099 (1912).

Recoupment is available as a defense by affidavit of illegality to mortgage foreclosure. — In proceeding to foreclose bill of sale retaining title to secure debt, the debtor may, by affidavit of illegality, avail oneself of any defense which the debtor might set up in an ordinary suit upon demand secured by a mortgage, and which goes to show that

amount claimed is not due and owing; and, while the debtor is thus permitted to avail oneself of a valid defense by way of recoupment, the debtor is not entitled to plead defense of setoff in such a summary proceeding, since the latter defense is not one which goes to justice of plaintiff's demand. *Atlas Auto Fin. Co. v. Atkins*, 79 Ga. App. 91, 53 S.E.2d 171 (1949).

Assignee of purchase money, title retention contract is subject to defense of failure of consideration against original vendor by way of recoupment, although assignee took without notice of it. *Columbia Loan Co. v. Parks*, 213 Ga. 723, 101 S.E.2d 720 (1958).

Buyer may recoup for delay in one of several shipments under single contract. — When several shipments of the same article, purchased under terms of a single contract, are made, buyer can recoup for damage caused by delay in any one of the shipments. *Gem Knitting Mills v. Empire Printing & Box Co.*, 3 Ga. App. 709, 60 S.E. 365 (1908).

Plea of recoupment as to breach of stipulation of contract different from stipulation underlying main action. — When plaintiff sues on one part of contract consisting of mutual stipulations made at same time and relating to same subject matter, defendant may recoup defendant's damages arising from breach of that part which is in defendant's favor, whether the different parts are contained in one instrument or several; and though one part be in writing and other in parol; otherwise where contract for breach of which damages are claimed by defendant, is entirely distinct and independent of one on which plaintiff sues. *Atlas Auto Fin. Co. v. Atkins*, 79 Ga. App. 91, 53 S.E.2d 171 (1949).

Reliance on underlying contract by plaintiff seller or transferee of note permits recoupment by defendant. — When seller of automobile or transferee of the note given for the purchase price thereof rely on the contract by suing thereon, the defendant would be entitled to recoup damages against either, suing as plaintiff for the alleged breach of the contract. *Commercial Credit Co. v. Anthony*, 48 Ga. App. 725, 173 S.E. 204 (1934).

Tenant may recoup damages arising from violation of lease, when landlord brings dispossessory warrant alleging failure to pay rent. *Weaver v. Roberson*, 134 Ga. 149, 67 S.E. 662 (1910).

Recoupment allowed for damages caused by delay in completion of construction. — Remedy of recoupment applies to actions *ex contractu*, between contractor and subcontractor, and for damages alleged to have been caused by delay in completion of construction. *Sasser & Co. v. Griffin*, 133 Ga. App. 83, 210 S.E.2d 34 (1974).

Damage to defendant from plaintiff's negligent performance may be pleaded in recoupment. — While it is true that on acceptance of work by owner after building contractor has rendered entire service for which contractor has contracted, the contractor is authorized to proceed to collect balance due contractor by terms of contract, any damage to owner resulting from negligent performance of contract by contractor is a matter for recoupment. *Allied Enters., Inc. v. Brooks*, 93 Ga. App. 832, 93 S.E.2d 392 (1956); *Sasser & Co. v. Griffin*, 133 Ga. App. 83, 210 S.E.2d 34 (1974).

While upon acceptance of work by owner after architect has rendered entire service for which architect has contracted, the architect is authorized to proceed to collect balance due the architect by terms of contract, any damage to owner resulting through negligent performance of contract by the architect is a matter for recoupment. *Housing Auth. v. Ayers*, 211 Ga. 728, 88 S.E.2d 368 (1955).

If plaintiff in undertaking to perform a building contract could, by use of proper care and skill, have avoided alleged damages to defendant, and defendant is required to incur additional expenditures in order to correct the situation brought about by plaintiff, this is a proper item of recoupment in reduction of plaintiff's demand. *Allied Enters., Inc. v. Brooks*, 93 Ga. App. 832, 93 S.E.2d 392 (1956); *Kuhlke Constr. Co. v. Mobley, Inc.*, 159 Ga. App. 777, 285 S.E.2d 236 (1981).

On the acceptance of the work by the owner after a building contractor has rendered the entire service for which the contractor has contracted, the contractor is authorized to proceed to collect the balance due the contractor by the terms of the contract, any damage to the owner resulting through the negligent performance of the contract by the contractor is a matter for recoupment. *Kuhlke Constr. Co. v. Mobley, Inc.*, 159 Ga. App. 777, 285 S.E.2d 236 (1981).

Application (Cont'd)

When defendant's plea of recoupment seeks to recoup against plaintiff's action on contract with a plea that defendant was forced to spend a certain amount of money to have conveyor system, which the plaintiff erected under contract, repaired due to unskillful and improper manner in which plaintiff did certain of the work, motion to strike plea of recoupment was properly denied. *Burton v. Campbell Coal Co.*, 95 Ga. App. 338, 97 S.E.2d 924 (1957).

Recoupment, by way of crossaction, does not arise ex delicto and does not require affirmative equitable relief. *Allied Enters., Inc. v. Brooks*, 93 Ga. App. 832, 93 S.E.2d 392 (1956).

Recoupment based on negligent act not assertable in defense of debt claim. — Summary judgment under O.C.G.A. § 9-11-56(c) was properly granted to a creditor in the creditor's action seeking to collect on a debt since the debtor's defense consisted of a claim in recoupment, pursuant to O.C.G.A. §§ 13-7-2 and 13-7-13, based on personal injuries the debtor suffered from the negligent conduct of the creditor; the court ruled that such a defense was not applicable to the creditor's claim because the claims were legally distinct. *Long v. Reeves Southeastern Corp.*, 259 Ga. App. 257, 576 S.E.2d 641 (2003).

Speculative damages cannot be recouped. *White v. Blitch*, 112 Ga. 775, 38 S.E. 80 (1901).

No recoupment by tenant. — In an action seeking a writ of possession for a mobile home, because the mobile home's tenants expressly waived any recourse against their bankrupt lender arising from a prior judgment, based on a voluntary settlement with the bankrupt lender accepting a general unsecured claim, the tenants could not later assert any right of recoupment; as a result, the trial court did not err in granting summary judgment as to that claim against the tenants and in favor of a successor lender. *Hill v. Green Tree Servicing, LLC*, 280 Ga. App. 151, 633 S.E.2d 451 (2006).

Recovery by parent against school prohibited. — Trial court's finding that the school fulfilled the school's contractual obligation to the parent under enrollment contracts the parties entered into by providing the

school, the teachers, and the facilities was supported by "any evidence"; thus, the trial court did not err in ruling against the parent on the parent's breach of contract counterclaim since the parent did not show an entitlement to recoup any of the damages that the trial court awarded to the school on the school's breach of contract claim for unpaid tuition. *Fuller v. Lakeview Acad.*, 261 Ga. App. 607, 583 S.E.2d 282 (2003).

Setoff inapplicable when no claim that plaintiff owed defendants. — It was error to exclude certain evidence as to damages on the ground that defendants had not asserted a setoff or recoupment counterclaim. The case did not involve setoff or recoupment under O.C.G.A. §§ 13-7-1 and 13-7-2, as there was no claim that plaintiff owed any debt to defendants or breached a cross-obligation or independent covenant. *Automated Print, Inc. v. Edgar*, 288 Ga. App. 326, 654 S.E.2d 413 (2007).

Pleadings and Practice

In plea of recoupment, averments must be full and clear as though the averments were set up in original demand. *Byrom v. Ringe*, 83 Ga. App. 234, 63 S.E.2d 235 (1951).

Properly asserted claim for recoupment is not barred by statute of limitation. *H.R. Kaminsky & Sons v. Yarbrough*, 158 Ga. App. 523, 281 S.E.2d 289 (1981).

Recoupment may be pleaded regardless of the statute of limitations. Therefore, a party may recover damages on claims raised as recoupments after the limitations have run. *Multivision N.W., Inc. v. Jerrold Elecs. Corp.*, 356 F. Supp. 207 (N.D. Ga. 1972).

Plea of recoupment is not barred by statute of limitations when main action is timely. *Multivision N.W., Inc. v. Jerrold Elecs. Corp.*, 356 F. Supp. 207 (N.D. Ga. 1972).

Recoupment may be used to gain affirmative recovery on claim which would ordinarily be barred by limitations. *Multivision N.W., Inc. v. Jerrold Elecs. Corp.*, 356 F. Supp. 207 (N.D. Ga. 1972).

Limitation on right to dismiss petition after filing of plea of recoupment. — After filing of a plea of recoupment, neither plaintiff by voluntary act nor court upon its own motion can dismiss petition without defendant's consent so as to prejudice the defendant's right of alleged counterclaim. *Calhoun v. Citizens Banking Co.*, 113 Ga.

621, 38 S.E. 977 (1901).

Defendant cannot move to dismiss plaintiff's petition, yet retain plea of recoupment for trial. *Rice-Stix Dry Goods Co. v.*

Friedlander Bros., 30 Ga. App. 312, 117 S.E. 762 (1923), *aff'd*, 158 Ga. 303, 122 S.E. 890 (1924).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Counterclaim, Recoupment, and Setoff, §§ 1, 2, 6, 10, 12, 17.

C.J.S. — 80 C.J.S., Set-Off and Counterclaim, § 2.

ALR. — Failure of creditor, or creditor's assignee, to secure credit insurance as affecting rights or liabilities of debtor, upon debtor's loss, 88 ALR3d 794.

13-7-3. Setoff and recoupment distinguished.

Recoupment differs from setoff in this respect: Any claim or demand the defendant may have against the plaintiff may be used as a setoff, while only a claim or demand arising out of the same transaction as that sued on by the plaintiff may be used as a recoupment. (Orig. Code 1863, § 2851; Code 1868, § 2859; Code 1873, § 2910; Code 1882, § 2910; Civil Code 1895, § 3757; Civil Code 1910, § 4351; Code 1933, § 20-1312.)

Cross references. — Counterclaim and cross-claim, § 9-11-13. Effect of counterclaim exceeding opposing claim under Civil Practice Act, § 9-11-13. Joinder of claims and remedies under Civil Practice Act, § 9-11-18.

Law reviews. — For article comparing the Federal Rules of Civil Procedure to Georgia trial practice procedures prior to the adoption of the Georgia Civil Practice Act, see 1 Ga. St. B.J. 315 (1965).

JUDICIAL DECISIONS

Distinction between recoupment and set-off. — Plea of recoupment is confined to contract sued upon by plaintiff, including any cross-obligation or independent covenant arising out of that contract. A plea of setoff is not so confined, but is a defense which goes not to the justice of plaintiff's demand, but which sets up a demand against plaintiff, and which includes all mutual debts and liabilities. *Bibb Basket Co. v. Eufaula Bank & Trust Co.*, 42 Ga. App. 394, 156 S.E. 310 (1930).

Ordinarily, the difference between recoupment and setoff is of little importance. The scheme of the Code is to recoup where both parties rely on same contract, and set off where they urge different contracts. *Byrom v. Ringe*, 83 Ga. App. 234, 63 S.E.2d 235 (1951).

Recoupment is confined to contract on which plaintiff's suit is brought, and does

not include all mutual debts and liabilities as does setoff. *Burton v. Campbell Coal Co.*, 95 Ga. App. 338, 97 S.E.2d 924 (1957).

When a defendant claims a right to a deduction from the plaintiff's damages for breach of a cross obligation arising from the same contract, the proper remedy is recoupment, not setoff. *Johnson v. Raatz*, 200 Ga. App. 289, 407 S.E.2d 489 (1991).

Defense based on the federal Truth in Lending Act, 15 U.S.C. § 1601 et seq., constitutes a set-off, not a recoupment. *Vikowsky v. Savannah Appliance Serv. Corp.*, 179 Ga. App. 135, 345 S.E.2d 621 (1986).

Claim arising out of distinct transaction cannot be recouped but may be setoff against suit on promissory note. *Hamilton v. Grangers' Life & Health Ins. Co.*, 65 Ga. 750 (1880).

Defendant may plead recoupment, but not setoff, in affidavit of illegality to chattel

mortgage foreclosure. *Alston v. J.W. Wheatley & Co.*, 47 Ga. 646 (1873); *Arnold v. Carter*, 125 Ga. 319, 54 S.E. 177 (1906).

Setoff is a defense which does not go to justice of plaintiff's demand, but which sets up a demand against plaintiff. *Aetna Ins. Co. v. Lunsford*, 179 Ga. 716, 177 S.E. 727 (1934).

Right to set off damages arising out of tort is an equitable right. — Right of one sued at law in action ex contractu to set off damages arising out of a tort committed by plaintiff, on ground that latter is insolvent or is a nonresident, is a right in this state recognized only by a court of equity. *Bibb Basket Co. v. Eufaula Bank & Trust Co.*, 42 Ga. App. 394, 156 S.E. 310 (1930).

City court lacks jurisdiction to entertain plea of setoff arising ex delicto against contract action. *Bibb Basket Co. v. Eufaula Bank & Trust Co.*, 42 Ga. App. 394, 156 S.E. 310 (1930).

Defendant seeking setoff arising out of tort must obtain jurisdiction in superior court. — When suit for damages arising ex contractu is pending in city court, defendant, in order to avail oneself of equitable setoff, may apply to superior court to enjoin proceeding in city court and take jurisdiction of entire controversy. *Bibb Basket Co. v. Eufaula Bank & Trust Co.*, 42 Ga. App. 394, 156 S.E. 310 (1930).

Test of recoupment is whether matter arises out of same contract. *Crow v. Mothers Beautiful Co.*, 115 Ga. App. 747, 156 S.E.2d 193 (1967).

Because a purchaser of a bankruptcy debtor's goods alleged that the debtor breached the debtor's obligation to provide insurance and indemnification against product liability and asserted recoupment against the debtor's unpaid invoices, recoupment was not available since the debtor's obligation to provide insurance and indemnity were not part of the same transaction as the obligation to pay for the goods, even though the

obligations arose out of the same contract. *Natale v. The Home Depot U.S.A. (In re Krause, Inc.)*, No. 00 B 71919(N.D. ILL.), 2005 Bankr. LEXIS 1404 (Bankr. N.D. Ga. July 11, 2005).

Plea of recoupment goes to justice of plaintiff's demand, including independent covenants of same contract. *Sammons v. F.A. Read, Inc.*, 31 Ga. App. 763, 121 S.E. 855, cert. denied, 31 Ga. App. 812 (1924).

Plea of recoupment for breach of contract generally disallowed in defense to trover action. — Claim for damages arising from breach of contract cannot be allowed by plea of recoupment in defense to action of trover, unless some special intervening equity arises in favor of defendant, such as insolvency or nonresidence of plaintiff. *Harden v. Lang*, 110 Ga. 392, 36 S.E. 100 (1900); *Aetna Ins. Co. v. Lunsford*, 179 Ga. 716, 177 S.E. 727 (1934).

In plea of recoupment, averments must be full and clear, as though the averments were set up in original demand. *Byrom v. Ringe*, 83 Ga. App. 234, 63 S.E.2d 235 (1951).

Cited in *Latimer v. Lane*, 45 Ga. 474 (1872); *Monroe v. Carter*, 48 Ga. 174 (1873); *Griffin v. Lawton & Willingham*, 54 Ga. 104 (1875); *Brown v. Alfried*, 61 Ga. 12 (1878); *Weaver v. Roberson*, 134 Ga. 149, 67 S.E. 662 (1910); *Wood & Bro. v. Jones & Son*, 10 Ga. App. 735, 73 S.E. 1099 (1912); *Atlantic Coast Line R.R. v. A. T. Snodgrass & Co.*, 14 Ga. App. 668, 82 S.E. 153 (1914); *Jordan v. Investment Corp.*, 39 Ga. App. 144, 146 S.E. 498 (1929); *Mashburn Drug Co. v. Valdosta Drug Co.*, 53 Ga. App. 88, 184 S.E. 903 (1936); *Middleton v. Pruden*, 191 Ga. 893, 14 S.E.2d 82 (1941); *Hollerman v. Commercial Credit Co.*, 66 Ga. App. 772, 19 S.E.2d 336 (1942); *Pittsburgh Plate Glass Co. v. Moulder*, 82 Ga. App. 148, 60 S.E.2d 647 (1950); *Alpharetta Feed & Poultry Co. v. Cocke*, 82 Ga. App. 718, 62 S.E.2d 642 (1950); *Carroll v. Taylor*, 87 Ga. App. 815, 75 S.E.2d 346 (1953); *Moore v. Todd*, 223 Ga. 702, 157 S.E.2d 587 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Counterclaims, Recoupment, and Setoff, §§ 1, 2, 6, 10, 12, 17.

C.J.S. — 80 C.J.S., Set-Off and Counterclaim, §§ 2, 13.

ALR. — Judgment debtor's right to restitution upon reversal or vacation of judgment as subject to setoff in favor of judgment creditor, 101 ALR 1148.

13-74. Limitations as to claims or demands for setoff generally.

Setoff must be between the same parties and in their own right. (Orig. Code 1863, § 2842; Code 1868, § 2850; Code 1873, § 2901; Code 1882, § 2901; Civil Code 1895, § 3747; Civil Code 1910, § 4341; Code 1933, § 20-1303.)

Cross references. — Counterclaim and cross-claim, § 9-11-13. Joinder of claims and remedies under Civil Practice Act, § 9-11-18.

JUDICIAL DECISIONS

Setoff must be between same parties and in the parties' own legal or equitable right. Shingler v. Furst, 176 Ga. 497, 168 S.E. 557 (1933).

Mutuality of obligation is required for valid setoff. Brunson v. Bridges, 130 Ga. App. 102, 202 S.E.2d 553 (1973).

If demands are mutual and of same nature, setoff need not arise between same parties. — Right of setoff, under former Code 1933, §§ 20-1301, 20-1302, and 20-1303 (see O.C.G.A. §§ 13-7-1, 13-7-4, and 13-7-5), if demands were mutual and of the same nature, was not limited to mutual dealings, and need not arise between same parties. Thus, a transferred chose in action, which can be sued on in name of assignee, may be used as a setoff. Wood v. Keysville Lumber Co., 49 Ga. App. 799, 175 S.E. 923 (1934).

Parties may, by agreement, make any debt a setoff. Threlkeld v. Dobbins, 45 Ga. 144 (1872); Long v. Cash, 54 Ga. App. 764, 189 S.E. 73 (1936).

If such agreement is for a consideration, it is binding as is any other agreement. Long v. Cash, 54 Ga. App. 764, 189 S.E. 73 (1936).

If such agreement is executed, it needs no consideration. Long v. Cash, 54 Ga. App. 764, 189 S.E. 73 (1936).

Transferred chose in action, actionable in name of assignee, may be used as a setoff. Meyer v. Hiatt, 40 Ga. App. 583, 150 S.E. 567 (1929).

Defendant, in order to plead a chose in action as a setoff, must obtain such title to it as would enable the defendant to sue upon it either in defendant's own name or in name of another for defendant's use. Meyer v. Hiatt, 40 Ga. App. 583, 150 S.E. 567 (1929).

Setoff against undisclosed principal of claims due by agent. — When undisclosed

principal sues upon contract made with one's agent, the opposite party may setoff any claim one may have against the agent. Ruan v. Gunn, 77 Ga. 53 (1886); Rosser, Armistead & Co. v. Darden, 82 Ga. 219, 7 S.E. 919 (1888); Durant Lumber Co. v. Sinclair & Simms Lumber Co., 2 Ga. App. 209, 58 S.E. 485 (1907).

Defendant cannot set off claim held in representative capacity when sued in individual capacity. — Defendant sued in defendant's individual capacity cannot set off against plaintiff's demand a claim that defendant held in a representative capacity as executor against plaintiff. Davis v. Hadden, 115 Ga. 466, 41 S.E. 608 (1902).

Owner of business cannot setoff debt owed to business. — When defendant business owner argued the purchase price of defendant's store's assets should be setoff against the owner's note owed to the debtor, any offset under 11 U.S.C. § 553 belonged to the owner's business, not to the owner and the owner had no setoff rights; because setoff had to be between the same parties and in their own right under O.C.G.A. § 13-7-4, summary judgment was properly entered under Fed. R. Civ. P. 56(c) for the trustee on the trustee's complaint to collect on the owner's note. Levine v. Kenny (In re Flooring Am., Inc.), 302 B.R. 403 (Bankr. N.D. Ga. 2003).

County cannot set off account due by deceased employee against employee's widow's year's support judgment. — When effect of defendant county's plea is to set off open account due by deceased county employee to defendant county against year's support judgment which plaintiff surviving spouse and her two minor children obtained and hold against estate of deceased em-

ployee, such a setoff is not between the same parties and in their own right. *Wayne County Bd. of Comm'rs v. Reddish*, 220 Ga. 262, 138 S.E.2d 375 (1964).

Mortgagor-mortgagee obligations. — When a note and a deed to secure debt is owed by the mortgagor to the mortgagees, who are tenants in common (i.e., a husband “and/or” his wife), while a subsequent judgment arising out of an action on the building contract is owed by one of the mortgagees to the mortgagor, these debts can be said to be “mutual” and can be set off against each other in a bankruptcy proceeding by the judgment debtor-mortgagee. *Straughair v. Palmieri*, 31 Bankr. 111 (Bankr. N.D. Ga. 1983).

Individual debt due by one partner cannot be set off against claim due to partnership. *Bank of La Grange v. Cotter*, 101 Ga. 134, 28 S.E. 644 (1897); *Carter & Martin v. Carter*, 7 Ga. App. 216, 66 S.E. 630 (1909).

Creditor of partner who purchases goods of the partnership cannot setoff creditor's claim against individual partner in action by the firm. *Wise v. Copley, Stone & Co.*, 36 Ga. 508 (1867).

Debt due by partnership cannot be set off against debt due to one partner individually. The firm and its individual members are different contractors, each being, in the eye of the law, a separate person. *Security Mgt. Co. v. King*, 132 Ga. App. 618, 208 S.E.2d 576 (1974).

Right of setoff in cases other than those

covered by O.C.G.A. Ch. 7, T. 13 is an equitable right. — Right to set off one legal demand against another, other than in cases covered by former Code 1933, § 20-1301 et seq. (see O.C.G.A. Ch. 7, T. 13), was an equitable right, which was not and had never been recognized by a court of law in this state, except in obedience to a statute, and therefore it can be asserted only in a court having jurisdiction in equity matters. *Gormley ex rel. Citizens Bank v. Chance*, 55 Ga. App. 838, 191 S.E. 701 (1937).

City court has no jurisdiction to entertain a plea setting up an equitable setoff, or equitable right of setoff, for simple reason that to entertain such a plea it is necessary for court, not only to recognize an equitable right, but to give affirmative relief as a result of such recognition. *Gormley ex rel. Citizens Bank v. Chance*, 55 Ga. App. 838, 191 S.E. 701 (1937).

Cited in *Mordecai v. Stewart*, 37 Ga. 364 (1867); *Pickett v. Andrews*, 135 Ga. 299, 69 S.E. 478 (1910); *Ellis v. Dudley*, 19 Ga. App. 566, 91 S.E. 904 (1917); *Metcalf v. People's Grocery Co.*, 24 Ga. App. 663, 101 S.E. 768 (1920); *Webb-Harris Auto Co. v. Industrial Acceptance Corp.*, 164 Ga. 54, 137 S.E. 770 (1927); *Sheffield v. Preacher*, 175 Ga. 719, 165 S.E. 742 (1932); *Dickens v. Howard*, 67 F.2d 263 (5th Cir. 1933); *Roberts v. First Nat'l Bank*, 61 Ga. App. 284, 6 S.E.2d 88 (1939); *National Sur. Corp. v. Algernon Blair, Inc.*, 114 Ga. App. 30, 150 S.E.2d 256 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Counterclaim, Recoupment, and Setoff, §§ 57, 74 et seq., 161.

C.J.S. — 80 C.J.S., Set-Off and Counterclaim, §§ 66 et seq., 101.

ALR. — Right of one indebted to insolvent bank to set off deposits which he has made as trustee, 5 ALR 83; 55 ALR 822.

Right to set off claim of individual partner against claim against partnership, 5 ALR 1541; 55 ALR 566.

Right to setoff deposit in insolvent bank against indebtedness to bank, 25 ALR 938; 82 ALR 665; 97 ALR 588.

Setoff by surety of claim paid for insolvent principal whose assets are being adminis-

tered for the benefit of creditors, against own indebtedness to principal, 40 ALR 1096.

Judgment by consent, confession, or default of principal as affecting sureties whose obligation is conditioned upon judicial determination of liability or rights of principal, 51 ALR 1489.

Equitable setoff of claim of one person and claim of his debtor against another, 57 ALR 778; 93 ALR 1164.

Availability as setoff or counterclaim of claim in favor of one alone of several defendants, 81 ALR 781.

Right to set off deposit in insolvent bank against indebtedness to bank, 82 ALR 665; 97 ALR 588.

Setoff as between dividends from assets of insolvent bank or other corporation and liability of creditors as stockholders, 91 ALR 326.

Right of counterclaim, setoff, and the like, of defendant against partners individually, in action to enforce partnership claim, 39 ALR2d 295.

13-7-5. Setoff of demands between parties to suits.

Between the parties themselves, any mutual demands existing at the time of the commencement of the suit may be set off. (Orig. Code 1863, §§ 2841, 3394; Code 1868, §§ 2849, 3413; Code 1873, §§ 2900, 3465; Code 1882, §§ 2900, 3465; Civil Code 1895, §§ 3746, 5084; Civil Code 1910, §§ 4340, 5668; Code 1933, § 20-1302.)

Cross references. — Counterclaim and cross-claim, § 9-11-13. Joinder of claims and remedies under Civil Practice Act, § 9-11-18.

Law reviews. — For article comparing

sections of the Georgia Civil Practice Act with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION APPLICATION

General Consideration

Setoff as not defeating plaintiff's claim, regardless of legal or equitable nature of setoff. — Existence of valid right of setoff does not operate to defeat plaintiff's claim, although it might preclude plaintiff's recovery of any actual damages; and this is true regardless of the assertion of the setoff as a legal right or an equitable right. *National City Bank v. Busbin*, 175 Ga. App. 103, 332 S.E.2d 678 (1985).

Setoff must be between same parties and in their own legal or equitable right. *Shingler v. Furst*, 176 Ga. 497, 168 S.E. 557 (1933).

Mutuality of obligation is required for a valid setoff. *Brunson v. Bridges*, 130 Ga. App. 102, 202 S.E.2d 553 (1973).

If demands are mutual and of same nature, setoff need not arise between same parties. — Right of setoff, under former Code 1933, §§ 20-1301, 20-1302, and 20-1303 (see O.C.G.A. §§ 13-7-1, 13-7-4, and 13-7-5), if demands were mutual and of the same nature, was not limited to mutual dealings, and need not arise between same parties. Thus, a transferred chose in action, which can be sued on in name of assignee, may be used as a setoff. *Wood v. Keysville*

Lumber Co., 49 Ga. App. 799, 175 S.E. 923 (1934).

Setoff as counterclaim, not defense. — When defendant asserts a setoff of mutual demands existing at the time of commencement of the action, the setoff must be asserted as a counterclaim rather than a defense. *National City Bank v. Busbin*, 175 Ga. App. 103, 332 S.E.2d 678 (1985).

In general, parties to a suit are entitled to set off mutual demands existing at the time of the commencement of the suit, but such a setoff must be asserted as a counterclaim rather than a defense, since it does not operate as a denial of the plaintiff's claim, but merely allows the defendant to set off a debt owed the defendant by the plaintiff against that claim. *Stewart v. Stewart*, 236 Ga. App. 348, 511 S.E.2d 919 (1999).

When defendant's claim for monies due on a promissory note ceased to be a counterclaim when it was severed and transferred to another court for adjudication as an original action, the defendant could not assert defendant's claim as a set off defense in the now separate suit on the promissory note. *Stewart v. Stewart*, 236 Ga. App. 348, 511 S.E.2d 919 (1999).

Former Civil Code 1895, § 3750 (see O.C.G.A. § 13-7-7) was an exception to

General Consideration (Cont'd)

former Civil Code 1895, §§ 3746 and 5084 (see O.C.G.A. § 13-7-5). *Nix v. Ellis*, 118 Ga. 345, 45 S.E. 404 (1903).

Parties may, by agreement, make any debt a set off; if agreement is for a consideration, it is binding on same terms as any other agreement, and if it is executed, it needs no consideration. *Long v. Cash*, 54 Ga. App. 764, 189 S.E. 73 (1936).

Sales are not the subject matter of setoff. *State v. Southwestern R.R.*, 70 Ga. 11 (1883).

Judgment assignee subject to equities and defenses of judgment debtor against judgment creditor at assignment. — Claim of assignee of a judgment is subject to such equities and defenses as may have existed in favor of judgment debtor against judgment creditor at time of assignment, but is not subject to rights which did not then exist in favor of such judgment debtor and of which judgment debtor did not become possessed until some time later as by subsequent purchase of judgments against the judgment creditor. *Sheffield v. Preacher*, 175 Ga. 719, 165 S.E. 742 (1932).

Right of setoff in cases other than those covered by former Code 1933, § 20-1301 et seq. (see O.C.G.A. Ch. 7, T. 13) is an equitable right. — Right to set off one legal demand against another, other than in cases covered by former Code 1933, § 20-1301 et seq. (see O.C.G.A. Ch. 7, T. 13), is an equitable right, which is not and has never been recognized by a court of law in this state, except in obedience to a statute, and therefore it can be asserted only in a court having jurisdiction in equity matters. *Gormley ex rel. Citizens Bank v. Chance*, 55 Ga. App. 838, 191 S.E. 701 (1937).

City court has no jurisdiction to entertain plea setting up equitable setoff, or equitable right of setoff, for simple reason that to entertain such a plea it is necessary for court, not only to recognize an equitable right, but to give affirmative relief as a result of such recognition. *Gormley ex rel. Citizens Bank v. Chance*, 55 Ga. App. 838, 191 S.E. 701 (1937).

Plea must show that demand against plaintiff was due at time plaintiff commenced action. — A plea of setoff is not good unless the plea alleges facts showing that demand against plaintiff, which defendant therein

seeks to set up, was in existence, and due to latter by former, at time plaintiff's action was begun. *Nixon v. Nixon*, 194 Ga. 301, 21 S.E.2d 702 (1942).

Mortgagor-mortgagee obligations. — When a note and a deed to secure debt is owed by the mortgagor to the mortgagees, who are tenants in common (i.e., a husband "and/or" his wife), while a subsequent judgment arising out of an action on the building contract is owed by one of the mortgagees to the mortgagor, these debts can be said to be "mutual" and can be set off against each other in a bankruptcy proceeding by the judgment debtor-mortgagee. *Straughair v. Palmieri*, 31 Bankr. 111 (Bankr. N.D. Ga. 1983).

Cited in *Fahn v. Bleckley*, 55 Ga. 81 (1875); *McKleroy v. Sewell*, 73 Ga. 657 (1884); *Davis v. Hadden*, 115 Ga. 466, 41 S.E. 608 (1902); *Kahrs v. Kahrs*, 115 Ga. 288, 41 S.E. 649 (1902); *Butler v. Holmes*, 128 Ga. 333, 57 S.E. 715 (1907); *Wood & Bro. v. Jones & Son*, 10 Ga. App. 735, 73 S.E. 1099 (1912); *Ellis v. Dudley*, 19 Ga. App. 566, 91 S.E. 904 (1917); *Fuller v. Coker*, 24 Ga. App. 418, 101 S.E. 1 (1919); *Stephens v. Blackwell*, 24 Ga. App. 798, 102 S.E. 452 (1920); *Jefferson Std. Life Ins. Co. v. Rankin*, 39 Ga. App. 373, 147 S.E. 157 (1929); *Reed v. Mobley*, 172 Ga. 116, 157 S.E. 321 (1931); *Commercial Credit Co. v. Anthony*, 48 Ga. App. 725, 173 S.E. 204 (1934); *Roberts v. First Nat'l Bank*, 61 Ga. App. 284, 6 S.E.2d 88 (1939); *Attaway v. Attaway*, 193 Ga. 51, 17 S.E.2d 72 (1941); *Pittsburgh Plate Glass Co. v. Moulder*, 82 Ga. App. 148, 60 S.E.2d 647 (1950); *Powell v. Barker*, 96 Ga. App. 592, 101 S.E.2d 113 (1957); *General Acceptance Corp. v. Nix Ford, Inc.*, 107 Ga. App. 32, 129 S.E.2d 202 (1962); *Martin Mgt. Corp. v. Farner*, 124 Ga. App. 552, 184 S.E.2d 597 (1971); *Pickett v. Chamblee Constr. Co.*, 124 Ga. App. 769, 186 S.E.2d 123 (1971); *Marler v. Rockmart Bank*, 146 Ga. App. 548, 246 S.E.2d 731 (1978); *Jones v. FDIC*, 151 Ga. App. 619, 260 S.E.2d 751 (1979); *Scarboro v. Ralston Purina Co.*, 160 Ga. App. 576, 287 S.E.2d 623 (1981); *Atlanta Window Co. v. Haskell Assocs.*, 162 Ga. App. 789, 293 S.E.2d 51 (1982); *David J. Joseph Co. v. S & M Scrap Metal Co.*, 163 Ga. App. 685, 295 S.E.2d 860 (1982); *Thompson v. Crouch Contracting Co.*, 164 Ga. App. 532, 297 S.E.2d 524 (1982); *Sterling Nat'l Bank & Trust Co. v.*

Southwire Co., 713 F.2d 684 (11th Cir. 1983); *J.R. Mabbett & Son v. Ripley*, 185 Ga. App. 601, 365 S.E.2d 155 (1988).

Application

Damages for breach of contract arise ex contractu and may be set off in suit on contract. *Pickett v. Andrews*, 135 Ga. 299, 69 S.E. 478 (1910); *Stephens v. Blackwell*, 24 Ga. App. 798, 102 S.E. 452 (1920).

Damages arising from violation of terms of a lease may be set off against rent. *Johnston v. Patterson*, 91 Ga. 531, 18 S.E. 350 (1893).

Money procured by fraud may be set off against suit on non-negotiable instrument for money loaned. *Hamilton v. Grangers' Life & Health Ins. Co.*, 65 Ga. 750 (1880).

Set off of usury paid on former contract between same parties is permissible. — Usury paid on former contract may be pleaded as a setoff to existing debt, provided it is not barred by statute of limitations, and provided further that former contract, on which usury was paid, was between same parties as those to existing debt. *Wolfe v. Citizens' Bank*, 26 Ga. App. 510, 106 S.E. 605, cert. denied, 26 Ga. App. 801 (1921).

Running payments and over-payments on account, may be setoff against plaintiff's account sued on, when plea admits latter to a certain amount, but disputes balance; and if plea be sustained by evidence, the defendant may have judgment for any excess which defendant ought to recover. *Petit v. Teal*, 57 Ga. 145 (1876).

In suit for property damage, enhancement in property's market value may be set off. — Defendant may setoff any enhancement in market value of owner's land resulting from change in grade of street, when sued by plaintiff for damage to plaintiff's property. *Wolff v. Georgia S. & F.R.R.*, 94 Ga. 555, 20 S.E. 484 (1894).

Allegation of setoff of unliquidated damages arising from contract breach. — Unliquidated damages arising from breach of contract may be set off in action ex contractu, but answer must allege a contract between defendant and plaintiff, and aver such breach of contract by plaintiff as would justify recovery of damages against it. *Janes v. City of Cedartown*, 14 Ga. App. 72, 80 S.E. 339 (1913).

Word's "mutual demands," as applied to debts, imports that there must be reciprocal obligations between the parties. Thus, a defendant cannot ordinarily set off an indebtedness held against plaintiff and another, since it is not a mutual demand. *Wolfe v. Citizens' Bank*, 26 Ga. App. 510, 106 S.E. 605 (1921).

Demand of any one defendant can be set off in action against them severally. — Where two or more defendants are joined in action to which the defendants are severally liable, and in which a separate judgment may be taken against each defendant, a cross-demand in favor of any one defendant against plaintiff may be setoff. *Wilson v. Exchange Bank*, 122 Ga. 495, 50 S.E. 357, 69 L.R.A. 97, 2 Ann. Cas. 597 (1905).

Endorsers sued jointly can set off account due firm in which endorsers are sole members. *Oliver v. Godley*, 38 Ga. App. 66, 142 S.E. 566 (1928).

Setoff by purchaser of jointly owned property of debt owed by one joint owner. — See *Browning v. Rewis*, 156 Ga. App. 178, 274 S.E.2d 157 (1980).

Transferred chose in action, actionable in name of assignee, may be used as a setoff. *Nix v. Ellis*, 118 Ga. 345, 45 S.E. 404 (1903); *Cox v. Stowers*, 204 Ga. 595, 50 S.E.2d 339 (1948).

One may purchase claim against bank and use claim as setoff when sued by bank. — One indebted to a bank may purchase a claim due by the bank, and use the claim as setoff, when subsequently sued on debt due by the purchaser. *Nix v. Ellis*, 118 Ga. 345, 45 S.E. 404 (1903).

Applicability of section to proceeding by judgment debtor to set off judgment against judgment creditor. — In proceeding by judgment debtor to set off a judgment assigned to the debtor against a judgment rendered against the debtor, word "suit", if it has any application, refers to judgment debtor's proceeding to set off, rather than to suit resulting in judgment against the debtor. *Piedmont Sav. Co. v. Davis*, 55 Ga. App. 386, 190 S.E. 386 (1937).

Corporate or partnership debt cannot be set off in suit brought by individual member. — In suit by individual upon open account, debtor cannot set off a claim due by corporation or partnership of which plaintiff is a member. *Metcalf v. People's Grocery Co.*, 24

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Ga. App. 663, 101 S.E. 768 (1920).

Debts due widow by estate cannot be set off against heirs unless estate's representative is a party. — Debts due widow by estate of her deceased husband are not based on a course of dealing with an heir, or heirs of his estate, and cannot form basis of action by widow against other heir, or heirs, without

making legal representative of estate of deceased a party thereto; since items relied upon by defendant to support her contention that her answer contains proper matters for setoff are not such demands as could have been maintained by defendant in direct proceeding against plaintiff, equity will not sanction a proceeding to accomplish indirectly that which the law prohibits. *Cox v. Stowers*, 204 Ga. 595, 50 S.E.2d 339 (1948).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Counterclaim, Recoupment, and Setoff, §§ 142, 143, 148.

C.J.S. — 80 C.J.S., Set-off and Counterclaim, § 1 et seq.

ALR. — Right to setoff deposit in insolvent bank against indebtedness to bank, 25 ALR 938; 82 ALR 665; 97 ALR 588.

Character of claims available by way of setoff, counterclaim, or recoupment in action on construction contract, 46 ALR 393.

Right to setoff, as against claim for rent accruing subsequent to assignment by lessor or sublessor, claim existing against assignor at time of assignment, 78 ALR 824.

Availability as setoff or counterclaim of claim in favor of one alone of several defendants, 81 ALR 781.

Right of setoff by or against bank or trust

company as affected by division of its business into departments, 81 ALR 1508.

Set-off as between dividends from assets of insolvent bank or other corporation and liability of creditors as stockholders, 91 ALR 326.

Counterclaim or setoff as defense to proceeding to revive judgment, 131 ALR 802.

Right of setoff as between debt represented by instrument held in pledge to secure debt of owner (third person) and debt of pledgee to obligor of such instrument, 145 ALR 1006.

Right of attorney to set off claim for unrelated services against client's claim for money collected, 173 ALR 429.

Waiver or estoppel with respect to debtor's assertion, as setoff or counterclaim against assignee, of claim valid as against assignor, 51 ALR2d 886.

13-7-6. Setoff of claims or demands against beneficiaries of suits.

If the plaintiff sues for the benefit of another person, a setoff against the beneficiary shall be allowed. (Orig. Code 1863, § 2844; Code 1868, § 2852; Code 1873, § 2903; Code 1882, § 2903; Civil Code 1895, § 3749; Civil Code 1910, § 4343; Code 1933, § 20-1304.)

JUDICIAL DECISIONS

Section applicable to suit by agent in own name upon contract made for principal's benefit. — When an agent sues in the agent's own name upon a contract made for benefit of the agent's principal, the action will be subject to any defenses which defendant could lawfully assert against principal if action had been brought in name of latter; this rule as to defenses can have no application where instrument sued on is a sealed

instrument and principal does not appear to be a party thereto. *Hollingsworth v. Georgia Fruit Growers, Inc.*, 185 Ga. 873, 196 S.E. 766 (1938).

Cited in *Wortsmann v. Wade*, 77 Ga. 651, 4 Am. St. R. 102 (1886); *Summers v. Lee*, 10 Ga. App. 441, 73 S.E. 602 (1912); *National Sur. Corp. v. Algernon Blair, Inc.*, 114 Ga. App. 30, 150 S.E.2d 256 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Counterclaim, Recoupment, and Setoff, § 82.

C.J.S. — 70 C.J.S., Set-Off and Counterclaim, § 71.

13-7-7. Allowance of setoff against original payee in action by holder or transferee of negotiable instrument received under dishonor.

When suit is brought by a holder or transferee on a negotiable instrument received under dishonor, no setoff shall be allowed against the original payee except such as is in some way connected with the debt sued on or the transaction from which it sprang. (Orig. Code 1863, § 2845; Code 1868, § 2853; Code 1873, § 2904; Code 1882, § 2904; Civil Code 1895, § 3750; Civil Code 1910, § 4344; Code 1933, § 20-1305.)

Cross references. — Liability of parties to negotiable instruments generally, § 11-3-401 et seq.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICATION

General Consideration

Former Civil Code 1895, § 3750 (see O.C.G.A. § 13-7-7) was an exception to former Civil Code 1895, §§ 3635 and 3636 (see O.C.G.A. § 13-1-5). *Nix v. Ellis*, 118 Ga. 345, 45 S.E. 404 (1903).

Any sum due from payee to maker, connected with note sued on may be set off. *Butler v. Mitchell*, 128 Ga. 431, 57 S.E. 764 (1907).

Equities arising between maker and payee, after transfer to third person, will not affect holder's rights, though transfer be made after note becomes due. *Central Trust Co. v. Fargason*, 21 Ga. App. 696, 94 S.E. 902 (1918); *Georgia State Bank v. Harden*, 32 Ga. App. 300, 124 S.E. 68 (1924).

Damages for fraud in collateral transaction cannot be set off. *Ingram v. Jordan*, 55 Ga. 356 (1876).

Essential allegations of a plea of setoff are that note was received by plaintiff under dishonor and that setoff grew out of, or was in some way connected with contract sued on. *Kinard v. Sanford*, 64 Ga. 630 (1880).

Cited in *Ellis v. Dudley*, 19 Ga. App. 566, 91 S.E. 904 (1917); *Southeastern Rubber*

Works Co. v. National Disc. Co., 27 Ga. App. 244, 107 S.E. 598 (1921); *Cole v. Bank of Bowersville*, 31 Ga. App. 435, 120 S.E. 790 (1923); *Fulton Nat'l Bank v. Redmond*, 161 Ga. 204, 130 S.E. 568 (1925); *Pullen v. Powell*, 35 Ga. App. 333, 132 S.E. 922 (1926); *Stanfield v. Kennedy*, 43 Ga. App. 738, 159 S.E. 880 (1931); *National Sur. Corp. v. Algernon Blair, Inc.*, 114 Ga. App. 30, 150 S.E.2d 256 (1966).

Application

Two notes executed under same contract are considered parts of same transaction. *Rountree v. Culpepper*, 40 Ga. App. 629, 150 S.E. 859 (1929).

Statute applies as to one not a holder in due course. — Statute is construed to mean that, even as to one not a holder in due course, setoff is a defense only as to those equities existing between original parties which grew out of same transaction. *Martin Mgt. Corp. v. Farner*, 124 Ga. App. 552, 184 S.E.2d 597 (1971) (see O.C.G.A. § 13-7-7).

Debt must be connected with note. — When note payable to one corporation has, after maturity, been transferred to another

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corporation, the maker cannot set off against transferee a debt due the maker by the other corporation which was not connected with debt evidenced by note sued on, or transaction out of which debt sued on originated. *Porter v. Wootten*, 51 Ga. App. 834, 181 S.E. 866 (1935).

Procedural benefit afforded by former Code 1933, § 20-1305 (see O.C.G.A. § 13-7-7) **was not available to original payee of negotiable paper**; this was so even though

original payee may qualify as a holder under former Code 1933, § 109A-1-201 (see O.C.G.A. § 11-1-201(20)). *Jones v. FDIC*, 151 Ga. App. 619, 260 S.E.2d 751 (1979).

Setoff against one note of second note for subsequent indebtedness disallowed. — When two notes were executed at different dates, the second note could not be setoff to first note, if it covered indebtedness arising after execution of note sued on, although consideration of both notes was used to construct an ice house. *Polk v. Stewart*, 144 Ga. 335, 87 S.E. 21 (1915).

RESEARCH REFERENCES

Am. Jur. 2d. — 11 Am. Jur. 2d, Bills and Notes, § 1027. 20 Am. Jur. 2d, Counterclaim, Recoupment, and Setoff, § 31.

C.J.S. — 70 C.J.S., Set-Off and Counterclaim, §§ 40 et seq., 49 et seq.

ALR. — Setoff or counterclaim between prior parties to a negotiable instrument as available against one not a holder in due course, 70 ALR 245.

What amounts to waiver, estoppel, or loss of bank's right to set off depositor's indebtedness against deposit or to apply deposit upon indebtedness, 143 ALR 453.

Waiver or estoppel with respect to debtor's assertion, as setoff or counterclaim against assignee, of claim valid as against assignor, 51 ALR2d 886.

13-7-8. Allowance of setoff of debt of testator or intestate against representative of estate.

A debt of a testator or intestate is not a proper setoff against a debt contracted with the representative of the estate unless both were contracted during the lifetime of the decedent. (Orig. Code 1863, § 2846; Code 1868, § 2854; Code 1873, § 2905; Code 1882, § 2905; Civil Code 1895, § 3751; Civil Code 1910, § 4345; Code 1933, § 20-1306.)

Cross references. — Counterclaim and cross-claim, § 9-11-13. Joinder of claims and remedies under Civil Practice Act, § 9-11-18.

JUDICIAL DECISIONS

Claim brought before death of testator may be setoff. *Nix v. Ellis*, 118 Ga. 345, 45 S.E. 404 (1903).

Cited in *Drew v. Drew*, 25 Ga. App. 355,

103 S.E. 196 (1920); *Shingler v. Furst*, 176 Ga. 497, 168 S.E. 557 (1933); *National Sur. Corp. v. Algernon Blair, Inc.*, 114 Ga. App. 30, 150 S.E.2d 256 (1966).

RESEARCH REFERENCES

ALR. — Right of set-off as between decedent's debt to corporation and dividend

declared by corporation after his death, 84 ALR 738.

13-7-9. Allowance of setoff of distributive share in estate against judgment against legatee or owner of share.

A legatee or owner of a distributive share in an estate may set off such share against a judgment against him unless special reason exists requiring the collection of the judgment. (Civil Code 1895, § 3752; Civil Code 1910, § 4346; Code 1933, § 20-1307.)

History of Code section. — This Code section is derived from the decision in *Dorsey v. Simmons*, 49 Ga. 245 (1873).

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Legatee's right to setoff requires that estate be solvent. — A legatee cannot, as a matter of right, set off the legatee's distributive share in estate against debt due by the legatee to estate unless it appears that estate is solvent. *Adams v. Bishop*, 42 Ga. App. 811, 157 S.E. 523 (1931).

Application to contract claim of former

administratrix against estate. — See *Shadburn Banking Co. v. Streetman*, 180 Ga. 500, 179 S.E. 377 (1935).

Cited in *Jarecky v. Arnold*, 51 Ga. App. 954, 182 S.E. 66 (1935); *National Sur. Corp. v. Algernon Blair, Inc.*, 114 Ga. App. 30, 150 S.E.2d 256 (1966).

13-7-10. Allowance of setoff of value of improvements against claim for mesne profits.

The value of improvements made by one bona fide in possession under a claim of right may be set off against a claim for mesne profits. (Orig. Code 1863, § 2847; Code 1868, § 2855; Code 1873, § 2906; Code 1882, § 2906; Civil Code 1895, § 3753; Civil Code 1910, § 4347; Code 1933, § 20-1308.)

Cross references. — Setoff of improvements by one in bona fide possession, § 44-11-9.

JUDICIAL DECISIONS

Tenant may set off value of improvements made by tenant against mesne profits. — Tenant in ejectment may prove increased value of premises resulting from improvements made thereon by the tenant and set off value thereof in action for mesne profits. *Roe v. Doe*, 39 Ga. 328 (1869).

Defendant must either have erected improvements or show connection with one who did. — To take credit for improvements, requisite foundation must be laid in evidence of increased value, and where defendant neither erected improvements nor connected oneself by evidence with those who did, it was not error for jury to refuse to

reduce mesne profits. *Jenkins v. Means*, 59 Ga. 55 (1877).

Setoff of improvements made by predecessor in title by one holding warranty deed is allowed. — Law does not confine setoff to improvements made by defendant in ejectment. If defendant is bona fide in possession under claim of right with a warranty from previous possessor who made improvements, the defendant may set off the value of those improvements. *Roe v. Doe*, 47 Ga. 540 (1873).

Defendant in ejectment may set off value of improvements made by predecessor in title under whom the defendant holds war-

ranty deed to extent such predecessor could have done. *Dean v. Feely*, 69 Ga. 804 (1883).

Improvements cannot be set off against mesne profits unless the improvements have increased rental value of premises. *Hunt v. Pond*, 67 Ga. 578 (1881).

One bona fide in possession is entitled to set off full value of improvements. — When premises are held bona fide under independent and adversary claims of title, party making improvements is entitled to have the full value of the improvements allowed the party. *Dean v. Feely*, 69 Ga. 804 (1883).

Extent of setoff allowed for improvements made by tenant by sufferance. — When improvements of a permanent character are made in good faith by one who has no claim of right to possession, but is a tenant by sufferance, the value of such improvements may be allowed to extent of rent found to be due for use of land, but no further. *Dean v. Feely*, 69 Ga. 804 (1883).

Fence erected by trespasser for purpose of dispossessing plaintiff cannot be set off in action for mesne profits, since it is not an improvement, but rather an obstruction. *Hunt v. Pond*, 67 Ga. 578 (1881).

Trespassers are not entitled to benefit of improvements. *Hunt v. Pond*, 67 Ga. 578 (1881).

Set off of improvements in action for mesne profits as between tenants in common. — As between tenants in common, when one has held out the other, believing to be the sole owner, and, pending such exclusion, one has made permanent improvements, the cotenant, unless the cotenant resorts to equity, cannot be compelled to contribute anything for the cost or value of the improvements, beyond such portion of rents as may be chargeable to party erecting the improvements. *Bazemore v. Davis*, 55 Ga. 504 (1875).

Plaintiff in ejectment cannot claim enhanced rents from defendant by reason of improvements made by defendant. *Dean v. Feely*, 69 Ga. 804 (1883).

Improvements by life tenant not charge upon property when passed to remainderman. — When tenant for life makes valuable improvements upon land during tenant's occupancy, these improvements are not a charge upon property when it comes to remainderman. *Dean v. Feely*, 69 Ga. 804 (1883).

Cited in *McPhee v. Guthrie & Co.*, 51 Ga. 83 (1874); *National Sur. Corp. v. Algernon Blair, Inc.*, 114 Ga. App. 30, 150 S.E.2d 256 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 *Am. Jur. 2d*, Ejectment, § 54. 41 *Am. Jur. 2d*, Improvements, §§ 4 et seq., 28, 32, 33.

C.J.S. — 42 *C.J.S.*, Improvements, §§ 17 et seq.

13-7-11. Allowance of setoff of debt not due against claim of nonresident or insolvent plaintiff.

If a plaintiff resides outside this state or is insolvent, the defendant may set off against him a debt not due under such equitable terms as may be prescribed by the court. (Orig. Code 1863, § 2849; Code 1868, § 2857; Code 1873, § 2908; Code 1882, § 2908; Civil Code 1895, § 3755; Civil Code 1910, § 4349; Code 1933, § 20-1309.)

JUDICIAL DECISIONS

Depositors in insolvent state depository may set off their deposits against notes held by receiver. *State v. Brobston*, 94 Ga. 95, 21 S.E. 146, 47 *Am. St. R.* 138 (1894).

Setoff by garnishee against assets of non-

resident debtor. — Garnishee can set off any debt, even though not yet due, against assets of nonresident debtor that garnishee holds, comparison of claims will determine amount of indebtedness and assets. *Holmes Co. v.*

Pope & Fleming, 1 Ga. App. 338, 58 S.E. 281 (1907).

City court lacks equity where defendant's plea exceeds plaintiff's demand. — City court has no jurisdiction where defendant pleads nonresidence or insolvency of plaintiff, and further asks a judgment in excess of plaintiff's demand, because affirmative equitable relief is involved. *Fuller v. Coker*, 24 Ga. App. 418, 101 S.E. 1 (1919).

Cited in *Macon Nat'l Bank v. Smith*, 40 Ga. App. 150, 149 S.E. 172 (1929); *Quitman Cooperage Co. v. People's First Nat'l Bank*, 178 Ga. 90, 172 S.E. 17 (1933); *Shepard v. Veal*, 178 Ga. 535, 173 S.E. 644 (1934); *National Sur. Corp. v. Algernon Blair, Inc.*, 114 Ga. App. 30, 150 S.E.2d 256 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Counterclaim, Recoupment, and Setoff, § 33.

ALR. — Right to setoff deposit in insolvent bank against indebtedness to bank, 25 ALR 938; 82 ALR 665; 97 ALR 588.

Immaturity of claim against insolvent at time of insolvency proceedings as affecting right of setoff, 43 ALR 1325; 51 ALR 1477.

Right and remedy as regards application of debt due from insolvent as between debts owed by creditor to insolvent, 86 ALR 993.

Set-off as between dividends from assets of

insolvent bank or other corporation and liability of creditors as stockholders, 91 ALR 326.

Fractional interest in debt as subject of setoff, 139 ALR 1328.

Bank's right to set off unmatured claims as against receiver, assignee for benefit of creditors, or trustee in bank's right to setoff unmatured claims as against receiver, assignee for benefit of creditors, or trustee in bankruptcy, of insolvent depositor, 37 ALR2d 850.

13-7-12. Grounds for allowance of recoupment generally.

Recoupment lies for overpayments by the defendant or for payments by fraud, accident, or mistake. (Orig. Code 1863, § 2852; Code 1868, § 2860; Code 1873, § 2911; Code 1882, § 2911; Civil Code 1895, § 3758; Civil Code 1910, § 4352; Code 1933, § 20-1313.)

JUDICIAL DECISIONS

Partial payments for land for which plaintiff knew plaintiff had no title may be recouped in action on notes procured through fraud. *Norton v. Graham*, 130 Ga. 391, 60 S.E. 1049 (1908).

Vendee may recoup damage resulting from deficiency in land purchased by action on note in city court. *Edenfield v. Rountree*, 33 Ga. App. 444, 126 S.E. 731 (1925).

Recoupment allowed for overpayment when debtor exercises right to direct payments. — When debtor exercised right to direct payments under former Code 1882, § 2869 (see O.C.G.A. § 13-4-42), the debtor may recoup any overpayment on a note where it had applied to other notes. *Thompson v. Mitchell*, 74 Ga. 797 (1885).

Recoupment not authorized for payments made in ignorance of law. — Company was

not entitled to recoup overpayments made under a purchase agreement's tax clause as the payments were made in ignorance of the law; the company pointed to no evidence that the company was mistaken as to what the law required with respect to the payments after the decedent's death, but made the payments until it was informed that payment was not required. *Wallis v. B & A Construction Co.*, 273 Ga. App. 68, 614 S.E.2d 193 (2005).

Although O.C.G.A. § 13-7-12 arguably allows recoupment for any overpayment, O.C.G.A. § 13-1-13 more specifically provides that payments may not be recovered if made in ignorance of the law; O.C.G.A. § 13-1-13 has been applied to overpayments; to the extent a conflict exists, therefore, the appellate court cannot construe O.C.G.A.

§ 13-7-12 to permit recoupment of an overpayment made in ignorance of the law. *Wallis v. B & A Construction Co.*, 273 Ga. App. 68, 614 S.E.2d 193 (2005).

Trial court was authorized to conclude that the buyers were not entitled to recover on their recoupment claim made in the context of the sellers' suit on three promissory notes; a management agreement was a sham, and the evidence showed that no money was paid thereunder; further, money paid as a downpayment on a business sale contract and additional money paid to one of the sellers in return for services were voluntarily paid, and the evidence did not demand a finding of an overpayment or payment on account of fraud, accident, or mistake. *Park v. Fortune Ptnr., Inc.*, 279 Ga. App. 268, 630 S.E.2d 871 (2006).

Rule for obtaining affirmative relief on tort claim against contract claim is same for setoff and recoupment. — Rule as to setting off a tort claim against a contractual claim, and obtaining affirmative relief in a court of

law, is the same when counterclaim is based on recoupment as it is in cases when counterclaim is based on setoff. *Georgia Mach. Co. v. Auburn Mach. Works, Inc.*, 103 Ga. App. 574, 120 S.E.2d 28 (1961).

Plea of recoupment must allege terms or conditions of overpayments. — Plea in the nature of a recoupment for alleged overpayments which nowhere alleges upon what terms or conditions, if any, alleged overpayments were made, fails to set out any right in defendant to recover against plaintiff. *Risener v. Kidd*, 35 Ga. App. 38, 132 S.E. 112 (1926).

Cited in *Wiseberg v. Novelty Hat Mfg. Co.*, 3 Ga. App. 362, 59 S.E. 1112 (1908); *Wood & Bro. v. Jones & Son*, 10 Ga. App. 735, 73 S.E. 1099 (1912); *Middleton v. Pruden*, 191 Ga. 893, 14 S.E.2d 82 (1941); *MacNeill v. Bazemore*, 194 Ga. 406, 21 S.E.2d 414 (1942); *Alpharetta Feed & Poultry Co. v. Cocke*, 82 Ga. App. 718, 62 S.E.2d 642 (1950); *Tempo Mgt., Inc. v. Lewis*, 210 Ga. App. 390, 436 S.E.2d 98 (1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Counterclaim, Recoupment, and Setoff, §§ 1, 2, 6, 10, 12, 17.

C.J.S. — 80 C.J.S., Set-Off and Counterclaim, §§ 2, 13, 14.

ALR. — Character of claims available by way of setoff, counterclaim, or recoupment in action on construction contract, 46 ALR 393.

Payments made under unenforceable contract as applicable in reduction of amount recoverable on quantum meruit, 76 ALR 1412.

Right of counterclaim, setoff, and the like, of defendant against partners individually, in action to enforce partnership claim, 39 ALR2d 295.

Landlord's liability for damage to tenant's property caused by water, 35 ALR3d 143.

Failure of creditor, or creditor's assignee, to secure credit insurance as affecting rights or liabilities of debtor, upon debtor's loss, 88 ALR3d 794.

13-7-13. Actions in which recoupment may be pleaded; procedure where damages of defendant exceed damages of plaintiff.

Recoupment may be pleaded in all actions *ex contractu* where the plaintiff is liable to the defendant under the same contract.

If the damages of the defendant exceed those of the plaintiff, the defendant shall be awarded the amount of such excess from the plaintiff. (Orig. Code 1863, § 2853; Code 1868, § 2861; Code 1873, § 2912; Ga. L. 1878-79, p. 147, § 1; Code 1882, § 2912; Civil Code 1895, § 3759; Civil Code 1910, § 4353; Code 1933, § 20-1314.)

Cross references. — Counterclaim and cross-claim, § 9-11-13. Joinder of claims and remedies under Civil Practice Act, § 9-11-18.

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Recoupment sums up grievances on each side, strikes balance and gives judgment for difference. — Recoupment looks through the whole contract, treating the contract as an entirety, and regarding things done and stipulated to be done on each side as the consideration for things done and stipulated to be done on the other; and when plaintiff seeks redress for breach of stipulations in the plaintiff's favor, it sums up grievances on each side, strikes a balance, and gives the plaintiff a judgment for only such difference as may be found in the plaintiff's favor. *Atlas Auto Fin. Co. v. Atkins*, 79 Ga. App. 91, 53 S.E.2d 171 (1949).

Recoupment in Georgia is not limited to a defensive purpose. *Multivision N.W., Inc. v. Jerrold Elecs. Corp.*, 356 F. Supp. 207 (N.D. Ga. 1972).

For recoupment to lie, plaintiff should be liable to defendant under contract sued upon. *Tench v. Downey Hosp.*, 36 Ga. App. 20, 135 S.E. 106 (1926).

Remedy for plaintiff's breach is recoupment, not nonpayment. — Late performance may constitute a breach of contract by plaintiff, but remedy for breach is not nonpayment; it is recoupment, or what is now a counterclaim. *Sasser & Co. v. Griffin*, 133 Ga. App. 83, 210 S.E.2d 34 (1974).

Carrier's breach of duty imposed by law is not the basis of recoupment. *Atlantic Coast Line R.R. v. A. T. Snodgrass & Co.*, 14 Ga. App. 668, 82 S.E. 153 (1914).

Cited in *Williams v. Waters*, 36 Ga. 454 (1867); *Weaver v. Roberson*, 134 Ga. 149, 67 S.E. 662 (1910); *Wood & Bro. v. Jones & Son*, 10 Ga. App. 735, 73 S.E. 1099 (1912); *Copeland v. White*, 17 Ga. App. 565, 87 S.E. 846 (1916); *Phillips v. Lindsey*, 31 Ga. App. 479, 120 S.E. 923 (1923); *Bennett v. Tucker*

& *Pennington*, 32 Ga. App. 288, 123 S.E. 165 (1924); *Mashburn Drug Co. v. Valdosta Drug Co.*, 53 Ga. App. 88, 184 S.E. 903 (1936); *Middleton v. Pruden*, 191 Ga. 893, 14 S.E.2d 82 (1941); *Otwell Motor Co. v. Hill*, 79 Ga. App. 686, 54 S.E.2d 765 (1949); *Alpharetta Feed & Poultry Co. v. Cocke*, 82 Ga. App. 718, 62 S.E.2d 642 (1950); *Copeland v. Beckham*, 87 Ga. App. 34, 73 S.E.2d 34 (1952); *Leslie, Inc. v. Russ*, 123 Ga. App. 611, 181 S.E.2d 912 (1971); *Windjammer Assocs. v. Hodge*, 153 Ga. App. 758, 266 S.E.2d 540 (1980); *Natale v. The Home Depot U.S.A. (In re Krause, Inc.)*, No. 00 B 71919 (N.D. ILL.), 2005 Bankr. LEXIS 1404 (Bankr. N.D. Ga. July 11, 2005).

Recoupment in Tort

Rule for obtaining affirmative relief on tort claim against contract claim is same for setoff and recoupment. — The rule as to setting off a tort claim against a contractual claim, and obtaining affirmative relief in a court of law, is the same when counterclaim is based on recoupment as it is in cases when counterclaim is based on setoff. *Georgia Mach. Co. v. Auburn Mach. Works, Inc.*, 103 Ga. App. 574, 120 S.E.2d 28 (1961).

Causes of action ex delicto cannot ordinarily be set off against suit proceeding ex contractu. — Causes of action ex delicto cannot, except in some special instances, be set off against a suit proceeding ex contractu. While damages resulting from plaintiff's breach of contract sued on may be set off by plea of recoupment, still this right of set off is not broad enough to include damages alleged to have arisen from plaintiff's wrongful act in connection with a transaction legally distinct from contract sued on, even though closely connected with it in point of time. *Aetna Ins. Co. v. Lunsford*, 179

Recoupment in Tort (Cont'd)

Ga. 716, 177 S.E. 727 (1934).

Tort committed subsequent to completion of contract cannot be set up as a defense thereto. Georgia Lumber Co. v. Johnson-Battle Lumber Co., 31 Ga. App. 290, 120 S.E. 640 (1923).

Recoupment in tort allowed unless breach complained of is simply neglect of contractual duty. Porter v. Davey Tree Expert Co., 34 Ga. App. 355, 129 S.E. 557, cert. denied, 34 Ga. App. 836 (1925).

Waiver of rights under contract and recoupment in tort. See Porter v. Davey Tree Expert Co., 34 Ga. App. 355, 129 S.E. 557, cert. denied, 34 Ga. App. 836 (1925).

Application

Damages for breach of warranty may be recouped. Bowers v. Williams, 17 Ga. App. 779, 88 S.E. 703 (1916).

Expenses incurred in attempting to operate threshing machine can be recouped in action for price. Cochran v. Jones, 85 Ga. 678, 11 S.E. 811 (1890).

Tenant may recoup damages to goods resulting from landlord's failure to repair roof after notice of leaky condition. Guthman v. Castleberry, 48 Ga. 172 (1873).

Recoupment is available as a defense by affidavit of illegality to mortgage foreclosure. — In proceeding to foreclose bill of sale retaining title to secure debt, the debtor may, by affidavit of illegality avail oneself of any defense which the debtor might set up in an ordinary suit upon demand secured by a mortgage, and which goes to show that amount claimed is not due and owing; and, while the debtor is thus permitted to avail oneself of a valid defense by way of recoupment, one is not entitled to plead defense of setoff in such a summary proceeding, since latter defense is not one which goes to justice of the plaintiff's demand. Atlas Auto Fin. Co. v. Atkins, 79 Ga. App. 91, 53 S.E.2d 171 (1949).

Plea of recoupment as to breach of stipulation of contract different from stipulation underlying main action. — When a plaintiff sues on one part of contract consisting of mutual stipulations made at same time and relating to same subject matter, defendant may recoup the defendant's damages arising from breach of that part which is in the

defendant's favor, whether the different parts are contained in one instrument or several; and though one part be in writing and the other in parol; otherwise, when the contract for the breach of which damages are claimed by defendant is entirely distinct and independent of one on which plaintiff sues. Atlas Auto Fin. Co. v. Atkins, 79 Ga. App. 91, 53 S.E.2d 171 (1949).

Reliance on underlying contract by plaintiff seller or transferee of note permits recoupment by defendant. — When seller of automobile or transferee of note given for purchase price thereof rely on contract by suing thereon, defendant is entitled to recoup damages against either, suing as plaintiff for alleged breach of contract. Commercial Credit Co. v. Anthony, 48 Ga. App. 725, 173 S.E. 204 (1934).

Recoupment allowed for damages caused by delay in completion of construction. — Remedy of recoupment applies to actions ex contractu, between contractor and subcontractor, and for damages alleged to have been caused by delay in completion of construction. Sasser & Co. v. Griffin, 133 Ga. App. 83, 210 S.E.2d 34 (1974).

Recoupment based on negligent act not assertable in defense of debt claim. — Summary judgment under O.C.G.A. § 9-11-56(c) was properly granted to a creditor in the creditor's action seeking to collect on a debt, since the debtor's defense consisted of a claim in recoupment, pursuant to O.C.G.A. §§ 13-7-2 and 13-7-13, based on personal injuries the debtor suffered from the negligent conduct of the creditor; the court ruled that such a defense was not applicable to the creditor's claim because the claims were legally distinct. Long v. Reeves Southeastern Corp., 259 Ga. App. 257, 576 S.E.2d 641 (2003).

Damage to defendant from plaintiff's negligent or improper performance may be pleaded in recoupment. — When defendant's plea of recoupment seeks to recoup against plaintiff's action on contract with a plea that defendant was forced to spend a certain amount of money to have conveyor system, which the plaintiff erected under contract, repaired due to unskillful and improper manner in which plaintiff did certain of the work, motion to strike plea of recoupment was properly denied. Burton v. Campbell Coal Co., 95 Ga. App. 338, 97 S.E.2d 924 (1957).

In action on note given for purchase price of property or in payment or part payment of contract price agreed to be paid for performance of work and labor, it is competent for defendant to set off any claim the defendant may have against plaintiff arising out of performance of work embodied in contract, including damages arising by reason of failure of plaintiff to perform contract in accordance with the contract's terms. *Williams v. Metropolitan Home Imp. Co.*, 110 Ga. App. 770, 140 S.E.2d 56 (1964).

While it is true that on acceptance of work by owner after building contractor has rendered entire service for which owner has contracted, the contractor is authorized to proceed to collect balance due the contractor by terms of contract, any damage to owner resulting from negligent performance of contract by contractor is a matter for recoupment. *Sasser & Co. v. Griffin*, 133 Ga. App. 83, 210 S.E.2d 34 (1974).

Recoupment, by way of cross-action, does not arise ex delicto and does not require affirmative equitable relief. *Allied Enters., Inc. v. Brooks*, 93 Ga. App. 832, 93 S.E.2d 392 (1956).

Application of doctrine of res ipsa loquitur to plea of recoupment. — In order for doctrine of res ipsa loquitur to be applicable when defendant in a plea of recoupment alleged that plaintiff was not entitled to recover for construction of conveyor system because of improper construction of the system, defendant must show plaintiff had control of premises. *Burton v.*

Campbell Coal Co., 95 Ga. App. 338, 97 S.E.2d 924 (1957).

Pleading and Practice

Averments in plea of recoupment must be full, clear, certain, and definite in setting out defendant's demand as much so as the defendant's allegations would be if the defendant were a plaintiff asserting demand in original declaration. *H.W. Ivey Constr. Co. v. Southwest Steel Prods.*, 111 Ga. App. 527, 142 S.E.2d 394 (1965).

Plea of recoupment subject to same test of sufficiency as a petition as against a general demurrer (now motion to dismiss). *H.W. Ivey Constr. Co. v. Southwest Steel Prods.*, 111 Ga. App. 527, 142 S.E.2d 394 (1965).

Recoupment may be pleaded regardless of statute of limitations. Therefore, a party may recover damages on claims raised as recoupments after limitations have run. *Multivision N.W., Inc. v. Jerrold Elecs. Corp.*, 356 F. Supp. 207 (N.D. Ga. 1972).

Plea of recoupment is not barred by statute of limitations if main action is timely. *Multivision N.W., Inc. v. Jerrold Elecs. Corp.*, 356 F. Supp. 207 (N.D. Ga. 1972).

Properly asserted claim for recoupment is not barred by statute of limitation. *H.R. Kaminsky & Sons v. Yarbrough*, 158 Ga. App. 523, 281 S.E.2d 289 (1981).

Recoupment may be used to gain affirmative recovery on claim ordinarily barred by limitations. *Multivision N.W., Inc. v. Jerrold Elecs. Corp.*, 356 F. Supp. 207 (N.D. Ga. 1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Counterclaim, Recoupment and Setoff, §§ 1, 2, 6, 10, 12, 17.

C.J.S. — 80 C.J.S., Set-Off and Counterclaim, § 13.

ALR. — Counterclaim or setoff as defense to proceeding to revive judgment, 131 ALR 802.

Landlord's liability for damage to tenant's property caused by water, 35 ALR3d 143.

Failure of creditor, or creditor's assignee, to secure credit insurance as affecting rights or liabilities of debtor, upon debtor's loss, 88 ALR3d 794.

13-7-14. Effect of conflict between this chapter and Chapter 11 of Title 9.

In the event of a conflict between this chapter and Chapter 11 of Title 9, the latter shall control to the extent of the conflict.

CHAPTER 8

ILLEGAL AND VOID CONTRACTS GENERALLY

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13-8-1.	Contracts to do immoral or illegal things.
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13-8-2.1.	(For effective date, see note.) Contracts in partial restraint of trade.
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13-8-20.	Damages recoverable for injuries sustained by violations; class actions; punitive damages.
13-8-21.	Contracts and agreements in violation of article deemed void.
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13-8-23.	Repurchase of inventory upon death or incapacity of dealer or majority stockholder of corporate dealer.
13-8-24.	Indemnification of dealer for losses relating to manufacture, assembly, design, or functions beyond control of dealer.
13-8-25.	Applicability of article to existing contracts without expiration dates and to contracts entered or renewed on or after July 1, 2002.

Article 3

Regulation of Farm Equipment Manufacturers, Distributors, and Dealers

13-8-31.	Legislative findings.
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13-8-33.	Persons subject to provisions of article.
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13-8-35.	Unfair methods of competition and unfair or deceptive acts or practices.
13-8-36.	Predelivery and preparation obligations; repair parts availability; return of surplus parts inventory.
13-8-37.	Warranty agreements; disapproval of claims under warranty agreements; special handling of claims; calculation of compensation to dealer for warranty work.
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	or restriction on transfer of franchise without due cause.	13-8-51.	(For effective date, see note.) Definitions.
13-8-40.	Damages recoverable for injuries sustained by violations of article; class actions; punitive damages.	13-8-52.	(For effective date, see note.) Application.
13-8-41.	Contracts and agreements in violation of article as void.	13-8-53.	(For effective date, see note.) Enforcement of covenants; determining competitive status; time geographic limitations.
13-8-42.	Repurchase of inventory upon termination of franchise; payment for inventory repurchased; title to repurchased inventory; exempt inventory items; civil liability for failure to repurchase inventory.	13-8-54.	(For effective date, see note.) Judicial construction of covenants.
13-8-43.	Repurchase of inventory upon death or incapacity of dealer or majority stockholder of corporate dealer.	13-8-55.	(For effective date, see note.) Requirements of person seeking enforcement of covenants.
13-8-44.	Indemnification of dealer for losses relating to manufacture, assembly, design, or functions beyond control of dealer.	13-8-56.	(For effective date, see note.) Reasonableness determinations restricting competition; presumptions.
13-8-45.	Applicability of article to existing contracts without expiration dates and to contracts entered or renewed after November 1, 1982.	13-8-57.	(For effective date, see note.) Reasonableness determinations restricting time; presumptions.
		13-8-58.	(For effective date, see note.) Enforcement by third parties.
		13-8-59.	(For effective date, see note.) Construction with federal provisions.

Article 4

Restrictive Covenants in Contracts

13-8-50. (For effective date, see note.) Legislative findings.

Cross references. — Contracts to force or restrain marriage, §§ 19-3-6, 19-3-7.

ARTICLE 1
GENERAL PROVISIONS

Editor’s notes. — Ga. L. 1982, p. 1753, §§ 13-8-1 through 13-8-4 as Article 1 of this § 1, effective November 1, 1982, designated chapter.

13-8-1. Contracts to do immoral or illegal things.

A contract to do an immoral or illegal thing is void. If the contract is severable, however, the part of the contract which is legal will not be invalidated by the part of the contract which is illegal. (Orig. Code 1863, § 2713; Code 1868, § 2707; Code 1873, § 2749; Code 1882, § 2749; Civil Code 1895, § 3666; Civil Code 1910, § 4251; Code 1933, § 20-501.)

Law reviews. — For article discussing effect of contracts against public policy, see 4 Ga. L. Rev. 469 (1970). For article discussing interpretation in Georgia of insurance policies containing evidentiary conditions, see 12 Ga. L. Rev. 783 (1978). For annual survey of law of wills, trusts, guardianships, and

fiduciary administration, see 56 Mercer L. Rev. 457 (2004).

For note, "Status or Contract? A Comparative Analysis of Inheritance Rights under Equitable Adoption and Domestic Partnership Doctrines," see 39 Ga. L. Rev. 675 (2005).

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ILLEGAL CONTRACTS

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Freedom of contract generally. — Absent a limiting statute or controlling public policy, parties may contract with one another on whatever terms the parties wish, and the written contract defines the full extent of the parties' rights and duties. In the absence of a public policy question, parties may contract to waive numerous and substantial rights. *Basic Four Corp. v. Parker*, 158 Ga. App. 117, 279 S.E.2d 241 (1981).

Power of parties to contract as parties please is modified by O.C.G.A. Art. 1, Ch. 8, T. 13 and O.C.G.A. § 11-2-302(1). — While it was a general rule in this state that parties may contract as the parties please subject to exceptions of former Code 1933, § 20-501 et seq. (see O.C.G.A. Art. 1, Ch. 8, T. 13), former Code 1933, § 109A-2-302 (see O.C.G.A. § 11-2-302(1)) modified this general rule that parties were free to make whatever contracts the parties please so long as there was no fraud or illegality, by giving courts discretion to refuse to enforce sales contracts under Georgia Uniform Commercial Code, in whole or in part, which the courts find to be unconscionable. *Chrysler Corp. v. Wilson Plumbing Co.*, 132 Ga. App. 435, 208 S.E.2d 321 (1974).

Illegal contracts are unenforceable whether malum in se or malum prohibitum. — In applying rule that no recovery can be had in action to enforce an illegal contract, no distinction is recognized between a contract whose object is malum in se and one whose object is malum prohibitum. *Raleigh & G.R.R. v. Swanson*, 102 Ga. 754, 28 S.E.

601, 39 L.R.A. 275 (1897); *McAndrew v. Taylor*, 15 Ga. App. 555, 83 S.E. 967 (1914).

Courts of equity will not aid either party to executed immoral or illegal contract. *Watkins v. Nugen*, 118 Ga. 372, 45 S.E. 262 (1903).

An illegal contract if executed will be left to stand, if executory, will not be enforced.

— Insofar as illegal contracts have been executed or performed, a court will not disturb the contracts, but will leave parties where it finds the parties; and insofar as such contracts are not executed or performed, a court will afford no aid whatever to enforce the contracts. *City Council v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S.E. 907 (1899); *Beard v. White*, 120 Ga. 1018, 48 S.E. 400 (1904).

Contract to do an immoral or illegal thing is void, and if such contract is executory, neither party can enforce the contract, but if executed, the contract will be allowed to stand. *Quinton v. Millican*, 196 Ga. 175, 26 S.E.2d 435 (1943).

If a contract is illegal as against public policy, the contract's invalidity will be a defense while the contract remains unexecuted. If such a contract is in part performed, and money has been paid in pursuance of the contract, no action will lie to recover the money back. *Jones v. Faulkner*, 101 Ga. App. 547, 114 S.E.2d 542 (1960).

Courts will not interpose to grant any relief to parties to illegal contract. — When parties are engaged in illegal transactions, whether malum prohibition or malum in se, courts of this state will not interpose to grant any relief; in such cases the rule is for the

court to leave parties where it finds the parties, no matter whether illegality of contract appears from plaintiff's case or is set up by way of defense. *Sheehan v. City Council*, 71 Ga. App. 233, 30 S.E.2d 502 (1944); *Jones v. Lowman*, 85 Ga. App. 743, 70 S.E.2d 122 (1952).

Neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon illegal or immoral consideration. *Rehak v. Mathis*, 239 Ga. 541, 238 S.E.2d 81 (1977).

Courts will not enforce contracts outlawed by public policy and good morals. — Aid of courts of justice cannot be invoked to enforce alleged rights which depend upon contracts outlawed by sound public policy and good morals. *Glass v. Childs*, 9 Ga. App. 520, 71 S.E. 920 (1911); *Jones v. Crawford*, 21 Ga. App. 29, 93 S.E. 515 (1917).

When parties to an illegal or immoral contract are in pari delicto, courts will not interpose, but will leave parties where the courts find the parties. *McAndrew v. Taylor*, 15 Ga. App. 555, 83 S.E. 967 (1914).

Courts will not assist in recovery, under illegal contract, of property sold or its value. *Wright Co. v. Haralson*, 52 Ga. App. 27, 182 S.E. 55 (1935).

Law will not enforce a contract, performance of which is made penal. The crime is punished and the criminal must likewise lose the fruits of the illegal act. *Lewis v. Brannen*, 6 Ga. App. 419, 65 S.E. 189 (1909); *Jones v. Bell Isle*, 13 Ga. App. 437, 79 S.E. 357 (1913).

Courts may grant injunctions to prevent enforcement of illegal contract to injury of third parties. — A court of equity will interpose by injunction to prevent members of illegal combination from enforcing an illegal agreement to the hurt and injury of one engaged in competitive business. *Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509, 50 S.E. 353, 106 Am. St. R. 137, 69 L.R.A. 90, 2 Ann. Cas. 694 (1905).

Burden is on party attacking legality of a contract to show that the contract is illegal. *Gower v. Ozmer*, 55 Ga. App. 81, 189 S.E. 540 (1936).

State claim not applicable in class action. — Defendant banks' motion to dismiss class action suit was granted where despite court's supplemental jurisdiction, plaintiffs' state actions were dismissed and the claims failed under both Kan. Stat. Ann. §§ 21-3104 et

seq. and 21-4302 and O.C.G.A. § 13-8-1 et seq., because the case did not involve gambling debt or gaming contracts. *Thompson v. Visa Int'l Serv. Ass'n* (In re Mastercard Int'l, Inc. Internet Gambling Litig.), No. 00-MD-1321; No. 00-MD-1322; No. 00-1171, 2004 U.S. Dist. LEXIS 2049 (E.D. La. Feb. 11, 2004).

Cited in *Citizens Bank v. N.C. Hoyt & Co.*, 25 Ga. App. 222, 102 S.E. 837 (1920); *Clemons v. Payne*, 26 Ga. App. 142, 105 S.E. 623 (1921); *Smith v. Smith*, 154 Ga. 702, 115 S.E. 73 (1922); *De Loach v. W.D. Eyre & Co.*, 46 Ga. App. 155, 167 S.E. 123 (1932); *Washington County v. Sheppard*, 46 Ga. App. 240, 167 S.E. 339 (1933); *Eatonton Oil & Auto Co. v. Greene County*, 53 Ga. App. 145, 185 S.E. 296 (1936); *Scott v. Hall*, 56 Ga. App. 467, 192 S.E. 920 (1937); *Sinclair Ref. Co. v. Reid*, 60 Ga. App. 119, 3 S.E.2d 121 (1939); *Pittsburgh Plate Glass Co. v. Jarrett*, 42 F. Supp. 723 (M.D. Ga. 1942); *Smith v. Nix*, 206 Ga. 403, 57 S.E.2d 275 (1950); *Smith v. Patterson*, 82 Ga. App. 595, 61 S.E.2d 679 (1950); *Columbus Wine Co. v. Sheffield*, 83 Ga. App. 593, 64 S.E.2d 356 (1951); *Simmons v. Noble*, 84 Ga. App. 255, 65 S.E.2d 834 (1951); *Bowman v. Fuller*, 84 Ga. App. 421, 66 S.E.2d 249 (1951); *Jones v. Faulkner*, 101 Ga. App. 547, 114 S.E.2d 542 (1960); *Southern Airways Co. v. DeKalb County*, 102 Ga. App. 850, 118 S.E.2d 234 (1960); *Prosser v. Horis A. Ward, Inc.*, 123 Ga. App. 205, 180 S.E.2d 270 (1971); *Morris v. Durbin*, 123 Ga. App. 383, 180 S.E.2d 925 (1971); *Morris v. Jones*, 128 Ga. App. 847, 198 S.E.2d 354 (1973); *Garber v. American Mut. Fire Ins. Co.*, 131 Ga. App. 366, 206 S.E.2d 86 (1974); *Camp Concrete Prods. v. Central of Ga. Ry.*, 134 Ga. App. 537, 215 S.E.2d 299 (1975); *Gilreath v. Argo*, 135 Ga. App. 849, 219 S.E.2d 461 (1975); *Austin v. Benefield*, 140 Ga. App. 96, 230 S.E.2d 16 (1976); *Frazer v. City of Albany*, 245 Ga. 399, 265 S.E.2d 581 (1980); *Sabin Meyer Regional Sales Corp. v. Citizens Bank*, 502 F. Supp. 557 (N.D. Ga. 1980); *Lindenberg v. First Fed. Sav. & Loan Ass'n*, 90 F.R.D. 255 (N.D. Ga. 1981); *Merren v. Plaza Towers Ltd. Partnership*, 161 Ga. App. 543, 287 S.E.2d 771 (1982); *Boddy Enters., Inc. v. City of Atlanta*, 171 Ga. App. 551, 320 S.E.2d 374 (1984); *DOT v. Brooks*, 254 Ga. 303, 328 S.E.2d 705 (1985); *Bryant v. PMC Capital, Inc.*, 244 Ga. App. 313, 535 S.E.2d 319

General Consideration (Cont'd)

(2000); *Abrams v. Massell*, 262 Ga. App. 761, 586 S.E.2d 435 (2003).

Severable Contracts

Party to severable contract cannot object to opposite party's willingness to accept performance of legal portions. *Jones v. Clark*, 147 Ga. App. 657, 249 S.E.2d 619 (1978).

Criterion for determining whether contract is entire or severable. — In determining whether a contract is entire or severable, the criterion is to be found in the question whether the whole quantity, service, or thing — all as a whole — is of the essence of the contract. If it appears that the contract was to take the whole or none, then it is entire. *Scott v. Hall*, 56 Ga. App. 467, 192 S.E. 920 (1937).

Contract containing invalid waiver, unconnected with purposes of contract, is severable. — Contract based on legal and binding consideration and containing an attempted waiver of a right which cannot be waived because contrary to public policy, which waiver is wholly unconnected with purposes of the contract, is severable, and the part which is legal is nevertheless enforceable. *Brenau College v. Mincey*, 68 Ga. App. 137, 22 S.E.2d 322 (1942).

Contract based on legal consideration which contains legal and illegal promises, valid as to former. — When agreement consists of single promise, based on single consideration, if either is illegal, the whole contract is void. But where agreement is founded on legal consideration containing a promise to do several things or to refrain from doing several things, and only some of the promises are illegal, those promises which are not illegal will be held to be valid. *Roberts v. H. C. Whitmer Co.*, 46 Ga. App. 839, 169 S.E. 385 (1933); *Scott v. Hall*, 56 Ga. App. 467, 192 S.E. 920 (1937); *Martell v. Atlanta Biltmore Hotel Corp.*, 114 Ga. App. 646, 152 S.E.2d 579 (1966).

When a contract contains mutual, binding, legal promises independent of two allegedly illegal, void provisions, the contract is severable, and legal portions are not annulled by illegal ones and can be enforced, disregarding the latter. *Martell v. Atlanta Biltmore Hotel Corp.*, 114 Ga. App. 646, 152 S.E.2d 579 (1966).

Bail bond compensation in excess of statutory maximum. — Excessive portion of a bail bond charge can be severed from the legal part such that, under O.C.G.A. § 13-8-1, the legal part of the bail bond contract (the amount of compensation up to the statutory maximum) is not invalidated by the illegal part (the amount of the compensation in excess of the statutory maximum). *Borison v. Christian*, 257 Ga. App. 257, 570 S.E.2d 696 (2002).

Usurious loans. — A usurious loan is not void and unenforceable as an illegal contract even though the interest charges are violative of O.C.G.A. § 7-4-18; usurious interest can be severed from the principal amount of the loan under O.C.G.A. § 7-4-10. *Pave Way Constr. Co. v. Parrish*, 187 Ga. App. 428, 370 S.E.2d 495, cert. denied, 187 Ga. App. 908, 370 S.E.2d 495 (1988).

Illegality Collateral to Contract

Contract not necessarily void where violation of law is incidental to performance rather than required. *Shannondoah, Inc. v. Smith*, 140 Ga. App. 200, 230 S.E.2d 351 (1976).

When the alleged illegal activity was at most incidental to the contract rather than required by the contract, and the contract is supported by legal consideration, and the promises contained in the contract are also legal, then enforcement of those promises does not contravene O.C.G.A. § 13-8-1. *Crooke v. Gilden*, 262 Ga. 122, 414 S.E.2d 645 (1992).

Section may be inapplicable when illegality is collateral or remotely connected with contract. — This rule has been held inapplicable where object of contract is not illegal or against public policy, but when illegality is only collateral or remotely connected with contract. *Shannondoah, Inc. v. Smith*, 140 Ga. App. 200, 230 S.E.2d 351 (1976).

Enforceability of obligation supported by independent consideration, but indirectly connected with illegal transaction. — Obligation supported by independent consideration will be enforced, though indirectly connected with an illegal transaction, when plaintiff does not require aid of illegal transaction to make out plaintiff's case. *Armstrong v. American Exch. Nat'l Bank*, 133 U.S. 433, 10 S. Ct. 450, 33 L. Ed. 747 (1890); *Sewell v. Norris*, 128 Ga. 824, 58 S.E.

637, 13 L.R.A. (n.s.) 1118 (1907); *Mechanics Realty & Imp. Co. v. Leva*, 16 Ga. App. 7, 84 S.E. 222 (1915).

Contract is unenforceable when party seeking enforcement must rely upon an illegal transaction to establish the case. *Brooke v. Kennedy*, 172 Ga. 461, 158 S.E. 4 (1931).

Collateral federal law infractions. — When the alleged infractions of federal law were collateral to the object of an otherwise legal, moral contract for the lease of an automobile, severable issues existed such that the entire contract was not void. *Adams v. Trust Co. Bank*, 206 Ga. App. 554, 426 S.E.2d 36 (1992).

Illegal Contracts

Agreement which cannot be performed without violating some statute or ordinance is illegal and void. For a contract to be illegal under this principle, the contract's purpose or object must be illegal. *Shannondoah, Inc. v. Smith*, 140 Ga. App. 200, 230 S.E.2d 351 (1976).

Illegal and void contracts become immoral contracts when made a crime by statute. *International Agrl. Corp. v. Spencer*, 17 Ga. App. 649, 87 S.E. 1101 (1916); *Jones v. Crawford*, 21 Ga. App. 29, 93 S.E. 515 (1917).

An attorney's promise to secure an inmate's release from prison regardless of the legality of the inmate's conviction and sentence was not enforceable and could not serve as the basis for a fraud action. *Hamm v. Auld*, 192 Ga. App. 717, 386 S.E.2d 385, cert. denied, 192 Ga. App. 902, 386 S.E.2d 385 (1989).

Contract to share expenses of cohabitation. — Although a simple agreement between parties to share living expenses is not per se an illegal or immoral contract, a specific agreement between parties regarding living expenses to be incurred in connection with their state of unmarried meretricious cohabitation is founded on or grows out of immorality or illegality within the meaning of O.C.G.A. § 13-8-1. *Liles v. Still*, 176 Ga. App. 65, 335 S.E.2d 168 (1985).

Woman's action for damages against man with whom she cohabited for 14 years was barred by O.C.G.A. § 13-8-1, when evidence showed that parties' arrangement envisioned a meretricious relationship rather than a simple agreement to share living

expenses. *Samples v. Monroe*, 183 Ga. App. 187, 358 S.E.2d 273 (1987).

Contracts for sale of unregistered federal securities. — Sales agents who sold billboards that buyers leased back to a shell company as part of a massive Ponzi scheme were unjustly enriched because the investment contracts the buyers entered were construed as selling unregistered securities in violation of 15 U.S.C. § 77e(a), (c), which rendered the securities void as immoral under 15 U.S.C. § 78cc and O.C.G.A. § 13-8-1; although not personally accused of knowing malfeasance, the sales agents were ordered to disgorge their sales commissions and bonuses to an equity receiver appointed to represent the investment company's interests by the Securities and Exchange Commission. *Hays v. Adam*, 512 F. Supp. 2d 1330 (N.D. Ga. Mar. 15, 2007).

Test for determining whether a demand connected with an illegal transaction is capable of enforcement at law is whether plaintiff requires any aid from the illegal transaction to establish plaintiff's case. *McAndrew v. Taylor*, 15 Ga. App. 555, 83 S.E. 967 (1914).

Contract in violation of the state constitution is illegal and unenforceable, even if plaintiff has fully performed plaintiff's part of the agreement. *Penitentiary Co. v. Rountree*, 113 Ga. 799, 39 S.E. 508 (1901).

Contract violating civil statute not enacted for purpose of raising revenue is void. — Where terms of a contract directly involve infraction of a civil statute, not enacted for purpose of raising revenue, and such infraction is penalized by a fine, or imprisonment, or both, the contract is void and unenforceable. *Couch v. Blackwell & Assocs.*, 150 Ga. App. 739, 258 S.E.2d 552 (1979).

Sale of stolen goods, although to bona fide purchaser for value, transfers no lawful interest in the property and does not divest title of true owner. *Middle Ga. Livestock Sales v. Commercial Bank & Trust Co.*, 123 Ga. App. 733, 182 S.E.2d 533 (1971).

Contracts of maintenance or champerty, express or implied, are void and unenforceable. *Sapp v. Davids*, 176 Ga. 265, 168 S.E. 62 (1933).

Deed in consideration of grantee's promise to live in concubinage with grantor is absolutely void. *Watkins v. Nugen*, 118 Ga. 375, 45 S.E. 260 (1903).

Note given for agreement to settle or prevent criminal prosecution is void. — Al-

Illegal Contracts (Cont'd)

though one may legally take a promissory note as compensation for a personal injury, if injury was a crime, such as by our law the parties cannot settle between themselves, and if there be any attempt, by giving of a note, to suppress a prosecution for the offense, it vitiates the whole agreement, even though note is for less than actual damages received. *Chandler v. Johnson*, 39 Ga. 85 (1869).

A negotiable promissory note given in whole or in part upon agreement, express or implied, to settle or prevent a criminal prosecution is void, unless case falls within some express statute authorizing settlement. *William-Hester Marble Co. v. Walton*, 22 Ga. App. 433, 96 S.E. 269 (1918); *Commercial Credit Co. v. Fry*, 31 Ga. App. 488, 122 S.E. 77, cert. denied, 31 Ga. App. 811, 122 S.E. 260 (1924).

Agreement in violation of statutory requirements void. — Purported agreement between a police officer and county human resources director that the officer would withdraw an appeal of the officer's termination if disciplinary materials were removed from the officer's employee file to preserve the officer's Peace Officer Standards and Training Council (P.O.S.T.) certification was void and unenforceable because it would have violated not only the P.O.S.T. Council's regulations but also the record-keeping requirements of O.C.G.A. § 35-8-15 and the prohibition of O.C.G.A. § 35-8-7.2(a)(2) against knowingly making "misleading, deceptive, untrue, or fraudulent representations in the practice of being a peace officer or in any document connected therewith." *Maner v. Chatham County*, 246 Ga. App. 265, 540 S.E.2d 248 (2000).

Personal guarantor may not avoid liability under contract by claiming illegality as to third persons. — Personal guarantor may not avoid liability under a contract on ground that its making constituted an illegal act to the detriment of third persons. *Hullender v. Acts II*, 153 Ga. App. 119, 264 S.E.2d 486 (1980).

Application

Reading which would result in unenforceable contract unsustainable. — Upon a de novo review of the plain terms outlined in an

employment contract, a former employer was not entitled to receive commission payments from its former employee, a licensed sales agent, for deals closed with the employee's subsequent employer, as any contrary reading would result in an unenforceable contract, under O.C.G.A. § 43-40-19(c); hence, summary judgment was properly granted to the employee on that issue, and the former employer's claim for money had and received also failed. *Richard Bowers & Co. v. Creel*, 280 Ga. App. 199, 633 S.E.2d 555 (2006).

Agreement to repay loan between cohabitating couple. — Defendant lived with plaintiff for a period of time and made a written agreement to repay plaintiff for loans the plaintiff made to the defendant. The fact that defendant was married during the course of the parties' relationship did not make the agreement void as a contract to do an illegal thing. *Boot v. Beelen*, 224 Ga. App. 384, 480 S.E.2d 267 (1997).

Action by trustees. — Because the alleged illegalities cited by a trustee were incidental to the purpose of trustee's contracts with the investors, those contracts did not require a securities violation or usurious interest rate; thus, it followed that the trial court erred in denying a motion for judgment notwithstanding the verdict on the trustee's rescission claim. *Douglas v. Bigley*, 278 Ga. App. 117, 628 S.E.2d 199 (2006).

Selection of appraiser. — Realty sales contract that contained a clause stating that an appraiser selected by the parties would be appointed to set a fair market value if the parties were unable to agree on valuation was not void as illegal for being immoral, impossible to perform, or against public policy under O.C.G.A. § 13-8-1 because any potential illegality in the contract's manner of appointing an appraiser was incidental to the contract. *Stephens v. Trust for Pub. Land*, 475 F. Supp. 2d 1299 (N.D. Ga. 2007).

Agreement to advertise. — Even if the sale of defendants' product violated federal copyright law, an agreement under which a contractor would advertise the product through mass electronic mailings was not void under O.C.G.A. § 13-8-1 because the agreement's object or purpose was not illegal; the alleged illegality was not required by the contract and was incidental to contract performance, and thus the contractor could recover

against the defendants for breach of contract. *Smith v. Saulsbury*, 286 Ga. App. 322, 649 S.E.2d 344 (2007).

Agreement not to report on professional conduct unenforceable. — Doctor's claim that a hospital promised not to report the doctor's conduct to the National Practitioner Data Bank if the doctor complied with the psychiatrist's treatment plan was rejected as any such agreement would violate federal law requiring a hospital to conduct periodic appraisals of their medical staff under 42 C.F.R. § 482.22(a)(1) and to report the doctor's resignation to the data bank under 42 U.S.C. §§ 11133 and 11134; any such agreement was unenforceable under O.C.G.A. §§ 13-8-1 and 13-8-2 as against public policy to provide quality health care. *Taylor v. Kennestone Hosp., Inc.*, 266 Ga. App. 14, 596 S.E.2d 179 (2004).

Gambling contract, or one based upon a gaming consideration is void and unenforceable. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Side bet placed upon ultimate outcome or final result of any game whatever constitutes gaming. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Betting that one game competitor, among many, will win is a side bet upon a game. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Betting upon a game of golf is gaming. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Agreement to purchase lottery ticket enforceable. — An agreement by parties in Georgia to purchase a Kentucky lottery ticket and share the proceeds if the ticket won was not a gambling contract unenforce-

able as against public policy. *Talley v. Mathis*, 265 Ga. 179, 453 S.E.2d 704 (1995).

Fact that gaming contract is made by insurance company does not render contract valid. — Fact that loser of bet is an insurance company and that contract is made by such company does not render such contract valid and not a gaming contract. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Georgia courts have jurisdiction if gaming contract is made or bet is laid in Georgia. — Fact that loser of bet resides in England and that money is paid from that country does not necessarily render matter not within the jurisdiction of courts of this state; it is sufficient if gaming contract is made or bet is laid in State of Georgia. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Agreement to purchase stock. — Agreement which an investor concluded with a person who was employed by a company that offered to sell stock to the company's employees during an initial public offering, wherein the employee offered to purchase stock in the employee's own name for the investor, was illegal, and the trial court correctly ruled that the investor was not entitled to profits the investor lost because the employee did not buy the stock. *McCondichie v. Groover*, 261 Ga. App. 784, 584 S.E.2d 57 (2003).

Medical contracts. — Contract for massage services between a chiropractor and patient was void because massage is not an authorized treatment modality under the law limiting chiropractic treatment. *Siegrist v. Iwuagwa*, 229 Ga. App. 508, 494 S.E.2d 180 (1997), cert. denied, 525 U.S. 933, 119 S. Ct. 344, 142 L. Ed. 2d 284 (1998).

OPINIONS OF THE ATTORNEY GENERAL

Classification of crime as one involving moral turpitude requires more than statutory prohibition for public welfare purposes. — Crime involving moral turpitude has been held to be one which is mala in se,

that is, bad within itself, and not evil merely because some statute prohibits the act as a matter, perhaps, of public welfare. 1945-47 Op. Att'y Gen. p. 477.

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Actions, §§ 51, 52. 17 Am. Jur. 2d, Contracts, § 155 et seq.

ALR. — Innocence of the person threat-

ened as affecting the rights or remedies in respect of contracts made, or money paid, to prevent or suppress a criminal prosecution, 17 ALR 325.

Validity of agreement to pay an officer or employee of a bank or trust company to disclose the existence of, or to assist one to establish, a deposit, 18 ALR 979.

Agreement or understanding between attorney and client to use money for unlawful purposes as affecting their rights inter se, 20 ALR 1476; 26 ALR 98.

Right to recover purchase price of articles or substances susceptible of illegal use in manufacture of beverages, 29 ALR 1058.

Contract for services in connection with attempt to prevent a criminal investigation or prosecution, 33 ALR 779.

Validity and enforceability of agreement to pay for disclosure of assets belonging to another or to estate, 42 ALR 1146.

Failure to procure occupational or business license or permit as affecting validity or enforceability of contract, 42 ALR 1226; 118 ALR 646.

Validity of contract to influence third person with respect to disposal of property at death or by gift during lifetime, 61 ALR 646.

Removal or attempted removal of one from field of competition by inducing him to enter another's employment as violation of anti-monopoly act, 74 ALR 289.

Noncompliance with conditions prescribed by statute as affecting validity of contract, under usury laws, for payment of premium on loan of building and loan association, 74 ALR 973.

Waiver of usury by renewal or other executory agreements, 74 ALR 1184.

Sunday law as applicable to contracts signed by guarantor or surety on Sunday but delivered to obligee on weekday, 112 ALR 1200.

Failure of purchaser of stock from existing corporation, or of subscriber thereto, to pay for same as affecting his right to dividends, 122 ALR 1048.

Validity and enforceability of contract which was contrary to statute or public policy when made, as affected by subsequent change of law, 126 ALR 685.

Validity of lease or other contract which contemplates or provides for acts by a party that at the time of the contract would be contrary to zoning regulations, 128 ALR 87.

Rule that denies remedy in case of an illegal contract as applicable to an action of conversion, replevin, or detinue for property possession of which was obtained by defen-

dant, or by a third person through whom he claims, as the result of such a contract with the plaintiff or his predecessor in interest, 132 ALR 619.

Validity of contract to influence administrative or executive officer or department, 148 ALR 768.

Statute providing for apportionment between lessor and lessee of a tax imposed upon the producer of oil, gas, or other natural production as violation of the constitutional provision against impairment of the obligation of contracts, 160 ALR 980.

Enforceability, as between parties, of an executory agreement made in fraud of creditors, 172 ALR 1121.

Recovery of money or property entrusted to another for illegal purpose, but not so used, 8 ALR2d 307.

Court rules limiting amount of contingent fees or otherwise imposing conditions on contingent fee contracts, 77 ALR2d 411.

Construction and effect of lease provision relating to attorneys' fees, 77 ALR2d 735.

Purchaser's right to set up invalidity of contract because of violation of state securities regulation as affected by doctrines of estoppel or *pari delicto*, 84 ALR2d 479.

Validity of contractual stipulation or provision waiving debtor's exemption, 94 ALR2d 967.

Validity of agreement to pay royalties for use of patented articles beyond patent expiration date, 3 ALR3d 770.

Validity and propriety of arrangement by which attorney pays or advances expenses of client, 8 ALR3d 1155.

Enforceability of transaction entered into pursuant to referral sales arrangement, 14 ALR3d 1420.

Failure of artisan or construction contractor to comply with statute or regulation requiring a work permit or submission of plans as affecting his right to recover compensation from contractee, 26 ALR3d 1395.

Rights between landlord and tenant as affected by zoning regulations restricting contemplated use of premises, 37 ALR3d 1018.

Validity of exculpatory clause in lease exempting lessor from liability, 49 ALR3d 321.

Spouse's secret intention not to abide by written antenuptial agreement relating to financial matters as ground for annulment, 66 ALR3d 1282.

Recovery back of money paid to unlicensed person required by law to have occupational or business license or permit to make contract, 74 ALR3d 637.

Recovery for services rendered by persons living in apparent relation of husband and wife without express agreement for compensation, 94 ALR3d 552.

Property rights arising from relationship

of couple cohabiting without marriage, 3 ALR4th 13; 69 ALR5th 219.

Failure of building and construction artisan or contractor to procure business or occupational license as affecting enforceability of contract or right of recovery for work done—modern cases, 44 ALR4th 271.

Contractual jury trial waivers in state civil cases, 42 ALR5th 53.

13-8-2. (For effective date, see note.) Contracts contravening public policy generally.

(a) A contract which is against the policy of the law cannot be enforced. Contracts deemed contrary to public policy include but are not limited to:

(1) Contracts tending to corrupt legislation or the judiciary;

(2) Contracts in general restraint of trade, as distinguished from contracts in partial restraint of trade as provided for in Code Section 13-8-2.1;

(3) Contracts to evade or oppose the revenue laws of another country;

(4) Wagering contracts; or

(5) Contracts of maintenance or champerty.

(b) A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to require that one party to such contract or agreement shall indemnify, hold harmless, insure, or defend the other party to the contract or other named indemnitee, including its, his, or her officers, agents, or employees, against liability or claims for damages, losses, or expenses, including attorney fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the indemnitee, or its, his, or her officers, agents, or employees, is against public policy and void and unenforceable. This subsection shall not affect any obligation under workers' compensation or coverage or insurance specifically relating to workers' compensation, nor shall this subsection apply to any requirement that one party to the contract purchase a project specific insurance policy, including an owner's or contractor's protective insurance, builder's risk insurance, installation coverage, project management protective liability insurance, an owner controlled insurance policy, or a contractor controlled insurance policy. (Orig. Code 1863, § 2714; Code 1868, § 2708; Code 1873, § 2750; Code 1882, § 2750; Civil Code 1895, § 3668; Civil Code 1910, § 4253; Code 1933, § 20-504; Ga. L. 1970, p. 441, § 1; Ga. L. 1982, p. 3, § 13; Ga. L. 1989, p. 14,

§ 13; Ga. L. 1990, p. 1676, § 1; Ga. L. 2007, p. 208, § 1/HB 136; Ga. L. 2009, p. 231, § 1/HB 173.)

Delayed effective date. — Ga. L. 2009, p. 231, § 4 provides that the 2009 amendment becomes effective following the ratification at the time of the 2010 general election of an amendment to the Constitution of Georgia providing for the enforcement of covenants in commercial contracts that limit competition and shall apply to contracts entered into on and after such date and shall not apply in actions determining the enforceability of restrictive covenants entered into before such date and that if such amendment is not so ratified, then this amendment shall stand automatically repealed. This Code section as amended is not set out in the Code owing to the delayed effective date. After the ratification is made, subsection (a) will read as follows: “A contract that is against the policy of the law cannot be enforced. Contracts deemed contrary to public policy include but are not limited to:

“(1) Contracts tending to corrupt legislation or the judiciary;

“(2) Contracts in general restraint of trade, as distinguished from contracts which restrict certain competitive activities, as provided in Article 4 of this chapter;

“(3) Contracts to evade or oppose the revenue laws of another country;

“(4) Wagering contracts; or

“(5) Contracts of maintenance or champerty.”

The 2009 amendment, in subsection (a), substituted “that” for “which” in the first sentence of the introductory paragraph and, at the end of paragraph (a)(2), substituted “which restrict certain competitive activities, as provided in Article 4 of this chapter” for “in partial restraint of trade as provided for in Code Section 13-8-2.1”. For effective date of this amendment, see the delayed effective date note.

Cross references. — Contracts to defeat or lessen competition or to encourage monopoly, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Book, periodical, or newspaper tie-in sales, § 10-1-330 et seq. Partial restraints of trade, § 13-8-2.1. Null and void nature of contracts between employer and employee whereby employer is exempted from liability to employee for negligence of employer or his other employees, as such

liability is fixed by law, § 34-7-22. Void nature of agreement by individual to waive, release, or commute rights to benefits or any other rights under laws pertaining to employment security, § 34-8-250. Restriction on power of common carriers to limit liability, § 46-9-2.

Editor's notes. — Ga. L. 1990, p. 1676, § 2, not codified by the General Assembly, provides: “This Act takes effect on July 1, 1990. As a statement of public policy, this Act shall have general applicability to the fullest extent permitted by law. This Act shall further apply to all remedies sought or granted after the effective date with respect to the subject matter of this Act.”

Ga. L. 2007, p. 208, § 2, not codified by the General Assembly, provides: “This Act shall not be applied to impair any obligation of contract or agreement entered into prior to July 1, 2007, but this Act shall apply to any contract entered into, extended, or renewed on or after such date.”

Law reviews. — For article, “The General Practitioner and Anti-trust Problems,” see 20 Ga. B.J. 47 (1957). For article surveying important general legal principles of municipal and county government purchasing and contracting in Georgia, see 16 Mercer L. Rev. 371 (1965). For article discussing effect of contracts against public policy, see 4 Ga. L. Rev. 469 (1970). For article discussing interpretation in Georgia of insurance policies containing evidentiary conditions, see 12 Ga. L. Rev. 783 (1978). For article surveying recent legislative and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979). For article on enforceability of restrictive covenants in employment contracts, see 17 Ga. St. B.J. 110 (1981). For article surveying developments in Georgia contracts law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 67 (1981). For article surveying developments in Georgia local government law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 187 (1981). For article surveying developments in Georgia real property law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 219 (1981). For article, “Liabilities of the Former Officer or Director,” see 18 Ga. St. B.J. 150 (1982). For annual survey on contracts, see 36 Mercer L. Rev.

151 (1984). For article, "The Underbrush Grows Deeper: Restrictive Covenants in Employment Agreements in Georgia," see 21 Ga. St. B.J. 28 (1984). For article, "The New Documentary Concerns Associated With Intelligent Buildings," see 22 Ga. St. B.J. 16 (1985). For article, "Defending the Lawsuit: A First-Round Checklist," see 22 Ga. St. B.J. 24 (1985). For annual survey of law of contracts, see 38 Mercer L. Rev. 107 (1986). For article, "Survey of Current Georgia Law Regarding Restrictive Covenants," see 25 Ga. St. B.J. 188 (1989). For article, "Georgia Constitution May Restrict the 1990 Restrictive Covenant Law," see 27 Ga. St. B.J. 82 (1990). For article, "Georgia's New Restrictive Covenant Act," see 42 Mercer L. Rev. 1 (1990). For annual survey on law of contracts, see 42 Mercer L. Rev. 125 (1990). For article, "Georgia's Indemnity Minefield," see 28 Ga. St. B.J. 142 (1992). For annual survey article on contract law, see 45 Mercer L. Rev. 109 (1993). For article, "Restrictions on Post-Employment Competition by an Executive Under Georgia Law," see 54 Mercer L. Rev. 1133 (2003). For survey article on construction law for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 85 (2003). For survey article on labor and employment law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 303 (2003). For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004). For annual survey of labor and employment law, see 56 Mercer L. Rev. 291 (2004). For annual survey of labor and employment law, see 57 Mercer L. Rev. 251 (2005). For annual survey of labor and em-

ployment law, see 58 Mercer L. Rev. 211 (2006). For survey article on construction law, see 59 Mercer L. Rev. 55 (2007). For survey article on insurance law, see 59 Mercer L. Rev. 195 (2007). For survey article on labor and employment law, see 59 Mercer L. Rev. 233 (2007). For survey article on labor and employment law, see 60 Mercer L. Rev. 217 (2008). For annual survey on construction law, see 61 Mercer L. Rev. 65 (2009). For article, "Georgia Gets Competitive," see 15 (No. 4) Ga. St. B.J. 13 (2009).

For note discussing organized crime in Georgia with respect to the application of state gambling laws, and suggesting proposals for combating organized crime, see 7 Ga. St. B.J. 124 (1970). For note discussing covenants not to compete in employment contracts as void when in general restraint of trade, see 10 Ga. St. B.J. 125 (1973). For note discussing exculpatory clauses in leases in light of *Country Club Apts. v. Scott*, No. 36346 (Ga. Sup. Ct., Oct. 1, 1980), see 32 Mercer L. Rev. 419 (1980). For note on 1990 amendment of this Code section, see 7 Ga. L. Rev. 244 (1990).

For comment on *Dixie Bearings, Inc. v. Walker*, 219 Ga. 353, 133 S.E.2d 338 (1963), see 1 Ga. St. B.J. 220 (1964). For comment on *Durham v. Stand-By Labor of Ga., Inc.*, 230 Ga. 558, 198 S.E.2d 145 (1973), appearing below, see 8 Ga. L. Rev. 526 (1974). For comment discussing indemnity and exculpatory agreements contained in real property leases, see 33 Emory L.J. 135 (1984). For comment, "The Application of Contract Law to Georgia Noncompete Agreements: Have We Been Overlooking Something Obvious?," see 41 Mercer L. Rev. 723 (1990).

JUDICIAL DECISIONS

ANALYSIS

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CONTRACTS OF MAINTENANCE OR CHAMPERTY

General Consideration

Editor's notes. — The pre-1990 cases cited in the annotations under this Code section were decided prior to enactment of § 13-8-2.1, relating to partial restraints of trade.

Determination of prevailing party in landlord-tenant suit. — Because a landlord recovered approximately three-fourths of the total amount of the damages the landlord sought, as well as significant non-monetary relief, namely a writ of possession, and the tenant lost on the tenant's counterclaim and recovered nothing, the trial court was entitled to conclude that the landlord was the prevailing party in the litigation. *Realty Lenders, Inc. v. Levine*, 286 Ga. App. 326, 649 S.E.2d 333 (2007).

Cited in Western Union Tel. Co. v. American Union Tel. Co., 65 Ga. 160, 38 Am. R. 781 (1880); *Reed v. Janes*, 84 Ga. 380, 11 S.E. 401 (1890); *Johnson v. Hilton*, 96 Ga. 577, 23 S.E. 841 (1895); *Sessions v. Payne & Tye*, 113 Ga. 955, 39 S.E. 325 (1901); *Parsons v. Ambos*, 121 Ga. 98, 48 S.E. 696 (1904); *McAuliffe v. Vaughan*, 135 Ga. 852, 70 S.E. 322, 33 L.R.A. (n.s.) 255, 1912A Ann. Cas. 290 (1911); *James v. Haven & Clement*, 185 F. 692 (5th Cir. 1911); *Gowen v. New Orleans Naval Stores Co.*, 157 Ga. 107, 120 S.E. 776 (1923); *Hood v. Legg*, 160 Ga. 620, 128 S.E. 891 (1925); *De Loach v. W.D. Eyre & Co.*, 46 Ga. App. 155, 167 S.E. 123 (1932); *Washington County v. Sheppard*, 46 Ga. App. 240, 167 S.E. 339 (1933); *Bradford v. Hammond*, 179 Ga. 40, 175 S.E. 18 (1934); *Hall v. Simmons*, 50 Ga. App. 634, 179 S.E. 272 (1935); *Vandhitch v. Alverson*, 52 Ga. App. 308, 183 S.E. 105 (1935); *Cary v. Neel*, 54 Ga. App. 860, 189 S.E. 575 (1936);

Fidelity-Phenix Fire Ins. Co. v. Cortez Cigar Co., 92 F.2d 882 (5th Cir. 1937); *Clark v. Baker*, 186 Ga. 65, 196 S.E. 750 (1938); *Aiken v. Armistead*, 186 Ga. 368, 198 S.E. 237 (1938); *Drummond v. McKinley*, 65 Ga. App. 145, 15 S.E.2d 535 (1941); *Columbus Wine Co. v. Sheffield*, 83 Ga. App. 593, 64 S.E.2d 356 (1951); *Iteld v. Karp*, 85 Ga. App. 835, 70 S.E.2d 378 (1952); *Peoples Loan & Fin. Corp. v. McBurnette*, 100 Ga. App. 4, 110 S.E.2d 32 (1959); *Collins v. Storer Broadcasting Co.*, 217 Ga. 41, 120 S.E.2d 764 (1961); *Martell v. Atlanta Biltmore Hotel Corp.*, 114 Ga. App. 646, 152 S.E.2d 579 (1966); *Taylor Publishing Co. v. Jones*, 226 Ga. 832, 177 S.E.2d 655 (1970); *Prosser v. Horis A. Ward, Inc.*, 123 Ga. App. 205, 180 S.E.2d 270 (1971); *Ken Stanton Music, Inc. v. Board of Educ.*, 227 Ga. 393, 181 S.E.2d 67 (1971); *Stone v. Reinhard*, 124 Ga. App. 355, 183 S.E.2d 601 (1971); *Robert & Co. Assocs. v. Pinkerton & Laws Co.*, 124 Ga. App. 309, 183 S.E.2d 628 (1971); *Fidelity & Deposit Co. v. Gainesville Iron Works, Inc.*, 125 Ga. App. 829, 189 S.E.2d 130 (1972); *Troup County Elec. Membership Corp. v. City of La-Grange*, 229 Ga. 171, 190 S.E.2d 64 (1972); *Troup County Elec. Membership Corp. v. Georgia Power Co.*, 229 Ga. 348, 191 S.E.2d 33 (1972); *Atlanta Gas Light Co. v. Georgia Pub. Serv. Comm'n*, 229 Ga. 659, 193 S.E.2d 835 (1972); *Morris v. Jones*, 128 Ga. App. 847, 198 S.E.2d 354 (1973); *Garber v. American Mut. Fire Ins. Co.*, 131 Ga. App. 366, 206 S.E.2d 86 (1974); *Southern Ry. v. Brunswick Pulp & Paper Co.*, 376 F. Supp. 96 (S.D. Ga. 1974); *Delta Air Lines v. McDonnell Douglas Corp.*, 503 F.2d 239 (5th Cir. 1974); *Camp Concrete Prods. v. Central of Ga. Ry.*, 134 Ga. App. 537, 215 S.E.2d 299 (1975); *Southern Protective Prods. Co. v.*

Leasing Int'l, Inc., 134 Ga. App. 945, 216 S.E.2d 725 (1975); Central of Ga. R.R. v. Schnadig Corp., 139 Ga. App. 193, 228 S.E.2d 165 (1976); C.V. Mosley Constr. Co. v. McCuin, 238 Ga. 503, 233 S.E.2d 763 (1977); Vaughn & Co. v. Saul, 143 Ga. App. 74, 237 S.E.2d 622 (1977); Hartline-Thomas, Inc. v. Arthur Pew Constr. Co., 151 Ga. App. 598, 260 S.E.2d 744 (1979); Frazer v. City of Albany, 245 Ga. 399, 265 S.E.2d 581 (1980); Dixie Groceries, Inc. v. Albany Bus. Machs., Inc., 156 Ga. App. 36, 274 S.E.2d 81 (1980); O.H. Carter Co. v. Buckner, 160 Ga. App. 627, 287 S.E.2d 636 (1981); Nordson Corp. v. Plasschaert, 674 F.2d 1371 (11th Cir. 1982); Merren v. Plaza Towers Ltd. Partnership, 161 Ga. App. 543, 287 S.E.2d 771 (1982); Stefan Jewelers, Inc. v. Electro-Protective Corp., 161 Ga. App. 385, 288 S.E.2d 667 (1982); Pope v. Kem Mfg. Corp., 249 Ga. 868, 295 S.E.2d 290 (1982); Mid-Georgia Bandage Co. v. National Equip. Rental, Ltd., 164 Ga. App. 68, 296 S.E.2d 391 (1982); Harnden v. Alpha-Atlanta Constr., Inc., 164 Ga. App. 685, 297 S.E.2d 368 (1982); Burgett v. Thamer Constr., Inc., 165 Ga. App. 404, 300 S.E.2d 211 (1983); Seaboard C.L.R.R. v. Maverick Materials, Inc., 167 Ga. App. 160, 305 S.E.2d 810 (1983); Shanco Int'l, Ltd. v. Digital Controls, Inc., 169 Ga. App. 184, 312 S.E.2d 150 (1983); Bicknell v. Richard M. Hearn Roofing & Remodeling, Inc., 171 Ga. App. 128, 318 S.E.2d 729 (1984); Boddy Enters., Inc. v. City of Atlanta, 171 Ga. App. 551, 320 S.E.2d 374 (1984); DOT v. Brooks, 254 Ga. 303, 328 S.E.2d 705 (1985); Crowe v. Columbus Temporary Servs., Inc., 256 Ga. 239, 347 S.E.2d 560 (1986); Terrace Shopping Ctr. Joint Venture v. Oxford Group, Inc., 192 Ga. App. 346, 384 S.E.2d 679 (1989); McAlpin v. Coweta Fayette Surgical Assocs., 217 Ga. App. 669, 458 S.E.2d 499 (1995); Phillips v. MacDougald, 219 Ga. App. 152, 464 S.E.2d 390 (1995); Glynn-Brunswick Mem. Hosp. Auth. v. Gibbons, 243 Ga. App. 341, 530 S.E.2d 736 (2000); Georgia Receivables, Inc. v. Kirk, 242 Ga. App. 801, 531 S.E.2d 393 (2000); Reliance Ins. Co. of Ill. v. Richfield Hospitality Servs., Inc., 92 F. Supp. 2d 1329 (N.D. Ga. 2000).

1. What Contravenes Public Policy

Contracts obviously and directly tending to bring about results prohibited by law are

void. — Contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made basis of a successful suit. Such contracts are against public policy. Orkin Exterminating Co. v. Dewberry, 204 Ga. 794, 51 S.E.2d 669 (1949), overruled on other grounds, Barry v. Stanco Communications Prods., Inc., 243 Ga. 68, 252 S.E.2d 491 (1979); Jones v. Faulkner, 101 Ga. App. 547, 114 S.E.2d 542 (1960).

Contracts against policy of the law are void and unenforceable even absent fraud in their procurement. Glosser v. Powers, 209 Ga. 149, 71 S.E.2d 230 (1952).

When contract can be said to be contrary to public policy. — Contract cannot be said to be contrary to public policy unless the General Assembly has declared it to be so, or unless consideration of the contract is contrary to good morals and contrary to law, or unless it is entered into for purpose of effecting an illegal or immoral agreement or doing something which is in violation of law. Porubiansky v. Emory Univ., 156 Ga. App. 602, 275 S.E.2d 163 (1980), aff'd, 248 Ga. 391, 282 S.E.2d 903 (1981).

Only authentic, admissible evidence of public policy of a state is the state's constitution, laws, and judicial decisions. Porubiansky v. Emory Univ., 156 Ga. App. 602, 275 S.E.2d 163 (1980), aff'd, 248 Ga. 391, 282 S.E.2d 903 (1981).

State regulation did not contravene public policy. — State revenue department's regulation concerning malt beverage distribution in Georgia did not conflict with the statute that prohibited contracts between private parties in restraint of trade because the regulation was a law authorized by statute, and was not a private contract. Ga. Oilmen's Ass'n v. Ga. Dep't of Revenue, 261 Ga. App. 393, 582 S.E.2d 549 (2003).

If part of the consideration of a contract is illegal, the contract is void. Hanley v. Savannah Bank & Trust Co., 208 Ga. 585, 68 S.E.2d 581 (1952).

Word illegal applies to contracts forbidden by public policy. Hanley v. Savannah Bank & Trust Co., 208 Ga. 585, 68 S.E.2d 581 (1952).

Illegal consideration is promise, act, or forbearance contrary to law or public policy. — An illegal consideration consists of any act or forbearance, or a promise to act or

General Consideration (Cont'd)**1. What Contravenes Public Policy (Cont'd)**

forbear, which is contrary to law or public policy. *Hanley v. Savannah Bank & Trust Co.*, 208 Ga. 585, 68 S.E.2d 581 (1952).

Contractual condition contrary to the health, safety, or welfare of others. — When the performance of a contractual condition would be contrary to the health, safety, or welfare of others, the contract may be considered unenforceable. *Tidwell Homes, Inc. v. Shedd Leasing Co.*, 191 Ga. App. 892, 383 S.E.2d 334 (1989).

Limitation of liability clause in construction contract. — In a negligence and breach of contractual warranty suit brought by a developer against an engineering firm for damages caused by the firm on a project involving the construction of an apartment complex, the trial court erred by granting the firm partial summary judgment and enforcing an indemnity clause in the contract that limited the firm's liability to the firm's fee. The limitation of liability clause violated public policy under O.C.G.A. § 13-8-2(b) since the clause contained language that applied to "any and all claims" by third parties and shifted all liability above the fee for services to the developer, no matter the origin of the claim or who was at fault. *Lanier at McEver, L.P. v. Planners & Eng'rs Collaborative, Inc.*, 284 Ga. 204, 663 S.E.2d 240 (2008).

When employee agreed to a deduction from the employee's paycheck to cover the cost of workers' compensation insurance, the agreement would be contrary to law and to public policy, and would, therefore, be unenforceable. *Morgan S., Inc. v. Lee*, 190 Ga. App. 410, 379 S.E.2d 219 (1989).

An attorney's promise to secure an inmate's release from prison regardless of the legality of the inmate's conviction and sentence was not enforceable and could not serve as the basis for a fraud action. *Hamm v. Auld*, 192 Ga. App. 717, 386 S.E.2d 385, cert. denied, 192 Ga. App. 902, 386 S.E.2d 385, (1989).

Mother's agreement to surrender child for benefit under will contravenes public policy. — Agreement by mother to surrender possession of her infant child in order to receive a benefit for herself and her other children

under a will was void as being against public policy. *Hanley v. Savannah Bank & Trust Co.*, 208 Ga. 585, 68 S.E.2d 581 (1952).

Provision prohibiting borrower from incurring additional debt without lender's consent while loan remains unpaid is valid. — Contract provision which prohibits the borrower from incurring additional debt for business operations without the consent of the lender while the loan is still unpaid is not an unreasonable restraint on trade because it protects the legitimate rights of the lender by promoting solvency of borrower. *Interstate Sec. Police, Inc. v. Citizens & S. Emory Bank*, 237 Ga. 37, 226 S.E.2d 583 (1976).

One-third contingency fee attorney retainer agreement for a workers' compensation case is not void and unenforceable as against public policy. *Norris v. Kunes*, 166 Ga. App. 686, 305 S.E.2d 426 (1983).

An attorney's express retainer agreement obtained through violations of Directory Rule 3-102, prohibiting dividing legal fees with a nonlawyer and Disciplinary Rule 4-102, Standards 13 and 26, disapproving rewards for referrals through fee-sharing agreements with nonlawyers, is itself void as against public policy and, thus, invalidated the attorney's claim of lien against settlement proceeds. *Brandon v. Newman*, 243 Ga. App. 183, 532 S.E.2d 743 (2000).

Contingency fee contract between county board and private auditing corporation by which the corporation contingently shared in a percentage of the tax collected, was void as against public policy. *Sears, Roebuck & Co. v. Parsons*, 260 Ga. 824, 401 S.E.2d 4 (1991).

Joint stipulation and contingent settlement agreement upon which a trial court based a grant of summary judgment was against public policy and was void under O.C.G.A. § 13-8-2 because it sought to bind the Georgia Insurers Insolvency Pool (GIIP) to make certain payments when the GIIP was not a party to the action. *Norman Enters. Interior Design, Inc. v. DeKalb County*, 245 Ga. App. 538, 538 S.E.2d 130 (2000).

Insurance exclusion clause. — An insurance policy clause which excluded payment to an injured person if such person has been paid damages by or on behalf of the liable party in an amount equal to or greater than the total reasonable and necessary medical expenses incurred by the injured person did

not fall within the types of contracts described as violating public policy in the statute. *State Farm Auto. Ins. Co. v. Walker*, 234 Ga. App. 101, 505 S.E.2d 828 (1998).

Provision in a golf course lease between a Chapter 11 debtor and a city that allowed authorized representatives of the city to use rounds at the golf course at no charge to entertain sponsors and clients and for promotional and other business purposes did not violate public policy under O.C.G.A. § 13-8-2(a) because it did not require a violation of any statute, and any unauthorized or inappropriate request by the city did not have to be honored. *In re Cherokee Run Country Club, Inc. v. City of Conyers* (In re Cherokee Run Country Club, Inc.), No. 08-84120-JB, 2009 Bankr. LEXIS 3700 (Bankr. N.D. Ga. Nov. 3, 2009).

Waiver clauses in leases which were explicitly labeled as “Waiver of Subrogation” clauses and which by their terms did not apply in the absence of insurance were not indemnification clauses void under O.C.G.A. § 13-8-2 and were enforceable. *Glazer v. Crescent Wallcoverings, Inc.*, 215 Ga. App. 492, 451 S.E.2d 509 (1994); *Southern Trust Ins. Co. v. Center Developers, Inc.*, 217 Ga. App. 215, 456 S.E.2d 608 (1995), rev’d in part on other grounds, 266 Ga. 806, 471 S.E.2d 194 (1996); *May Dep’t Store v. Center Developers, Inc.*, 266 Ga. 806, 471 S.E.2d 194 (1996).

Corporation had a right to contractual indemnity from a general contractor after the corporation paid for subcontractor’s employees’ injuries because the parties’ contract provided coverage of the contractor’s indemnity obligation would be through insurance. O.C.G.A. § 13-8-2(b) did not void the indemnification provision of their contract since it required the contractor to procure liability insurance for its own benefit. The indemnification provision was not made void by O.C.G.A. § 13-8-2(b) because the indemnity provision together with the clause requiring insurance coverage showed the parties intended coverage by insurance. *ESI, Inc. of Tenn. v. Westpoint Stevens, Inc.*, 254 Ga. App. 332, 562 S.E.2d 198 (2002).

Since the provision in the lease between the corporation and landlord required the corporation to provide liability insurance to the landlord on the landlord’s store premises and merely shifted the risk of loss to

the insurer, that provision was not made void by O.C.G.A. § 13-8-2(b) which explained the sort of agreements that are void as against public policy. *Great Atl. & Pac. Tea Co. v. F.S. Assocs.*, 257 Ga. App. 534, 571 S.E.2d 527 (2002).

Liability limit clause issue waived on review. — Because a city did not seek to exclude, by pretrial motion or by timely trial objection, a liability limit provision of a contract between the city and an engineering firm, the city failed to properly except to the jury’s consideration of that clause, and so the city waived appellate review of the issue of whether that clause should have been presented for the jury’s consideration in a negligent misrepresentation case against the engineering firm. *City of Cairo v. Hightower Consulting Eng’rs, Inc.*, 278 Ga. App. 721, 629 S.E.2d 518 (2006).

2. Power of Courts Regarding Illegal Contracts

Any impairment of freedom to contract must have statutory basis. — Unless prohibited by statute or public policy, parties are free to contract on any terms and about any subject matter in which the parties have an interest, and any impairment of that right must be specifically expressed or necessarily implied by the legislature in a statutory prohibition and not left to speculation. *Porubiansky v. Emory Univ.*, 156 Ga. App. 602, 275 S.E.2d 163 (1980), aff’d, 248 Ga. 391, 282 S.E.2d 903 (1981).

Courts should exercise power to void contracts only in cases free from doubt. — Power of courts to declare contracts void for contravening sound public policy is a very delicate and undefined power, and, like power to declare statutes unconstitutional, should be exercised only in cases free from doubt. *Equitable Loan & Sec. Co. v. Waring*, 117 Ga. 599, 44 S.E. 320, 97 Am. St. R. 177, 62 L.R.A. 93 (1903); *McClelland v. Alexander*, 117 Ga. App. 663, 161 S.E.2d 397 (1968), aff’d, 248 Ga. 391, 282 S.E.2d 903 (1981); *Porubiansky v. Emory Univ.*, 156 Ga. App. 602, 275 S.E.2d 163 (1980).

Contracts in violation of statute requiring business license. — When a statute provides that a person proposing to engage in a certain business shall procure a license before being authorized to do so, and when it appears from the terms of the statute that it

General Consideration (Cont'd)**2. Power of Courts Regarding Illegal Contracts (Cont'd)**

was enacted not merely as a revenue measure but was intended as a regulation of such business in the interest of the public, contracts made in violation of such statute are void and unenforceable. *Georgia Cent. Credit Union v. Weems*, 157 Ga. App. 439, 278 S.E.2d 88 (1981).

It is not to be presumed that people intend to violate the law, and the language of their undertakings must, if possible, be so construed as to make obligation one which the law will recognize as valid. *Lie-Nielsen v. Tuxedo Plumbing & Heating Co.*, 149 Ga. App. 502, 254 S.E.2d 729 (1979), rev'd on other grounds, 245 Ga. 27, 262 S.E.2d 794 (1980).

Contracts will not be avoided unless injury to public interest clearly appears. — Contracts will not be avoided by courts as against public policy unless case is free from doubt and injury to public interest clearly appears. *Porubiansky v. Emory Univ.*, 156 Ga. App. 602, 275 S.E.2d 163 (1980), aff'd, 248 Ga. 391, 282 S.E.2d 903 (1981).

Provisions of the law should not be enlarged without convincing and conclusive reasons. *Mutual Life Ins. Co. v. Durden*, 9 Ga. App. 797, 72 S.E. 295 (1911); *Porubiansky v. Emory Univ.*, 156 Ga. App. 602, 275 S.E.2d 163 (1980), aff'd, 248 Ga. 391, 282 S.E.2d 903 (1981).

Courts cannot involve themselves with enforcement of contracts which contravene public policy. — No court can properly concern itself with enforcement of a contract which is contrary to public policy, and for that reason void, nor with adjustment of alleged rights or equities growing out of such a contract. *Gordon v. Gulf Am. Fire & Cas. Co.*, 113 Ga. App. 755, 149 S.E.2d 725 (1966).

Comity as to laws of sister states is limited to laws not contravening public policy. — In enforcing comity in respect to laws of sister states, Georgia does so only so long as its enforcement is not contrary to policy of this state. *Gulf Collateral, Inc. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976).

Courts of equity will not require specific performance of contract which contravenes public policy. *Glosser v. Powers*, 209 Ga. 149, 71 S.E.2d 230 (1952).

Invalidity of contract contravening public policy will be a defense while the contract remains unexecuted. *Hanley v. Savannah Bank & Trust Co.*, 208 Ga. 585, 68 S.E.2d 581 (1952); *Jones v. Faulkner*, 101 Ga. App. 547, 114 S.E.2d 542 (1960).

Executed illegal contract will be left to stand, but if executory, neither party can enforce the contract. *Jones v. Faulkner*, 101 Ga. App. 547, 114 S.E.2d 542 (1960).

No action lies to recover money paid pursuant to illegal contract. — If illegal contract is in part performed, and money has been paid in pursuance of the contract, no action will lie to recover money paid. *Hanley v. Savannah Bank & Trust Co.*, 208 Ga. 585, 68 S.E.2d 581 (1952); *Jones v. Faulkner*, 101 Ga. App. 547, 114 S.E.2d 542 (1960).

No right to recover damages. — O.C.G.A. § 13-8-2 merely declares certain contracts unenforceable and does not confer any right to recover damages. *E.T. Barwick Indus., Inc. v. Walter E. Heller & Co.*, 692 F. Supp. 1331 (N.D. Ga. 1987), aff'd, 891 F.2d 906 (11th Cir. 1989).

Contract which under common law is unenforceable cannot be enjoined by one not party to the contract. *Palmer v. Atlantic Ice & Coal Corp.*, 178 Ga. 405, 173 S.E. 424 (1934).

Insurer cannot take advantage of the insurer's own illegal contract to escape liability on legal one. *Wilson v. Progressive Life Ins. Co.*, 61 Ga. App. 617, 7 S.E.2d 44 (1940).

3. Severability of Contract Provisions

Invalid waiver, unconnected with purposes of contract, may be severed and remainder may be enforced. — Contract based on legal and binding consideration and containing an attempted waiver of a right which cannot be waived because contrary to public policy, which waiver is wholly unconnected with purposes of the contract, is severable, and the part which is illegal is nevertheless enforceable. *Brenau College v. Mincey*, 68 Ga. App. 137, 22 S.E.2d 322 (1942).

Contract based on legal consideration which contains legal and illegal promises, valid as to former. — When agreement consists of single promise, based on single consideration, if either is illegal, the whole contract is void. But when agreement is founded on legal consideration containing a

promise to do several things or to refrain from doing several things, and only some of the promises are illegal, those promises which are not illegal will be held to be valid. *Scott v. Hall*, 56 Ga. App. 467, 192 S.E. 920 (1937).

Trial court properly granted summary judgment to a payee under the terms of a settlement agreement to recover funds owed for a preexisting debt, despite the fact that a confidentiality provision contained therein was void for public policy reasons as the consideration supporting the payment provision was separate and apart from the confidentiality provision. *Unami v. Roshan*, 290 Ga. App. 317, 659 S.E.2d 724 (2008).

Adhesive contract found enforceable. — Mere fact that a contract was adhesive did not, standing alone, render the contract unenforceable. *Realty Lenders, Inc. v. Levine*, 286 Ga. App. 326, 649 S.E.2d 333 (2007).

Blue penciling theory. — Since Georgia courts have refused to adopt a “blue pencil” theory of contract severability, overly broad covenants may not be salvaged by excising—or “blue penciling”—their unenforceable provisions. If any part of a covenant is unenforceable, the entire covenant must fail. *A.L. Williams & Assocs. v. Stelk*, 960 F.2d 942 (11th Cir. 1992), vacated on other grounds, 984 F.2d 391 (11th Cir. 1993).

Exculpatory Clauses

Editor’s notes. — For cases regarding restriction on carriers’ ability to limit liability occasioned by their own negligence, see the Judicial Decisions under O.C.G.A. § 46-9-2.

Purpose of subsection (b) of O.C.G.A. § 13-8-2 is to prevent a building contractor, subcontractor, or owner from contracting away liability for accidents caused solely by that person’s negligence, whether during the construction of the building or after the structure is completed and occupied. *Smith v. Seaboard Coast Line R.R.*, 639 F.2d 1235 (5th Cir. 1981).

O.C.G.A. § 13-8-2 creates two threshold conditions: that the exculpatory clause purports to protect the indemnitee against the consequences of sole negligence and that the agreement pertain to the maintenance or construction of a building. *Smith v. Seaboard Coast Line R.R.*, 639 F.2d 1235 (5th Cir. 1981).

One may exempt oneself, by contract, from liability to another for injuries caused by negligence, and such agreement is not void for contravening public policy. *Porubiansky v. Emory Univ.*, 156 Ga. App. 602, 275 S.E.2d 163 (1980), *aff’d*, 248 Ga. 391, 282 S.E.2d 903 (1981).

As a general rule, a party may contract away liability to the other party for the consequences of one’s own negligence without contravening public policy, provided the parties’ intention to this effect is expressed in clear and unequivocal terms, and except when such an agreement is prohibited by statute or where a public duty is owed. *Smith v. Seaboard Coast Line R.R.*, 639 F.2d 1235 (5th Cir. 1981).

An exculpatory clause shields a defendant from liability for the plaintiff’s injury, even when the defendant’s negligence caused or contributed to the accident. *Smith v. Seaboard Coast Line R.R.*, 639 F.2d 1235 (5th Cir. 1981).

Absent questions of public policy parties may contract to waive numerous and substantial rights. *Orkin Exterminating Co. v. Stevens*, 130 Ga. App. 363, 203 S.E.2d 587 (1973).

Clause shifting risk of loss to insurer regardless of fault does not contravene public policy. — Waiver of subrogation clause, which only shifts risk of loss to insurance company, regardless of fault of parties, and does not require either party to indemnify the other and holds one harmless from one’s own sole negligence, does not violate public policy. *Tuxedo Plumbing & Heating Co. v. Lie-Nielsen*, 245 Ga. 27, 262 S.E.2d 794 (1980).

O.C.G.A. § 13-8-2 was inapplicable, where neither the insurance clause of a construction contract nor the contract’s “hold harmless clause” required of either contracting party that the one indemnify the other and hold one harmless from one’s own sole negligence; rather, the insurance clause shifted the risk of loss to the insurance company regardless of which party was at fault. *McAbee Constr. Co. v. Georgia Kraft Co.*, 178 Ga. App. 496, 343 S.E.2d 513 (1986).

Based on findings that the parties intended to shift the risk of loss under the contract to insurance and did not intend, under the indemnification agreement, for

Exculpatory Clauses (Cont'd)

defendant to bear the risk of loss for any accidents occurring due to the sole negligence of plaintiff, subsection (b) of O.C.G.A. § 13-8-2 was not applicable. Federal Paper Bd. Co. v. Harbert-Yeargin, Inc., 53 F. Supp. 2d 1361 (N.D. Ga. 1999).

Indemnity contracts not construed to indemnify against indemnitee's negligence unless such intent is clear. — Contracts of express indemnity are construed strictly and, absent plain, clear, and unequivocal language, will not be interpreted to indemnify against acts attributable to indemnitee's own negligence. Binswanger Glass Co. v. Beers Constr. Co., 141 Ga. App. 715, 234 S.E.2d 363 (1977).

Common carrier cannot arbitrarily limit liability for damages arising from negligence of carrier's agents. Such a contract is contrary to public policy and cannot be enforced. Southern Express Co. v. Hanaw, 134 Ga. 445, 67 S.E. 944, 137 Am. St. R. 227 (1910).

Exculpatory clause in consent form, signed as condition of receiving treatment, is invalid. — Exculpatory clause in consent form signed by patient as condition of receiving treatment at dental school clinic is invalid as contrary to public policy. Porubiansky v. Emory Univ., 156 Ga. App. 602, 275 S.E.2d 163 (1980), aff'd, 248 Ga. 391, 282 S.E.2d 903 (1981).

Clause voided in home inspection agreement. — An arbitrator's decision voiding a limitation of liability clause in a home inspection agreement on the basis of subsection (b) O.C.G.A. § 13-8-2 did not compel an inference that the arbitrator overstepped the arbitrator's authority. Amerispec Franchise v. Cross, 215 Ga. App. 669, 452 S.E.2d 188 (1994).

Home inspection agreements. — Subsection (b) of O.C.G.A. § 13-8-2 was inapplicable to a clause in a home inspection agreement limiting loss to the cost of inspection. Brainard v. McKinney, 220 Ga. App. 329, 469 S.E.2d 441 (1996).

Subsection (b) is applicable to exculpatory clauses in lease contracts. Country Club Apts., Inc. v. Scott, 246 Ga. 443, 271 S.E.2d 841 (1980).

Exculpatory and indemnity provision in commercial lease providing that "lessee

hereby releases lessor from any and all damages to both person and property and will hold the lessor harmless from such damages during the terms of this lease" was void as against public policy. Barnes v. Pearman, 163 Ga. App. 790, 294 S.E.2d 619 (1982), aff'd, 250 Ga. 628, 301 S.E.2d 647 (1983).

Leases are among those contracts that are included within the ambit of the public policy prohibition established by subsection (b) of O.C.G.A. § 13-8-2. Borg-Warner Ins. Fin. Corp. v. Executive Park Ventures, 198 Ga. App. 70, 400 S.E.2d 340 (1990).

Lease provision, even if construed as a mutual waiver of liability for the consequences of the parties' respective negligent acts or omissions, was unenforceable as a bar to the landlord's action against the tenant alleging that one of the tenant's employees or agents had negligently set a fire which damaged the leased premises. Borg-Warner Ins. Fin. Corp. v. Executive Park Ventures, 198 Ga. App. 70, 400 S.E.2d 340 (1990).

Lease provision releasing the parties from liability for losses to the property of the other regardless of cause, absent a mandatory insurance provision, was void as against public policy and consequently unenforceable against warehouse landlord, rendering the landlord liable for the tenant's fire-induced damages. Central Whse. & Dev. Corp. v. Nostalgia, Inc., 210 Ga. App. 15, 435 S.E.2d 230 (1993), overruled on other grounds, Glazer v. Crescent Wallcoverings, Inc., 215 Ga. App. 492, 451 S.E.2d 509 (1994).

Subsection (b) applies to license by tenant granting exhibit space. — Public policy provisions of subsection (b) of O.C.G.A. § 13-8-2 apply to license agreements involving a tenant's use of real estate, and a booth space contract between the tenant of an exhibition hall and an exhibitor at a trade show is a form of license or concession agreement. National Candy Wholesalers, Inc. v. Chipurnoi, Inc., 180 Ga. App. 664, 350 S.E.2d 303 (1986).

Exculpatory clauses in residential lease would not relieve landlord of liability for wrongful death of tenant. See Cain v. Vontz, 703 F.2d 1279 (11th Cir. 1983).

Exculpatory clause in license exculpating tenant-grantor as to all claims held void. — When a license or concession agreement dealing with the use of real estate between a

tenant and an exhibitor for booth space includes an attempt to exculpate the tenant from all claims, necessarily including those arising exclusively from the tenant's own, sole negligence, there is no error in the action of the trial court finding the exculpatory clause to be in violation of public policy, void, and unenforceable. *National Candy Wholesalers, Inc. v. Chipurnoi, Inc.*, 180 Ga. App. 664, 350 S.E.2d 303 (1986).

Subsection (b) of this statute operates in futuro only. *Seaboard Coast Line R.R. v. Freight Delivery Serv., Inc.*, 133 Ga. App. 92, 210 S.E.2d 42 (1974) (see O.C.G.A. § 13-8-2).

No retroactive application. — Subsection (b) of this statute, enacted in 1970, was not intended to, and does not, apply to contractual rights accruing prior to the law's enactment. *Southern Ry. v. Insurance Co. of N. Am.*, 228 Ga. 23, 183 S.E.2d 912 (1971) (see O.C.G.A. § 13-8-2).

There is no legislative intent apparent that subsection (b) of this statute be applied retroactively. *Orkin Exterminating Co. v. Stevens*, 130 Ga. App. 363, 203 S.E.2d 587 (1973) (see O.C.G.A. § 13-8-2).

Exculpatory clause purporting to nullify landlord's implied warranty concerning latent defect is unenforceable. — Landlord's implied warranty concerning latent defects existing at inception of lease is sufficiently analogous to a contract for maintenance or repair that an exculpatory provision purporting to nullify the effect of such implied warranty is void and unenforceable under subsection (b) of this statute. *Country Club Apts., Inc. v. Scott*, 154 Ga. App. 217, 267 S.E.2d 811, aff'd, 246 Ga. 443, 271 S.E.2d 841 (1980); *Porubiansky v. Emory Univ.*, 156 Ga. App. 602, 275 S.E.2d 163 (1980), aff'd, 248 Ga. 391, 282 S.E.2d 903 (1981) (see O.C.G.A. § 13-8-2).

Exculpatory clauses strictly construed in building construction or maintenance contracts. — As a general rule, a party can protect oneself by contract from liability for the consequences of one's own negligent acts. As to contracts relating to the construction or maintenance of buildings, however, O.C.G.A. § 13-8-2 changes this common-law rule and, thus, should be strictly construed. *Smith v. Seaboard Coast Line R.R.*, 639 F.2d 1235 (5th Cir. 1981).

No indemnification for sole negligence in construction contracts. — Contracts related

to the construction or maintenance of a building that purport to indemnify a party for that party's sole negligence are prohibited. *Watson v. Union Camp Corp.*, 861 F. Supp. 1086 (S.D. Ga. 1994); *Federal Paper Bd. Co. v. Harbert-Yeargin, Inc.*, 53 F. Supp. 2d 1361 (N.D. Ga. 1999).

Exculpatory clause in contract between contractor and subcontractor void. — An agreement which requires a building contractor to indemnify a subcontractor against "all loss, damage, claims, liability or expense arising therefrom irrespective of whether such were due to the possession, use, operation or condition of the elevators, appurtenances, or hatchways, or through failure to comply with any building laws or to any other cause" is in violation of the public policy of Georgia. *Morgan v. Westinghouse Elec. Corp.*, 579 F. Supp. 867 (N.D. Ga. 1984), aff'd, 752 F.2d 648 (11th Cir. 1985).

Indemnity provision enforceable in contract between architect and developer. — Indemnity provision in a contract between a developer and an architect did not contravene O.C.G.A. § 13-8-2(b) as the provision specifically excluded the architect's sole negligence from the indemnity obligation of the developer. *Precision Planning, Inc. v. Richmark Cmty., Inc.*, 298 Ga. App. 78, 679 S.E.2d 43 (2009).

Indemnity clause in a maintenance and rental agreement between a maintenance service corporation and the owner of a unit in a resort area, whereby the owner agreed to indemnify and hold harmless the corporation "from and against all claims, suits, damages, costs, losses and expenses arising from injury to any person, persons or property occurring on or about the said premises and relating to the performance of this Agreement," was clearly violative of O.C.G.A. § 13-8-2. *Big Canoe Corp. v. Moore & Groover, Inc.*, 171 Ga. App. 654, 320 S.E.2d 564 (1984).

"Building structures, appurtenances, or appliances." — An indemnification provision contract for the performance of maintenance on two large paper machines would fall within the ambit of subsection (b) of O.C.G.A. § 13-8-2 since the machines would be construed as either "appurtenances" or "appliances." *Federal Paper Bd. Co. v. Harbert-Yeargin, Inc.*, 53 F. Supp. 2d 1361 (N.D. Ga. 1999).

Exculpatory Clauses (Cont'd)

Validity of indemnity agreements where negligence not found. — Indemnification clause whereby contractor agreed to indemnify owner for attorney fees in defense of claims for personal injury "caused or claimed to have been caused by ... the performance of or failure to perform any work provided hereunder by the contractor [or] his subcontractors" did not violate public policy provisions of subsection (b), as the paragraph simply agreed to hold the owner harmless for a claim for monetary or property loss arising out of the contractor's performance of the contract and did not seek to protect the owner from the owner's own negligence. *Hartline-Thomas, Inc. v. Arthur Pew Constr. Co.*, 151 Ga. App. 598, 260 S.E.2d 744 (1979).

Contractor could invoke against subcontractor indemnification agreement for reimbursement of attorney's fees in defending personal injury action where verdict held contractor not negligent. *Hartline-Thomas, Inc. v. Arthur Pew Constr. Co.*, 151 Ga. App. 598, 260 S.E.2d 744 (1979).

Severability of valid and invalid indemnity provisions. — Valid indemnification clause holding owner harmless for claim or loss arising out of contractor's performance was severable from clause holding owner harmless from claims or losses arising out of owner's negligence and could be invoked where owner was not found negligent. *Hartline-Thomas, Inc. v. Arthur Pew Constr. Co.*, 151 Ga. App. 598, 260 S.E.2d 744 (1979).

Subsection (b) inapplicable. — In a suit against a burglary alarm company alleging that the equipment installed and maintained by the company failed to prevent a burglary at the purchaser's premises, where the contract contains an exculpatory clause, subsection (b) of O.C.G.A. § 13-8-2 does not apply because the contract is not a contract for real property and there are no "damages arising out of bodily injury to persons or damage to property." *West Side Loan Office v. Electro-Protective Corp.*, 167 Ga. App. 520, 306 S.E.2d 686 (1983).

Indemnity clause void and unenforceable. — Absent an insurance clause showing mutual intent for a subcontractor's insurance to cover losses to the store and contractor, an

indemnity clause was statutorily void and unenforceable. *Federated Dep't Stores v. Superior Drywall & Acoustical*, 264 Ga. App. 857, 592 S.E.2d 485 (2003).

Contracts Tending to Corrupt Legislature or Judiciary

Contract contravenes public policy when real consideration is buying of votes and political influence. *Exchange Nat'l Bank v. Henderson*, 139 Ga. 260, 77 S.E. 36, 51 L.R.A. (n.s.) 549 (1913).

Public officer's agreement to accept less than fees or salary allowed by law is void as contrary to public policy, and same is true of a promise to give public officer more than amount which law fixes as compensation for officer's services. *Owens v. Floyd County*, 96 Ga. App. 25, 99 S.E.2d 560 (1957).

Contracts in Restraint of Trade, Generally

1. In General

Contract in general restraint of trade is void. *Brewer & Co. v. Lamar, Rankin & Lamar*, 69 Ga. 656, 47 Am. R. 766 (1882); *Brown & Allen v. Jacobs' Pharmacy Co.*, 115 Ga. 429, 41 S.E. 553, 90 Am. St. R. 126, 57 L.R.A. 547 (1902).

Georgia law prohibits contracts or agreements tending to defeat or lessen competition or in general restraint of trade. *Uni-Worth Enters., Inc. v. Wilson*, 244 Ga. 636, 261 S.E.2d 572 (1979).

Both constitutional and legislative provisions, prohibit contracts or agreements in general restraint of trade. *Howard Schultz & Assocs. v. Broniec*, 239 Ga. 181, 236 S.E.2d 265 (1977), affirmed in part and remanded in part, *Jackson & Coker, Inc. v. Hart*, 261 Ga. 371, 405 S.E.2d 253 (1991).

Contracts tending to lessen competition are against public policy and are therefore void. *McNease v. National Motor Club of Am., Inc.*, 238 Ga. 53, 231 S.E.2d 58 (1976).

Georgia law provides that contracts which tend to lessen competition or which are in restraint of trade are against public policy and are void. *Wedgewood Carpet Mills, Inc. v. Color-Set, Inc.*, 149 Ga. App. 417, 254 S.E.2d 421 (1979).

Section does not impose absolute bar against every kind of restrictive agreement. *Howard Schultz & Assocs. v. Broniec*, 239 Ga.

181, 236 S.E.2d 265 (1977), affirmed in part and remanded in part, *Jackson & Coker, Inc. v. Hart*, 261 Ga. 371, 405 S.E.2d 253 (1991).

The prohibition of contracts or agreements in general restraint of trade does not impose an absolute bar against every kind of restrictive agreement. *Adcock v. Speir Ins. Agency, Inc.*, 158 Ga. App. 317, 279 S.E.2d 759 (1981).

Court prefers unrestrictive interpretation of contract. — When a court is presented with a restrictive covenant that is susceptible of more than one reasonable interpretation, the preferred interpretation is the one that least restricts competition, thereby posing the least affront to the public policy of the State of Georgia. *Atlanta Ctr. Ltd. v. Hilton Hotels Corp.*, 848 F.2d 146 (11th Cir. 1988).

Restrictive covenant for subdivision. — A restrictive covenant barring “For Sale” signs in a subdivision was not an unenforceable restraint on trade; the cases citing such authority referred to restrictive covenants in the employment area, not to restrictive covenants on the use of real property, and it was well settled that a grantor of real property could restrict the use of the property by restrictive covenants. *Godley Park Homeowners Ass’n v. Bowen*, 286 Ga. App. 21, 649 S.E.2d 308 (2007).

Public policy generally disfavors contracts which diminish competition. — Contractual restraints which tend to diminish competition and trade have to be considered against a background of public policy generally disfavoring contracts which have that effect. *Farmer v. Airco, Inc.*, 231 Ga. 847, 204 S.E.2d 580 (1974).

Public policy of this state in respect to contracts in restraint of trade is reflected in Ga. Const. 1976, Art. III, Sec. VIII, Para. VIII (see now Ga. Const. 1983, Art. III, Sec. VI, Para. V), declaring that agreements which may have effect, or are intended to have effect, of defeating or lessening competition, or of encouraging monopoly, are illegal and void. *Watkins v. Avnet, Inc.*, 122 Ga. App. 474, 177 S.E.2d 582 (1970).

An onerous contractual provision in restraint of one’s trade or profession is illegal and unenforceable. *Austin v. Benefield*, 140 Ga. App. 96, 230 S.E.2d 16 (1976).

In order to have standing to bring claims under Ga. Const. 1983, Art. III, Sec. VI, Para. V(c) (uncompetitive contracts) or para-

graph (a)(2) of O.C.G.A. § 13-8-2, the plaintiff must be a party to the alleged illegal contract or agreement. *Valley Prods. Co. v. Landmark*, 877 F. Supp. 1087 (W.D. Tenn. 1994), aff’d, 128 F.3d 398 (11th Cir. 1997).

Who may attack corporate contract as ultra vires or in restraint of trade. — State, stockholders, and parties could attack corporate contract as being ultra vires or in restraint of trade; bondholders could not do so. *Palmer v. Atlantic Ice & Coal Corp.*, 178 Ga. 405, 173 S.E. 424 (1934).

Common law tort actions. — Georgia recognizes a common law tort action in favor of third parties who are injured by a conspiracy in restraint of trade. *United States Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986 (11th Cir. 1993), cert. denied, 512 U.S. 1221, 114 S. Ct. 2710, 129 L. Ed. 2d 2837 (1994).

2. Nondisclosure Covenants

Covenants not to disclose and utilize confidential business information are related to general covenants not to compete because of the similar employer interest in maintaining competitive advantage. *Durham v. Stand-By Labor of Ga., Inc.*, 230 Ga. 558, 198 S.E.2d 145 (1973).

Such specific nondisclosure covenants, unlike general noncompetition covenants, bear no relation to territorial limitations, and their reasonableness turns on factors of time and nature of business interest sought to be protected. *Durham v. Stand-By Labor of Ga., Inc.*, 230 Ga. 558, 198 S.E.2d 145 (1973).

Georgia courts will provide injunctive relief to protect against disclosure of trade secrets notwithstanding an unenforceable nondisclosure covenant; this protection is an “implied term” in an employment contract. *Prudential Ins. Co. of Am. v. Baum*, 629 F. Supp. 466 (N.D. Ga. 1986).

Nondisclosure clause may be enforceable. — When a nondisclosure clause is reasonably related to protecting the interests of the owner of a computer software system against competitive use by a former employee of special knowledge the employee would have naturally obtained as a result of the employee’s employment, the clause may be enforceable. *U3S Corp. of Am. v. Parker*, 202 Ga. App. 374, 414 S.E.2d 513 (1991), cert. denied, 1992 Ga. LEXIS 310 (1992).

Contracts in Restraint of Trade, Generally (Cont'd)

3. Application

Contract tending to lessen competition or restrain trade may be upheld if restraint is reasonable and contract is valid in other respects. *Wedgewood Carpet Mills, Inc. v. Color-Set, Inc.*, 149 Ga. App. 417, 254 S.E.2d 421 (1979).

Reasonableness of restraints in noncompetition covenant is a question of law for court determination. *McNease v. National Motor Club of Am., Inc.*, 238 Ga. 53, 231 S.E.2d 58 (1976).

Whether or not a restrictive covenant is void is for a court to determine. *Foster v. Union Cent. Life Ins. Co.*, 103 Ga. App. 420, 119 S.E.2d 289 (1961), overruled on other grounds, *Brown Stove Works, Inc. v. Kimsey*, 119 Ga. App. 453, 167 S.E.2d 693 (1976).

Whether restraints imposed by employment contract are reasonable is a question of law for determination by court. *Orkin Exterminating Co. v. Dewberry*, 204 Ga. 794, 51 S.E.2d 669 (1949), overruled on other grounds, *Barry v. Stanco Communications Prods., Inc.*, 243 Ga. 68, 252 S.E.2d 491 (1979); *Mike Bajalia, Inc. v. Pike*, 226 Ga. 131, 172 S.E.2d 676 (1970); *Preferred Risk Mut. Ins. Co. v. Jones*, 233 Ga. 423, 211 S.E.2d 720 (1975); *Orkin Exterminating Co. v. Pelfrey*, 237 Ga. 284, 227 S.E.2d 251 (1976).

What is reasonable in a restrictive covenant is a matter of law for a court to decide. *Kutash v. Gluckman*, 193 Ga. 805, 20 S.E.2d 128 (1942); *Watkins v. Avnet, Inc.*, 122 Ga. App. 474, 177 S.E.2d 582 (1970).

Whether restraint imposed by agreement is reasonable determined by court. — In every case, it is for the court to determine whether, under its particular facts and circumstances, a restraint imposed by agreement is reasonable. *Bullock v. Johnson*, 110 Ga. 486, 35 S.E. 703 (1900); *Hood v. Legg*, 160 Ga. 620, 128 S.E. 891 (1925).

Enforceability of restrictive covenants generally. — Covenants in restraint of trade may be enforced if the covenant's are reasonable as to time and place and are not overly broad in activities proscribed, taking into consideration interests of individuals and commercial concerns as well as public policy in promoting competition. A rule of

reason will be applied by courts in reviewing such contracts. *Barrett-Walls, Inc. v. T.V. Venture, Inc.*, 242 Ga. 816, 251 S.E.2d 558 (1979).

Considerations for court. — In determining whether or not a restraint of trade is reasonable, a court should consider whether it is such only as to afford a fair protection to interest of party in favor of whom it is given, and not so large as to interfere with interest of public. Whatever restraint is larger than necessary for protection of the party can be of no benefit to either; it can only be oppressive and if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to interest of the public is void, on grounds of public policy. *Rakestraw v. Lanier*, 104 Ga. 188, 30 S.E. 735, 69 Am. St. R. 154 (1898); *Shirk v. Loftis Bros. & Co.*, 148 Ga. 500, 97 S.E. 66 (1918).

If considered with reference to situation, business and objects of parties, and in light of all surrounding circumstances with reference to which contract was made, a restraint contracted for appears to have been for a just and honest purpose, for protection of legitimate interests of party in whose favor it is imposed, reasonable as between them, and not specially injurious to the public, such restraint will be held valid. *Scott v. Hall*, 56 Ga. App. 467, 192 S.E. 920 (1937); *Turner v. Robinson*, 214 Ga. 729, 107 S.E.2d 648 (1959); *Spalding v. Southeastern Personnel of Atlanta, Inc.*, 222 Ga. 339, 149 S.E.2d 794 (1966); *Interstate Sec. Police, Inc. v. Citizens & S. Emory Bank*, 237 Ga. 37, 226 S.E.2d 583 (1976).

In determination of whether limitations in contract restraining trade are reasonable, a court will consider nature and extent of trade or business, situation of parties, and all other circumstances. To be valid, a covenant must be reasonably necessary to protect interest of party in whose favor it is imposed, and must not unduly prejudice interest of the public. The restrictions imposed upon promisor must not be larger than are necessary for protection of promisee. *Orkin Exterminating Co. v. Dewberry*, 204 Ga. 794, 51 S.E.2d 669 (1949), overruled on other grounds, *Barry v. Stanco Communications Prods., Inc.*, 243 Ga. 68, 252 S.E.2d 491 (1979).

No better test can be applied to question of whether restrictive covenant is reasonable

or not than by considering whether restraint is such only as to afford a fair protection to interest of party in favor of whom restraint is given, and not so large as to interfere with interest of public. *Coffee Sys. v. Fox*, 226 Ga. 593, 176 S.E.2d 71 (1970).

Under the law of Georgia, covenants in restraint of trade may be enforced if the covenants are reasonable as to time and place and are not overly broad as to activities proscribed, taking into consideration interests of individuals in gaining and pursuing a livelihood, of commercial concerns in protecting property, confidential information and relationships, good will and economic advantage, and of broader public policy favoring individual freedom to enter into contracts and to contract as one will. *Durham v. Stand-By Labor of Ga., Inc.*, 230 Ga. 558, 198 S.E.2d 145 (1973).

Noncompetitive provisions in contracts will be enforced only if restraints are reasonable in time, reasonable and definite in territorial extent, and in nature of business activities proscribed. *Barrett-Walls, Inc. v. T.V. Venture, Inc.*, 242 Ga. 816, 251 S.E.2d 558 (1979).

Prerequisites before enforcement of noncompetition provisions. — Under the law of Georgia, there are three prerequisites which must be met before noncompetition provisions in contracts may be enforced without contravening public policy. These prerequisites are that the provision: (1) must be reasonable as to time of restraint; (2) must be definite and reasonable as to territorial extent of duty owed not to compete; and (3) must be definite and reasonable as to nature of business activities proscribed. *Farmer v. Airco, Inc.*, 231 Ga. 847, 204 S.E.2d 580 (1974).

True test of validity of contract in restraint of trade is whether contract is supported by sufficient consideration and whether restraint is reasonable. *Stewart v. American Home Mut. Life Ins. Co.*, 107 Ga. App. 105, 129 S.E.2d 367 (1962).

Any covenant not to compete is invalid if not limited as to time and space. *Cheese Shop Int'l, Inc. v. Wirth*, 304 F. Supp. 861 (N.D. Ga. 1969), but see O.C.G.A. § 13-8-2.1.

Distinction between property and professional interest. — See *Rakestraw v. Lanier*, 104 Ga. 188, 30 S.E. 735, 69 Am. St. R. 154 (1898).

Distinction between restraints on practice of profession and restraints connected with sale of business. — A distinction exists between that class of contracts binding one to desist from practice of a learned profession, and those which bind one who has sold out a mercantile or other kind of business, and the good will therewith connected, not to again engage in that business. In the former class there should be a reasonable limit as to time, so as to prevent contract from operating with unnecessary harshness against person who is to abstain from practicing one's profession at a time when one so doing could in no way benefit the other contracting party. In the latter class such limit is not essential to validity of the contract, but the restraint may be indefinite. *Kutash v. Gluckman*, 193 Ga. 805, 20 S.E.2d 128 (1942); *Burdine v. Brooks*, 206 Ga. 12, 55 S.E.2d 605 (1949).

Principle applying to learned professions has been extended to occupations which require special skill. *Kutash v. Gluckman*, 193 Ga. 805, 20 S.E.2d 128 (1942).

Unenforceability due to no time limitation. — When a nondisclosure clause contained no time limitation, the clause was unenforceable. *U3S Corp. of Am. v. Parker*, 202 Ga. App. 374, 414 S.E.2d 513 (1991).

Contract restraining trade upheld when based upon consideration making it reasonable for parties to do so. — Contract in restraint of trade, upon a consideration which shows contract was reasonable for parties to enter it, is good. Whenever a consideration appears to make it a proper and useful contract and such as cannot be set aside without injury to a fair contractor, it ought to be maintained. *Scott v. Hall*, 56 Ga. App. 467, 192 S.E. 920 (1937); *Interstate Sec. Police, Inc. v. Citizens & S. Emory Bank*, 237 Ga. 37, 226 S.E.2d 583 (1976).

Nondisclosure covenant was held to be void due to the absence of any restriction upon the duration of the nondisclosure provisions and also because it was overbroad in that the covenant forbade disclosure of certain information without regard to whether the information was within scope of the employer's legitimate business interests. *Prudential Ins. Co. of Am. v. Baum*, 629 F. Supp. 466 (N.D. Ga. 1986).

Nondisclosure covenant executed by parties involved in a failed joint venture agree-

**Contracts in Restraint of Trade,
Generally (Cont'd)**

3. Application (Cont'd)

ment to develop a multimedia e-mail software program to be marketed to a specific company was void under O.C.G.A. § 13-8-2(a)(2) because it contained no territorial limit or limits on the scope of the restricted activity. *OnBrand Media v. Codex Consulting, Inc.*, 301 Ga. App. 141, 687 S.E.2d 168 (2009).

Hospital privileges. — Doctor's claim that a hospital promised not to report the doctor's conduct to the National Practitioner Data Bank if the doctor complied with the psychiatrist's treatment plan was rejected as any such agreement would violate federal law requiring a hospital to conduct periodic appraisals of their medical staff under 42 C.F.R. § 482.22(a)(1) and to report the doctor's resignation to the data bank under 42 U.S.C.S. §§ 11133 and 11134; any such agreement was unenforceable under O.C.G.A. §§ 13-8-1 and 13-8-2 as against public policy to provide quality health care. *Taylor v. Kennestone Hosp., Inc.*, 266 Ga. App. 14, 596 S.E.2d 179 (2004).

Waiver paragraph in contract. — Waiver paragraph in contract, providing that an independent contractor waived all of the contractor's rights for any recovery against a billboard owner for damages incurred by the contractor, did not violate O.C.G.A. § 13-8-2(b) as the statute applied only to contract provisions purporting to indemnify or hold harmless the promisee against liability for damages, and the paragraph in question did not purport to indemnify or hold the owner harmless from damages. *Holmes v. Clear Channel Outdoor, Inc.*, 298 Ga. App. 178, 679 S.E.2d 745 (2009).

Limitation of liability provision enforceable in contract. — Provision in a contract between a developer and an architect limiting the dollar amount of the latter's liability to the former for errors or professional negligence was not void as against public policy under O.C.G.A. § 13-8-2(b). That statute applied only to contract provisions purporting to indemnify or hold harmless the promisee against liability for damages, while the contract simply established a bargained-for cap on the liability of the architect to the developer. *Precision Plan-*

ning, Inc. v. Richmark Cmty., Inc., 298 Ga. App. 78, 679 S.E.2d 43 (2009).

Limitation of liability provision contained in a contract between a real estate developer and an engineering firm was enforceable because the provision represented a reasonable allocation of risks in an arms-length business transaction and did not violate the public policy underlying O.C.G.A. § 13-8-2(a) or the public policy for professional engineering practice set forth in O.C.G.A. § 43-15-1 et seq. *RSN Props. v. Eng'g Consulting Servs.*, 301 Ga. App. 52, 686 S.E.2d 853 (2009), cert. denied, No. S10C0519, 2010 Ga. LEXIS 249 (Ga. 2010).

4. Territorial Limitation

Size of territory restricted not determinative of reasonableness. — Reasonableness as to territory depends not so much on geographical size of the territory as on reasonableness of the territorial restriction. *Moore v. Dwoskin, Inc.*, 226 Ga. 835, 177 S.E.2d 708 (1970).

For discussion regarding territorial limitation necessary for upholding of contracts in restraint of trade. — See *Kinney v. Scarbrough Co.*, 138 Ga. 77, 74 S.E. 772, 40 L.R.A. (n.s.) 473 (1912).

Covenant not to compete which applies to entire state is not always void and unenforceable. Interests of the state will be better served by judging reasonableness of territorial restrictions, considering nature of business involved, and facts surrounding each case. *Barry v. Stanco Communications Prods., Inc.*, 243 Ga. 68, 252 S.E.2d 491 (1979).

Restriction against doing business with any actual or potential customers of the employer located in a specific geographical area in which the employee had not actually done business is overbroad and unreasonable. *Hulcher Servs. v. R.J. Corman R.R.*, 247 Ga. App. 486, 543 S.E.2d 461 (2000).

Partial Restraints of Trade

Partial restraints of trade are not void under O.C.G.A. § 13-8-2. — This provision merely declares existing common law prohibiting general restraints of trade, and partial restraints, as heretofore recognized, are not void. *Watkins v. Avnet, Inc.*, 122 Ga. App. 474, 177 S.E.2d 582 (1970).

Contract in partial restraint may be upheld provided restraint is reasonable and contract is valid in other essentials. *Britt v. Davis*, 239 Ga. 747, 238 S.E.2d 881 (1977).

Contracts in partial restraint of trade are not void as against public policy, provided those contracts are reasonable. *Hood v. Legg*, 160 Ga. 620, 128 S.E. 891 (1925).

Distinction between general and partial restraints of trade. — See *Brewer & Co. v. Lamar, Rankin & Lamar*, 69 Ga. 656, 47 Am. R. 766 (1882).

Reason for distinction between general and partial restraints of trade is that all general restraints tend to promote monopolies and to discourage industry, enterprise, and just competition; whereas same reason does not apply to special restraints, since, on the contrary, it may even be beneficial to the public that a particular place should not be overstocked with persons engaged in the same business. *State v. Central of Ga. Ry.*, 109 Ga. 716, 35 S.E. 37, 48 L.R.A. 351 (1900).

Whether contract in partial restraint of trade is reasonable has reference only to public interest. — Whether contract in partial restraint of trade is reasonable has no reference to contractual rights of parties themselves. It has reference only to interests of the public. *Hood v. Legg*, 160 Ga. 620, 128 S.E. 891 (1925).

Restrictive covenants in employment contracts are considered in partial restraint of trade. *Purcell v. Joyner*, 231 Ga. 85, 200 S.E.2d 363 (1973); *Preferred Risk Mut. Ins. Co. v. Jones*, 233 Ga. 423, 211 S.E.2d 720 (1975); *Orkin Exterminating Co. v. Pelfrey*, 237 Ga. 284, 227 S.E.2d 251 (1976); *McNease v. National Motor Club of Am., Inc.*, 238 Ga. 53, 231 S.E.2d 58 (1976); *Fuller v. Kolb*, 238 Ga. 602, 234 S.E.2d 517 (1977); *Uni-Worth Enters., Inc. v. Wilson*, 244 Ga. 636, 261 S.E.2d 572 (1979); *Merrill Lynch, Pierce, Fenner & Smith v. Sudham*, 506 F. Supp. 1182 (M.D. Ga. 1981), aff'd in part, vacated in part on other grounds, 658 F.2d 1098 (5th Cir. 1981).

Noncompetition and nonsolicitation covenants were reasonable and enforceable, the covenants were of a two-year duration and limited to a seven-county territorial area, and when prohibiting the professional activity of accounting and the solicitation of clients pursuant to the covenant were found to be reasonable in light of the firm's need

to protect the firm's investment in defendant's skills. *Habif, Arogeti & Wynne v. Baggett*, 231 Ga. App. 289, 498 S.E.2d 346 (1998).

What is partial restraint in connection with sale of business. — Restraint is partial when the restraint covers only time and locality during and in which vendee carries on business purchased, and beyond these limitations, seller is at liberty to carry on same business. *Cheese Shop Int'l, Inc. v. Wirth*, 304 F. Supp. 861 (N.D. Ga. 1969).

Contract not to engage in certain business, limited in time and territory, constitutes partial restraint. *Bullock v. Johnson*, 110 Ga. 486, 35 S.E. 703 (1900).

Enforceability of partial restraints of trade. — If a contract is in partial restraint of trade only, the contract may be supported, provided restraint is reasonable and contract is founded on a consideration. *State v. Central of Ga. Ry.*, 109 Ga. 716, 35 S.E. 37, 48 L.R.A. 351 (1900); *Bullock v. Johnson*, 110 Ga. 486, 35 S.E. 703 (1900); *Jefferson v. Markert & Co.*, 112 Ga. 498, 37 S.E. 758 (1900).

Contract only in partial restraint of trade may be upheld, provided restraint is reasonable, and contract is valid in other essentials. *Kutash v. Gluckman*, 193 Ga. 805, 20 S.E.2d 128 (1942); *Orkin Exterminating Co. v. Dewberry*, 204 Ga. 794, 51 S.E.2d 669 (1949), overruled on other grounds, *Barry v. Stanco Communications Prods., Inc.*, 243 Ga. 68, 252 S.E.2d 491 (1979); *Coffee Sys. v. Fox*, 226 Ga. 593, 176 S.E.2d 71 (1970); *Federated Mut. Ins. Co. v. Whitaker*, 232 Ga. 811, 209 S.E.2d 161 (1974).

In deciding whether a partial restraint of trade is reasonable, a court will look to whole subject matter of contract, kind and character of business, the business's location, purpose to be accomplished by restriction, and all circumstances which show intention of parties, and which must have entered into making of contract. *Kutash v. Gluckman*, 193 Ga. 805, 20 S.E.2d 128 (1942).

While contracts in general restraint of trade are void, a contract concerning a lawful and useful business in partial restraint of trade and reasonably limited as to time and place is not void. *Black v. Horowitz*, 203 Ga. 294, 46 S.E.2d 346 (1948); *Burdine v. Brooks*, 206 Ga. 12, 55 S.E.2d 605 (1949); *Aladdin, Inc. v. Krasnoff*, 214 Ga. 519, 105

Partial Restraints of Trade (Cont'd)

S.E.2d 730 (1958); *Spalding v. Southeastern Personnel of Atlanta, Inc.*, 222 Ga. 339, 149 S.E.2d 794 (1966).

Contracts in general restraint of trade are void but a contract concerning a lawful and useful business in partial restraint of trade and reasonably limited as to time and territory, and otherwise reasonable, is not void. *Nelson v. Woods*, 205 Ga. 295, 53 S.E.2d 227 (1949); *Turner v. Robinson*, 214 Ga. 729, 107 S.E.2d 648 (1959); *Thomas v. Coastal Indus. Servs., Inc.*, 214 Ga. 832, 108 S.E.2d 328 (1959); *Coffee Sys. v. Fox*, 226 Ga. 593, 176 S.E.2d 71 (1970); *Moore v. Dwoskin, Inc.*, 226 Ga. 835, 177 S.E.2d 708 (1970); *Federated Mut. Ins. Co. v. Whitaker*, 232 Ga. 811, 209 S.E.2d 161 (1974).

Certain agreements in partial restraint of trade are generally upheld as valid, but before the agreements can be upheld the court must find that restraints imposed are reasonably necessary to protect promisee's business. Thus, restraints must be no broader than necessary to protect promisee, and this surely implies time and place restrictions. *Cheese Shop Int'l, Inc. v. Wirth*, 304 F. Supp. 861 (N.D. Ga. 1969).

Contract in partial restraint of trade is enforceable if it is reasonably limited as to time and territory and not otherwise unreasonable. *Watkins v. Avnet, Inc.*, 122 Ga. App. 474, 177 S.E.2d 582 (1970).

Preventing competition and restraining trade were said to be synonymous terms in laws which prohibit general and unreasonable restraints. Limited restraints, however, if not greater than protection which other party requires, are not outlawed. *Interstate Sec. Police, Inc. v. Citizens & S. Emory Bank*, 237 Ga. 37, 226 S.E.2d 583 (1976).

Restrictive Covenants Ancillary to Employment Contracts

1. In General

Public policy generally disfavors covenants not to compete ancillary to employment contracts. — Covenants not to compete ancillary to employment contracts must be scrutinized in terms of the public policy generally disfavoring such contracts as restraints on trade and competition. Preferred

Risk Mut. Ins. Co. v. Jones, 233 Ga. 423, 211 S.E.2d 720 (1975).

Restraints on future employment must be reasonable as to both time and territory. — Contract without limitation as to space or territory, although limited as to time, not to engage in a particular trade or business, is unenforceable as being against policy of the law. *Kinney v. Scarbrough Co.*, 138 Ga. 77, 74 S.E. 772, 40 L.R.A. (n.s.) 473 (1912); *Roberts v. H.C. Whitmer Co.*, 46 Ga. App. 839, 169 S.E. 385 (1933).

Negative covenant in a contract, ancillary to contract of employment, whereby employee is forbidden to enter into employment in competition with one's employer for a certain period of time after leaving service of employer, but which covenant is not limited as to space or territory, is in general restraint of trade, contrary to public policy of this state, and unenforceable. *Vendo Co. v. Long*, 213 Ga. 774, 102 S.E.2d 173 (1958).

It is essential to validity of restraints on future employment that the restraints be reasonable as to both time and territory. *Stewart v. American Home Mut. Life Ins. Co.*, 107 Ga. App. 105, 129 S.E.2d 367 (1962).

With respect to restrictive agreements ancillary to contract of employment, mere fact that covenant is unlimited as to either time or territory is sufficient to condemn the covenant as unreasonable. *Cheese Shop Int'l, Inc. v. Wirth*, 304 F. Supp. 861 (N.D. Ga. 1969); *Coffee Sys. v. Fox*, 226 Ga. 593, 176 S.E.2d 71 (1970).

Regarding negative covenant ancillary to a contract of employment, it is essential to validity of the contract that the contract contain a reasonable limitation both as to time and territory. *Edwin K. Williams & Co. — E. v. Padgett*, 226 Ga. 613, 176 S.E.2d 800 (1970).

It is essential to validity of an employment contract that a restrictive covenant contain a reasonable limitation both as to time and territory. *Heller v. Margaro*, 148 Ga. App. 591, 252 S.E.2d 11 (1978).

Enforceability of restrictive covenants in employment contracts. — When restrictive clause in contract of employment is supported by sufficient consideration in form of mutual promises and has been rendered definite by performance of main contract, and is reasonable as to time and area, it is

not void under this statute or Ga. Const. 1976, Art. III, Sec. VIII, Para. VIII (see Ga. Const. 1983, Art. III, Sec. VI, Para V). *Griffin v. Vandegriff*, 205 Ga. 288, 53 S.E.2d 345 (1949) (see O.C.G.A. § 13-8-2).

So long as a noncompetition provision in an employment contract does not adversely affect interest of public or injure obligor beyond what is necessary to protect legitimate rights of obligee, it is valid under laws of this state. *Griffin v. Vandegriff*, 205 Ga. 288, 53 S.E.2d 345 (1949).

When restrictive covenant of partnership agreement concerns a useful and lawful business, is only in partial restraint of trade, and is reasonably limited as to time and place, the covenant is valid and enforceable. *Habif v. Maslia*, 214 Ga. 654, 106 S.E.2d 905 (1959).

Restrictive covenants in employment contracts are void unless the covenants are reasonable as between parties, serve a proper function, as protection of legitimate interests of employer, and are not specially injurious to the public. *Foster v. Union Cent. Life Ins. Co.*, 103 Ga. App. 420, 119 S.E.2d 289 (1961), overruled on other grounds, *Brown Stove Works, Inc. v. Kimsey*, 119 Ga. App. 453, 167 S.E.2d 693 (1969).

Agreement in restraint of trade, ancillary to a contract of employment, support by a valuable consideration, and limited as to both time and territory, and not otherwise unreasonable, is enforceable. *Mike Bajalia, Inc. v. Pike*, 226 Ga. 131, 172 S.E.2d 676 (1970).

Three separate elements of restrictive contracts are considered in determining whether such contracts are reasonable: (1) restraint in activity of employee, or former employee, imposed by contract; (2) territorial or geographic restraint; and (3) length of time during which covenant seeks to impose restraint. *Coffee Sys. v. Fox*, 226 Ga. 593, 176 S.E.2d 71 (1970); *Britt v. Davis*, 239 Ga. 747, 238 S.E.2d 881 (1977); *ALW Mktg. Corp. v. McKinney*, 205 Ga. App. 184, 421 S.E.2d 565 (1992).

As a matter of law, a restrictive covenant in an employment contract is to be upheld if the covenant is not unreasonable, is founded on valuable consideration, and is reasonably necessary to protect interest of party in whose favor the covenant is imposed, and does not unduly prejudice interests of the

public. *Moore v. Dwoskin, Inc.*, 226 Ga. 835, 177 S.E.2d 708 (1970).

In determining whether restraints imposed by contract are reasonable, a court will consider nature and extent of trade or business, situation of parties, and all other circumstances. *Preferred Risk Mut. Ins. Co. v. Jones*, 233 Ga. 423, 211 S.E.2d 720 (1975).

Considerations in determining enforceability. — The scope of activities restricted in employment contracts against competition will be found reasonable when there is a rational relationship between those activities and the activities the employee conducted for the former employer. *Wesley-Jessen, Inc. v. Armento*, 519 F. Supp. 1352 (N.D. Ga. 1981).

In covenants against competition in employment contracts, if the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor the restraint is imposed, reasonable as between the parties, and not specially injurious to the public, the restraint will be held valid. *Wesley-Jessen, Inc. v. Armento*, 519 F. Supp. 1352 (N.D. Ga. 1981).

Although restrictive covenants are not favored in law, when the contract is not unreasonable or overbroad and there is strong evidence of and necessity for some protection of employer's expectations from those to whom the employer's affairs are entrusted, restrictive covenants will not be held against public policy. *Puritan/Churchill Chem. Co. v. McDaniel*, 248 Ga. 850, 286 S.E.2d 297 (1982).

Covenants not to compete are scrutinized to determine if the covenant's are sufficiently limited in time and territorial effect and are otherwise reasonable, considering the interests to be protected and the effects on both parties to the contract. *Rash v. Toccoa Clinic Medical Assocs.*, 253 Ga. 322, 320 S.E.2d 170 (1984).

When restrictive covenants in employment contract are divisible, valid ones may be enforced. — When, in an employment contract, two restrictive covenants are divisible, the first, which is valid, may be enforced even though the second is invalid. *Aladdin, Inc. v. Krasnoff*, 214 Ga. 519, 105 S.E.2d 730 (1958).

Performance of underlying contract of employment is sufficient consideration to

Restrictive Covenants Ancillary to Employment Contracts (Cont'd)

1. In General (Cont'd)

support ancillary restrictive agreement which is reasonable and otherwise enforceable. *Griffin v. Vandegriff*, 205 Ga. 288, 53 S.E.2d 345 (1949).

Independent covenant in restraint of trade, with one not a party to employment is invalid, even though supported by a consideration. *Horne v. Peavy*, 224 Ga. 849, 165 S.E.2d 125 (1968).

When one party leased the party's equipment to the other on a long-term basis, the facts were more closely analogous to the covenant not to compete which were ancillary to a franchise or distributorship agreement than the sale of business' assets. Thus, the alleged noncompetition agreement between the parties, even if found to be a binding contract, were unenforceable under Georgia law when the terms of the agreement were not definite or strictly limited in time and territorial effect. *American Equip. Servs., Inc. v. Evans Trailer Leasing Co.*, 650 F. Supp. 1266 (N.D. Ga. 1986).

Mere desire to avoid competition insufficient. — Court will not accept as prima facie valid a covenant related to the territory when the employer does business when the only justification is that the employer wants to avoid competition by the employee in that area. *Adcock v. Speir Ins. Agency, Inc.*, 158 Ga. App. 317, 279 S.E.2d 759 (1981).

If one covenant is void, then all such covenants in same contract are void. — If any covenant not to compete, within a given employment contract, is unreasonable either in time, territory, or prohibited business activity, then all covenants not to compete within the same employment contract are unenforceable. *Ward v. Process Control Corp.*, 247 Ga. 583, 277 S.E.2d 671 (1981).

A nonsolicitation clause ancillary to an employment agreement was overbroad and unenforceable because the clause did not limit the prohibition to only customers with whom the employee had contact, and lacked a territorial restriction; thus, a noncompetition clause was likewise unenforceable as Georgia did not employ the "blue pencil" doctrine of severability. *Trujillo v. Great Southern Equip. Sales, LLC*, 289 Ga. App. 474, 657 S.E.2d 581 (2008).

Reasonableness of covenant is question of law. — Reasonableness of the restraints of covenants against competition in employment contracts is a question of law for determination by the court. *Wesley-Jessen, Inc. v. Armento*, 519 F. Supp. 1352 (N.D. Ga. 1981).

Judgment on the pleadings. — The question of reasonableness in determining the validity of a restrictive covenant remains one of law based on the wording of the covenant, and if after taking the well-pleaded allegations of the complaint as true, it appears that a covenant is void on the covenant's face such that no additional facts could save the covenant, judgment on the pleadings in favor of the defendant is appropriate. *ALW Mktg. Corp. v. McKinney*, 205 Ga. App. 184, 421 S.E.2d 565 (1992).

Protection of employer's image. — Restrictive covenant in employment contract between defendant broadcasting corporation and plaintiff meteorologist/television personality which prohibited competition "on air" in the Atlanta market for a period of six months after termination of employment was valid since the restriction was reasonably tailored to protection of defendant's interest in the defendant's television station's image. *Beckman v. Cox Broadcasting Corp.*, 250 Ga. 127, 296 S.E.2d 566 (1982).

Covenant restricting supervisory work. — Covenant was overbroad because the covenant did not permit an employee to "assist, aid or abet" others, which, in effect, prohibited the employee from working as a supervisor or in other capacities. *American Gen. Life & Accident Ins. Co. v. Fisher*, 208 Ga. App. 282, 430 S.E.2d 166 (1993).

Covenant not to solicit was unenforceable when the covenant prohibited a former insurance representative from accepting applications for insurance from employer's policyholders who wished to transfer to the representative's new company without any solicitation on the representative's part. *American Gen. Life & Accident Ins. Co. v. Fisher*, 208 Ga. App. 282, 430 S.E.2d 166 (1993).

Trial court erred by not determining, as a matter of law, whether noncompete agreements were enforceable; because the agreements contained neither specific territorial limits nor limited their restrictions to cus-

tomers with whom the former employees had contacts during their employment, the restrictions were unreasonable, overbroad, and unenforceable. *Fellows v. All Star, Inc.*, 272 Ga. App. 262, 612 S.E.2d 86 (2005).

Choice of law provisions. — When an employee executed a noncompete agreement in Ohio, then worked for the employer in Ohio and then in Illinois, and then moved to Georgia after going to work for a competitor of the employer, the federal district court declined to enforce the agreement's Ohio choice of law provision, as it was would have operated in contravention of Georgia's public policy under O.C.G.A. § 13-8-2. *Keener v. Convergys Corp.*, 205 F. Supp. 2d 1374 (S.D. Ga. 2002), *aff'd*, in part, *rev'd*, in part, 342 F.3d 1264 (11th Cir. Ga. 2003).

2. Territorial Limitation

Reasonableness of territorial limitation of restrictive covenant in employment contract.

— In determining reasonableness of territorial limitation of restrictive covenant in employment contract, courts will consider nature and extent of trade or business, situation of parties, and all other circumstances. *Turner v. Robinson*, 214 Ga. 729, 107 S.E.2d 648 (1959).

Overly broad covenant unenforceable.

— Agreement prohibiting a physician from practicing within a 20 mile radius of any of the employer's medical centers for two years from termination, even centers where the physician never worked and those opened during the physician's tenure, was overly broad and not enforceable. *Davis v. Albany Area Primary Health Care, Inc.*, 233 Ga. App. 311, 503 S.E.2d 909 (1998).

Reasonableness of territorial limitation.

— Territorial coverage restriction in a covenant not to compete was overbroad where the 80 mile radius stated in the covenant related to the area in which the employer, rather than the employee, did business and the employer could not show a legitimate business interest for the restriction. *Brunswick Floors, Inc. v. Guest*, 234 Ga. App. 298, 506 S.E.2d 670 (1998).

Restrictive covenant not to compete contained in former employee's employment agreement with plaintiff-company was overbroad as to territory and scope of activities where the covenant included all of Georgia and Florida, and was not tailored to the job

the employee performed for the company, but instead, prohibited the employee from being connected in any way with a similar business. *Ceramic & Metal Coatings Corp. v. Hizer*, 242 Ga. App. 391, 529 S.E.2d 160 (2000).

Territorial restrictions related to territory in which employee was employed are generally enforced. *Merrill Lynch, Pierce, Fenner & Smith v. Stidham*, 506 F. Supp. 1182 (M.D. Ga. 1981), *aff'd* in part, vacated in part on other grounds, 658 F.2d 1098 (5th Cir. 1981); *Adcock v. Speir Ins. Agency, Inc.*, 158 Ga. App. 317, 279 S.E.2d 759 (1981).

Absence of geographical limitation. — Nonsolicitation clause in employment contract prohibiting solicitation of employer's clients that employee actually contacted while serving employer is enforceable notwithstanding absence of explicit geographical limitation. *W.R. Grace & Co. v. Mouyal*, 262 Ga. 464, 422 S.E.2d 529 (1992).

Specific territory unascertainable at time of agreement. — Territorial restriction was too indefinite on its face to be enforceable because the restriction contained no specific territory ascertainable at the time the agreement was entered. *ALW Mktg. Corp. v. McKinney*, 205 Ga. App. 184, 421 S.E.2d 565 (1992).

3. Time Limitation

Restraint depriving one from practicing profession in restricted territory for all time is unenforceable. — Restraint or inhibition relating to the right of a person to follow a particular profession, and which deprives the person from practicing one's profession under any and all circumstances in a restricted territory for all time is unreasonable and unenforceable. *Stewart v. American Home Mut. Life Ins. Co.*, 107 Ga. App. 105, 129 S.E.2d 367 (1962).

Covenant preventing transactions with entity which did business with employer within 12 months of termination. — When a covenant prevents a former employee from transacting any business with an entity, with the exception of company vendors, which had transacted business with the company within the 12 months immediately preceding the date on which the employment of employee terminated with the company, such covenant is unreasonable regarding the scope of prohibited business activities. *Ward v. Process*

Restrictive Covenants Ancillary to Employment Contracts (Cont'd)

3. Time Limitation (Cont'd)

Control Corp., 247 Ga. 583, 277 S.E.2d 671 (1981).

4. Application

Restrictions placing greater limitations than are necessary to protect employer render contract void and unenforceable. Watkins v. Avnet, Inc., 122 Ga. App. 474, 177 S.E.2d 582 (1970).

Covenant not to compete in an employment contract that was overbroad as to the contract's territorial coverage and the scope of activity prohibited was unenforceable since the territorial coverage prohibition could not be determined with certainty at the time the employee signed the contract and the activities prohibited included holding stock in other companies working in similar areas. Harville v. Gunter, 230 Ga. App. 198, 495 S.E.2d 862 (1998).

Covenant preventing employee from working for competitor in any capacity is unnecessary for employer's protection. — Covenant wherein employee agreed not to accept employment with a competitor in any capacity imposes a greater limitation upon employee than is necessary for protection of employer and therefore is unenforceable. Uni-Worth Enters., Inc. v. Wilson, 244 Ga. 636, 261 S.E.2d 572 (1979).

Three year and world-wide restrictions unenforceable. — Covenant prohibiting former employee from working in any capacity in the world in the business of developing or selling electronic firearm systems for three years following the employee's termination was overbroad in terms of territorial coverage, the scope of prohibited activity, and substantially limited former employee's right to earn a living. Consequently, the trial court did not err in concluding that the covenant at issue was an unreasonable restraint on trade and therefore unenforceable. Firearms Training Sys. v. Sharp, 213 Ga. App. 566, 445 S.E.2d 538 (1994).

Noncompetition agreement alone not personal service contract. — While a noncompetition agreement joined with affirmative promises is a personal services contract which terminates upon the death of the promisor, a noncompetition agreement

standing alone, with no affirmative promises, is not. Mail & Media, Inc. v. Rotenberry, 213 Ga. App. 826, 446 S.E.2d 517 (1994).

Protection of customers by employers. — While it might have been reasonable to prohibit an employee from selling or soliciting memberships in other motor clubs in territories in which the employee had worked for a period of three years following termination, it was unreasonable to prohibit an employee from engaging in motor club or automobile association business without restricting the employee as to kind and character of activity in which the employee could not engage. McNease v. National Motor Club of Am., Inc., 238 Ga. 53, 231 S.E.2d 58 (1976).

Arguments can be made that a covenant is not too indefinite to be enforced where it merely prohibits employee from calling upon or taking away customers or accounts of employer solicited or contacted by employee during employee's term of employment. Uni-Worth Enters., Inc. v. Wilson, 244 Ga. 636, 261 S.E.2d 572 (1979).

Court will enforce an agreement prohibiting an employee from pirating a former employer's customers served by the employee, during the employment, at the employer's direct or indirect expense. Adcock v. Speir Ins. Agency, Inc., 158 Ga. App. 317, 279 S.E.2d 759 (1981).

Restrictive covenant in employment prohibiting competitive activity within 50-mile radius was overly broad. — A contractual provision which prohibited employee, upon termination of employment, from entering into competitive activity within 50-mile radius of where employer was operating was overly broad and unreasonably restrained trade due to chilling effect that may be had upon post-employment competitive activity because of employee's inability to forecast with certainty the territorial extent of duty owing the former employer. Durham v. Stand-By Labor of Ga., Inc., 230 Ga. 558, 198 S.E.2d 145 (1973).

Protection of confidential business information. — When a duty has been imposed upon an employee pursuant to contract not to disclose confidential business information upon termination of employment, public policy is swung in favor of protecting these commercial intangibles and of preventing unfair methods of exploiting them in breach

of duty. *Wesley-Jessen, Inc. v. Armento*, 519 F. Supp. 1352 (N.D. Ga. 1981).

Law firm fee schedule based on stage of litigation. — Fee schedule between the attorney and the law firm based on the stage of litigation of each case was inextricably linked with the agreement not to compete and as such constitutes an unenforceable restraint on trade because the agreement not to compete contained no limitation on duration. *William N. Robbins, P.C. v. Burns*, 227 Ga. App. 262, 488 S.E.2d 760 (1997).

Overly broad noncompete clause. — Employment contract which contained noncompete and nonsolicitation clauses was deemed unenforceable, pursuant to Ga. Const. 1983, Art. III, Sec. VI, Para. V(c) and O.C.G.A. § 13-8-2, because the noncompete clause was overly broad in that the clause attempted to preclude the former employee not only from performing painting services for prior clients, but also from acting as a sales person in the decorative or faux painting business; there was no evidence that the employer had employed “sales persons” or that the employee had ever acted in that capacity on behalf of the employer, and summary judgment to the employee was proper. *Whimsical Expressions, Inc. v. Brown*, 275 Ga. App. 420, 620 S.E.2d 635 (2005).

Noncompetition agreement that provided that an employee of a drug and alcohol testing service would not compete with the employer “in any area of business” of the employer’s, including solicitation of existing accounts, was unreasonable as overly broad and indefinite; when read as a whole, the agreement was plainly intended to prevent any type of competing activity whatsoever, with the reference to solicitation merely being illustrative of one type of prohibited activity. *Stultz v. Safety & Compliance Mgmt.*, 285 Ga. App. 799, 648 S.E.2d 129 (2007), cert. denied, 2007 Ga. LEXIS 812 (Ga. 2007).

Nonsolicitation of customer covenants not overly broad. — Trial court erred in striking down nonsolicitation of customer covenants in an employment contract between former employees and their employer as the restrictive covenants were reasonable, limited in scope, and not against public policy under Ga. Const. 1983, Art. III, Sec. VI, Para. V(c) and O.C.G.A. § 13-8-2; the covenants only

included current, existing clients and not former customers of the employer, the employees were only prohibited from soliciting the current customers that the employees had served during their employment, and the employees were only prohibited from selling the customer’s insurance or employee benefit plans that were offered by the employer during the employee’s employment. *Palmer & Cay of Ga., Inc. v. Lockton Cos., Inc.*, 284 Ga. App. 196, 643 S.E.2d 746 (2007), cert. denied, 2007 Ga. LEXIS 503 (Ga. 2007).

Restrictive Covenants Ancillary to Sale of Business

1. In General

Greater latitude is allowed for covenants relating to sale of business than those relating to employment. *Watkins v. Avnet, Inc.*, 122 Ga. App. 474, 177 S.E.2d 582 (1970).

Covenants not to compete incorporated in agreements for sale of a business or the business’s assets have been given greater latitude and broadness in their interpretation and enforcement by Georgia courts than those noncompetition covenants ancillary to contracts of employment. *Farmer v. Airco, Inc.*, 231 Ga. 847, 204 S.E.2d 580 (1974).

Latitude of restrictive covenants greater in business deals. — In determining the reasonableness of a restrictive covenant, greater latitude is allowed in those covenants relating to sale of a business, or dissolution of a partnership, than in those covenants ancillary to an employment contract. *Orkin Exterminating Co. v. Dewberry*, 204 Ga. 794, 51 S.E.2d 669 (1949), overruled on other grounds, *Barry v. Stanco Communications Prods., Inc.*, 243 Ga. 68, 252 S.E.2d 491 (1979); *Foster v. Union Cent. Life Ins. Co.*, 103 Ga. App. 420, 119 S.E.2d 289 (1961), overruled on other grounds, *Brown Stove Works, Inc. v. Kimsey*, 119 Ga. App. 453, 167 S.E.2d 693 (1969).

Restraints valid in sale of business may be unreasonable in employment contract. — Restraints which would be valid in sale of a business may be found to be unreasonable where employer seeks to restrain employees from further employment. *Stewart v. American Home Mut. Life Ins. Co.*, 107 Ga. App. 105, 129 S.E.2d 367 (1962).

Restrictive Covenants Ancillary to Sale of Business (Cont'd)

1. In General (Cont'd)

Noncompete agreement. — When partners filed a breach of contract action against a doctor, who was a minority shareholder in a corporation that was party to a joint venture, one of the partners, the trial court improperly used the middle level of scrutiny to evaluate whether the noncompete agreement was an impermissible restraint of trade under O.C.G.A. § 13-8-2 because the agreement was entered into incident to the sale of a partnership interest; hence, summary judgment was improperly granted to the doctor as to the doctor's liability under the agreement. *West Coast Cambridge, Inc. v. Rice*, 262 Ga. App. 106, 584 S.E.2d 696 (2003).

2. Territorial Limitation

Covenant prohibiting vendor from competing within territory to which vendee plans to extend may be valid where area which it embraces is not greater than that which parties may fairly anticipate the extended business will cover. *Orkin Exterminating Co. v. Dewberry*, 204 Ga. 794, 51 S.E.2d 669 (1949), overruled on other grounds, *Barry v. Stanco Communications Prods., Inc.*, 243 Ga. 68, 252 S.E.2d 491 (1979).

Restriction related to sale of business may, where appropriate, extend to all territory covered by such business. — Restrictive covenant which affords a fair protection to party in whose favor covenant is made, and is not injurious to the public may extend to all territory covered by business, the good will of which has been sold. *Farmer v. Airco, Inc.*, 231 Ga. 847, 204 S.E.2d 580 (1974).

3. Application

Covenant connected with sale of business limited as to time but not territory is unenforceable. *Seay v. Spratling*, 133 Ga. 27, 65 S.E. 137 (1909); *Bonner v. Bailey*, 152 Ga. 629, 110 S.E. 875 (1922).

Covenant not to reenter business like that sold within a limited territory is binding. *Holtman v. Knowles*, 141 Ga. 613, 81 S.E. 852 (1914); *Morris-Forrester Oil Co. v. Taylor*, 158 Ga. 201, 122 S.E. 680 (1924).

Restrictive covenant in contract selling good will, reasonable as to time and place, is

enforceable. — It has been settled by this court that a contract in reference to selling the good will of the vendor, and stipulating that the vendor will not enter into or engage in a similar business, if reasonable as to time and place, is enforceable. *Rakestraw v. Lanier*, 104 Ga. 188, 30 S.E. 735, 69 Am. St. R. 154 (1898); *Jefferson v. Markert & Co.*, 112 Ga. 498, 37 S.E. 758 (1900).

Duty not to compete for customers existing at time of sale of business is reasonable.

— Duty not to compete for customers is reasonable and definite where it extends only to those customers existing at time of sale as shown by seller's accounts receivable. *Farmer v. Airco, Inc.*, 231 Ga. 847, 204 S.E.2d 580 (1974).

Gambling and Wagering Contracts

1. In General

Gambling contract or one based upon a gaming consideration is void and unenforceable. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Gambling transactions contravene public policy of Georgia and constitute obligations unenforceable in Georgia courts. *Gulf Collateral, Inc. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976).

Gambler shall not be protected in the gambler's unlawful gains. *Gulf Collateral, Inc. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976).

In gambling contract, one party is certain to lose. — In an ordinary contract both parties may ultimately gain by entering into agreement; where in a gambling contract one of the parties is certain to lose, and by terms of such contract consideration must fall to one or the other upon determination of specified event. *Martin v. Citizens' Bank*, 177 Ga. 871, 171 S.E. 711 (1933).

Absence of purpose to deal with actual property marks distinction between legal and gambling contracts in reference to sale of personal property. *Martin v. Citizens' Bank*, 177 Ga. 871, 171 S.E. 711 (1933).

Mere insertion of provision for forfeiture does not constitute gambling, nor make of agreement a gambling contract. *Martin v. Citizens' Bank*, 177 Ga. 871, 171 S.E. 711 (1933).

Contracts known as options are not to be classed as gambling contracts under laws of

Georgia, nor are the contracts otherwise condemned as unlawful for any reason. *Martin v. Citizens' Bank*, 177 Ga. 871, 171 S.E. 711 (1933).

Georgia courts have jurisdiction if gaming contract is made or bet is laid in Georgia. — Fact that loser of bet resides in England and that money is paid from that country does not necessarily render matter not within the jurisdiction of the courts of this state; it is sufficient if gaming contract is made or bet is laid in State of Georgia. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Wagering contracts are against policy of the law and are unenforceable. *Gulf Collateral, Inc. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976).

Suit to enforce gambling debt judgment of another state. — O.C.G.A. § 13-8-2 did not preclude giving full faith and credit to a New Jersey judgment entered to enforce a gambling debt, where the Georgia suit was not on the gambling debt itself, but was rather a suit to domesticate a valid judgment of a sister state. *Hargreaves v. Greate Bay Hotel & Casino*, 182 Ga. App. 852, 357 S.E.2d 305 (1987).

Wagering contract defined. — Wagering contract has been defined to be one in which parties in effect stipulate that the parties shall gain or lose upon happening of uncertain event in which the parties have no interest, except that arising from possibility of such gain or loss. *Martin v. Citizens' Bank*, 177 Ga. 871, 171 S.E. 711 (1933).

So long as something is actually bought, sold, or contracted for, there is no wagering, not even if thing contracted for does not then exist. *Martin v. Citizens' Bank*, 177 Ga. 871, 171 S.E. 711 (1933).

Purely speculative contract is not necessarily a wagering contract. *Martin v. Citizens' Bank*, 177 Ga. 871, 171 S.E. 711 (1933).

Speculation is not per se unlawful. *Martin v. Citizens' Bank*, 177 Ga. 871, 171 S.E. 711 (1933).

2. Application

Betting upon a game of golf is gaming. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Side bet placed upon ultimate outcome or final result of any game whatever constitutes gaming. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Betting that one game competitor, among many, will win is a side bet upon a game. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Fact that gaming contract is made by insurance company does not render contract valid. — Fact that loser of a bet is an insurance company and that contract is made by such company does not render such contract valid and not a gaming contract. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Bet upon rise or fall of price of stock or merchandise constitutes a wager. — When there is no real transaction, but only a bet upon rise or fall of price of stock or article of merchandise in exchange or market, one party agreeing to pay if there is a rise, and the other party agreeing to pay if there is a fall in price, the agreement is a pure wager. *Martin v. Citizens' Bank*, 177 Ga. 871, 171 S.E. 711 (1933).

3. Insurance Contracts

Policy of insurance which contemplates anything beyond indemnity is a mere wager. *Fireman's Fund Ins. Co. v. Pekor*, 106 Ga. 1, 31 S.E. 779 (1898).

Contract insuring life of one in whom party beneficiary has no insurable interest is void. — Contract for insurance upon life of another party taken out by one without any insurable interest is a wagering contract contrary to public policy and is therefore null and void. *West v. Sanders*, 104 Ga. 727, 31 S.E. 619 (1898).

Contract of insurance entered into between one named as beneficiary therein and an insurance company, insuring another in whose life the beneficiary has no insurable interest, is void from the contract's inception, being a wagering contract and against public policy. *Wilson v. Progressive Life Ins. Co.*, 61 Ga. App. 617, 7 S.E.2d 44 (1940).

Courts should not concern themselves with disposition of proceeds of "wagering" insurance policies. *Exchange Bank v. Loh*, 104 Ga. 446, 31 S.E. 459, 44 L.R.A. 372 (1898); *West v. Sanders*, 104 Ga. 727, 31 S.E. 619 (1898).

Rule restricting execution of insurance contracts to persons having insurable interests is founded on public policy. *Gordon v. Gulf Am. Fire & Cas. Co.*, 113 Ga. App. 755, 149 S.E.2d 725 (1966).

Contracts of Maintenance or Champerty

Contracts of maintenance or champerty are void and cannot be enforced. — This rule applies alike to implied contracts. *Sapp v. Davids*, 176 Ga. 265, 168 S.E. 62 (1933).

What constitutes a champertous contract.

— There are two essential elements of a champertous agreement: first, there must be undertaking by one person to defray expense of whole or part of another's suit; second, agreement or promise on part of latter to divide with former proceeds of litigation in event the litigation proves successful. *Anderson v. Anderson*, 12 Ga. App. 706, 78 S.E. 271 (1913); *Clark v. Harrison*, 182 Ga. 56, 184 S.E. 620 (1936).

Champerty is the unlawful maintenance of a suit in consideration of a bargain to have part of thing in dispute, or some profit out of the litigation, and promise to pay expenses or costs, seems to be essential to such a contract. *Sapp v. Davids*, 176 Ga. 265, 168 S.E. 62 (1933).

Champerty is defined as a bargain by a champertor with a plaintiff or defendant for a portion of the matter involved in a suit in case of a successful termination of the ac-

tion, which champertor undertakes to maintain or carry on at champertor's own expense. Such a contract is unenforceable between parties. *Brown & Huseby, Inc. v. Chrietzberg*, 242 Ga. 232, 248 S.E.2d 631 (1978).

When there is no contract of employment, there can be no champerty or maintenance. *Clark v. Harrison*, 182 Ga. 56, 184 S.E. 620 (1936).

Contract for fee to be paid out of proceeds of suit is not champertous. *Twiggs v. Chambers*, 56 Ga. 279 (1876).

A contract between client and attorney, wherein it is stipulated that attorney shall receive a certain percent for collection of claim, upon or out of amount collected, is not champertous, there being no agreement on part of attorney to bear expenses of litigation, or to save plaintiff harmless from costs, as is essential to make out common-law offense of champerty. *Moses v. Bagley & Sewell*, 55 Ga. 283 (1875).

Prohibition of champertous contracts does not affect pending cause of action underlying such contracts. *Ellis v. Smith & Bussey*, 112 Ga. 480, 37 S.E. 739 (1900).

OPINIONS OF THE ATTORNEY GENERAL

O.C.G.A. § 13-8-2 and constitutional provision have same meaning. — Supreme Court has held that Ga. Const. 1976, Art. III, Sec. VIII, Para. VIII (see, now, Ga. Const. 1983, Art. III, Sec. VI, Para. V) is an embodiment of the common-law rule which prohibited contracts in general restraint of trade, and thus that it has same meaning as this statute which states that contracts in general restraint of trade cannot be enforced. 1960-61 Op. Att'y Gen. p. 429 (see O.C.G.A. § 13-8-2).

Contracts in partial restraint of trade are valid if reasonable and not injurious to public interest. 1960-61 Op. Att'y Gen. p. 429.

Rule as to partial restraints of trade is applicable to public service corporations. 1960-61 Op. Att'y Gen. p. 429.

Contract by public official which hampers or restricts performance of the official's public duties contravenes public policy. 1958-59 Op. Att'y Gen. p. 241.

Public offices may not be bought and sold, such agreements being contrary to public

policy and void at common law. 1958-59 Op. Att'y Gen. p. 241.

Insurer's partial payment of insured's attorney's fees, by itself, does not constitute maintenance. — Although by paying for at least a portion of an insured's attorney's fees an insurer would assist insured in defraying expenses of litigation, that fact alone does not require a contract to be regarded as a contract of maintenance. 1974 Op. Att'y Gen. No. 74-48.

Department of Offender Rehabilitation and the department's director cannot divest themselves of duty of selecting wardens. — Duty of selecting and employing wardens is vested exclusively in State Board of Corrections (now Department of Offender Rehabilitation) and director (now commissioner); the board and the director are to exercise their informed and expert judgment in selecting and discharging such officials, and any contract or agreement whereby they seek to divest themselves of that discretion, power, and judgment is void as being con-

trary to public policy. 1958-59 Op. Att'y Gen. p. 241.

RESEARCH REFERENCES

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Am. Jur. Proof of Facts. — Enforceability of Covenant Not to Compete, 8 POF2d 663. Enforcement of Casino Gambling Debts, 71 POF3d 193.

Enforcement of International Gambling Debts, 87 POF3d 347.

C.J.S. — 17 C.J.S., Contracts, §§ 29, 215 et seq., 273.

ALR. — Purchase of cause of action by attorney as champertous, 4 ALR 173.

Validity of individual contract by director to put or maintain a designated person in office, 12 ALR 1070; 45 ALR 795.

Rights and remedies of one whose contract for a free or reduced service rate with public utility in consideration of a grant of property or privileges is nullified by public authority, 14 ALR 252.

Validity of contract by agent for compensation from third person for negotiating loan or sale with principal, 14 ALR 464.

Innocence of the person threatened as affecting the rights or remedies in respect of contracts made, or money paid, to prevent or suppress a criminal prosecution, 17 ALR 325.

Validity of agreement by bailee of instrumentality to purchase his supplies from bailor, 17 ALR 392.

Validity of agreement to pay an officer or employee of a bank or trust company to disclose the existence of, or to assist one to establish, a deposit, 18 ALR 979.

Elements bearing directly upon the quality of a contract as affecting the character of one as independent contractor, 20 ALR 684.

Validity and enforceability of restrictive covenant in contracts of employment, 20 ALR 861; 29 ALR 1331; 52 ALR 1362; 67 ALR 1002; 98 ALR 963.

Validity of lobbying contracts, 29 ALR 157; 67 ALR 684.

Right of manufacturer to make its warranties conditional on nonuse of accessories manufactured by others, and to require its agents not to handle them, 29 ALR 235.

Validity and enforceability of restrictive covenants in contracts of employment, 29

ALR 1331; 52 ALR 1362; 67 ALR 1002; 98 ALR 963.

Judgments enforcing contract contrary to public policy as subject to collateral attack, 30 ALR 1100.

Laundry business as within statute relating to monopolies, 31 ALR 533.

Validity of contract for repayment of embezzled money, 32 ALR 422.

Right of manufacturer, producer, or wholesaler to control resale price, 32 ALR 1087; 103 ALR 1331; 125 ALR 1335.

Contract for services in connection with attempt to prevent a criminal investigation or prosecution, 33 ALR 779.

Validity of agreement for sale of information as to claims or property rights, 34 ALR 1537.

Incontestable clause as excluding a defense based upon public policy, 35 ALR 1491; 170 ALR 1040.

Public policy in respect of associations or combinations of public contractors and their rules and regulations, 45 ALR 549.

Validity of individual contract by director or stockholder to put or maintain a designated person in office, 45 ALR 795.

Insurance under Workmen's Compensation Act as coextensive with the insured's liability under act, 45 ALR 1329; 108 ALR 812.

Telegraph ticker service, 45 ALR 1379.

Agreement conditional upon obligor securing public office, 45 ALR 1399.

Validity of contract to testify, 45 ALR 1423.

Validity of contract to influence administrative or executive officer or department, 46 ALR 196; 148 ALR 768.

Validity and construction of contract or option on purchase of corporate stock by employee for resale thereof to original seller on termination of employment, 48 ALR 625; 66 ALR 1182.

Validity and construction, as regards buildings not on right of way, of contract relieving railroad from liability for destruction of buildings, 48 ALR 1003; 51 ALR 638.

Application of anti-trust laws to combinations to maintain prices of commodities as affected by reasonableness of prices fixed, 50 ALR 1000.

Validity and enforceability of restrictive covenants in contracts of employment, 52 ALR 1362; 67 ALR 1002; 98 ALR 963.

Enforceability of contract not in itself opposed to law or public policy but which may aid incidentally in evasion or violation of the law or public policy, 53 ALR 1364.

Effect on insurance contract of wagering assignment thereof, 53 ALR 1403.

Validity of contract as affected by public policy as an independent question for the federal courts, or one as to which they are bound to follow the decisions of the state court, 57 ALR 435.

Validity of contract which impairs or tends to impair the ability of a public service corporation to serve the public, 58 ALR 804.

Validity of contract to influence third person with respect to disposal of property at death or by gift during lifetime, 61 ALR 646.

Validity of agreement of stockholder not to engage in business in which corporation is engaged, 63 ALR 316.

Validity of contract to induce neighboring property owners to consent, or to withdraw objection, to erection of building or other private structure, 65 ALR 998.

Validity of lobbying contracts, 67 ALR 684.

Validity of stipulation in indemnity or guaranty contract or bond making voucher, accounts, books, or other evidence of payment or loss competent, prima facie, or conclusive evidence of the fact or amount of liability, 68 ALR 330.

Validity and effect of covenant or agreement of indemnity in lease, purporting to indemnify lessee against loss if use for which premises are leased proves illegal, 68 ALR 1379.

Contracts entered into before death, relating to burial or cremation, or steps incident thereto, as opposed to public policy, or as proper subject of regulation by statute, 68 ALR 1525.

Validity of agreement by public officer to accept less than compensation or fees fixed by law, 70 ALR 972; 118 ALR 1458; 160 ALR 490.

Champerty rule or statute as applicable to tax sale, execution sale, or judicial sale, or to conveyances by persons claiming under such sales, 71 ALR 592.

Right of municipality to exact of contractor additional consideration as condition of extension of time for completion of improvements, 71 ALR 904.

Validity of agreement by which one is to benefit from consent to, or promotion of, marriage between other persons, 72 ALR 2113.

Removal or attempted removal of one from field of competition by inducing him to enter another's employment as violation of Anti-monopoly Act, 74 ALR 289.

Change of conditions subsequent to judgment enforcing restrictive covenant, 76 ALR 1358.

What is a "manufacturing" business or enterprise within covenant restricting the use of real property, 81 ALR 1047.

Right of manufacturer to question reasonableness of regulation by individual or private corporation which excludes use of manufacturer's products, 81 ALR 1422.

Sale of business and "good will," or of interest in partnership and "good will," as implying restriction against competition in absence of provision in that regard, 82 ALR 1030.

Contract by one party to sell his entire output to, or to take his entire requirements of a commodity from, the other as contrary to public policy or antimonopoly statutes, 83 ALR 1173.

Validity, construction, application, and effect of provision of lease exempting landlord from liability on account of condition of property, 84 ALR 654.

Right of attorney to recover upon quantum meruit or implied contract for services rendered under champertous contract, 85 ALR 1365.

Validity and effect of agreement between attorney and layman to divide attorney's fees or compensation for business of third person, 86 ALR 195.

Right of attorney to recover for services performed under contract procured by solicitation, 86 ALR 517.

Validity and effect of agreement by property owner, by bond or other contract, to pay assessment against property for local improvement, 86 ALR 779; 127 ALR 551; 167 ALR 1030.

Contract to keep out of a particular business or not to use property for a specified purpose as an unlawful restraint of trade when independent of any other contract, 91 ALR 980.

Right of one not a party to a combination or contract in restraint of trade to maintain

a suit to enjoin the same or to recover damages he suffers by reason thereof, 92 ALR 185.

Relation to, or nature of contract with, competitor which amounts to violation of covenant or injunction against engaging directly or indirectly in competing business, but not expressly prohibiting acceptance of employment from competitor, 93 ALR 121.

Bond to indemnify public against expense of extradition or other criminal proceedings in event they are unsuccessful as contrary to public policy, 94 ALR 355.

Validity of provision accelerating maturity of obligation as affected by rule against contract in restraint of trade, 96 ALR 1130.

Agreement to indemnify one otherwise responsible for loss on unauthorized investment of infant's funds or trust funds as contrary to public policy, 103 ALR 945.

Validity of guaranty, by bank officers or stockholders, of deposit, 103 ALR 1032.

Right of manufacturer, producer, or wholesaler to control resale price, 103 ALR 1331; 125 ALR 1335; 125 ALR 1335.

Law as to champerty or maintenance as applied to agreements with respect to bringing and prosecution of claims against government or agencies of government, 106 ALR 1494.

Rights and remedies of parties to an otherwise valid contract as affected by intended use for improper ulterior purpose of the writing or document by which it is evidenced as distinguished from its subject matter, 114 ALR 370.

Validity and construction of contract by labor unions to continue salary or wages in whole or part or pay benefits if other party loses employment or position because of joining union, 114 ALR 1300; 125 ALR 1260.

Rule that denies relief to party in *pari delicto* as applicable to transaction with a public officer or an official of the court, 116 ALR 1018.

Suppression of will, or agreement for its suppression, as contrary to public policy or to statute in that regard, 117 ALR 1249.

Validity of covenant by employee or seller of business not to enter employment of customers, clients, or patrons of the business, 119 ALR 1452.

Legality of combination among building or construction contractors, 121 ALR 345.

Contract in consideration of renunciation

of one's status, or right to appointment, as guardian, executor, administrator, trustee, or other fiduciary, as contrary to public policy, 121 ALR 677.

Life policy or collateral agreement under which benefits on death of one member of a group or class of policyholders who have no insurable interest in lives of one another are to be shared by surviving members, as contrary to public policy as a wagering contract, 121 ALR 725.

Contract by one person to defend litigation that has been or may be instituted against another as champertous or maintainous, 121 ALR 847.

Validity of note or other obligation given to prevent or discourage prosecution as affected by fact that criminal prosecution had already been commenced when obligation was given, 129 ALR 1153.

Legality of combination among farmers, 130 ALR 1326.

Validity of contract between governmental unit and attorney which makes compensation contingent upon results accomplished, 136 ALR 116.

Judicial decisions involving ASCAP, 136 ALR 1438.

Offense of barratry; criminal aspects of champerty and maintenance, 139 ALR 620.

Who is nonprofessional or casual gambler within statute relating to recovery of gambling losses which in terms or by construction distinguishes between professional and nonprofessional or casual gamblers, 141 ALR 941.

Validity of contract to influence administrative or executive officer or department, 148 ALR 768.

Validity and enforceability of provision restricting competition after termination of employment in, or sale of, real-estate broker's business, 149 ALR 633.

Validity and enforceability of negative restrictive covenant in contract for services as affected by fact that it was not included in original contract of employment but in a subsequent contract for continuance of employment, 152 ALR 415.

Usury as affecting conditional sale contract, 152 ALR 598.

Restrictive clause in employment or sales contract to prevent future competition or performance of services for others as affected by breach by party seeking to enforce

it, of his own obligations under the contract, 155 ALR 652.

Provisions of articles or bylaws of non-profit corporation or association formed by business competitors whereby the amount of dues of respective members varies according to amount of business done by them, as contrary to public policy, 161 ALR 795.

Operation of negative or restrictive covenant in contract of employment for a specific period, as extended by continuance in the employment after the expiration of that period, 163 ALR 405.

Validity, construction, and application of guaranty of corporate stock, or dividends thereon, by one other than corporation, 170 ALR 1171.

Rights and remedies in respect of property pledged for payment of gambling debt, 172 ALR 701.

Enforceability, as between parties, of an executory agreement made in fraud of creditors, 172 ALR 1121.

Construction and application of covenant restricting use of property to "residence" or "residential purposes," 175 ALR 1191.

Statutes prohibiting restraint on profession, trade, or business as applicable to restrictions in employment or agency contracts, 3 ALR2d 522.

Obligations as between applicant for admission to charitable home, and home, respecting compensation to home, and property rights of applicant, 10 ALR2d 864.

Validity and construction of provision for liquidated damages in contract with cooperative marketing association, 12 ALR2d 130.

Enforceability as between the parties of agreement to purchase property at judicial or tax sale for their joint benefit, 14 ALR2d 1267.

Assignment of, or succession to, statutory right of action for recovery of money lost at gambling, 18 ALR2d 999.

Restrictive agreements or covenants in respect of purchase or handling of petroleum products by operator of filling station, 26 ALR2d 219.

Validity and effect of promise not to make a will, 32 ALR2d 370.

Validity of agreement by veteran purchasing property under loan guaranty to hold property on trust and the like for another furnishing the consideration, 33 ALR2d 1285.

Enforceability of restrictive covenant, ancillary to employment contract, as affected by duration of restriction, 41 ALR2d 15.

Validity and enforceability of agreement to drop or compromise will contest or withdraw objections to probate, or of agreement to induce others to do so, 42 ALR2d 1319.

Enforceability of restrictive covenant, ancillary to employment contract, as affected by territorial extent of restriction, 43 ALR2d 94.

Enforceability of covenant against competition, ancillary to sale or other transfer of business, practice, or property, as affected by duration of restriction, 45 ALR2d 77; 13 ALR4th 661.

Validity and effect of agreement controlling the vote of corporate stock, 45 ALR2d 799.

Enforceability of covenant against competition, ancillary to sale or other transfer of business, practice, or property, as affected by territorial extent of restriction, 46 ALR2d 119.

Court rules limiting amount of contingent fees or otherwise imposing conditions on contingent fee contracts, 77 ALR2d 411.

Validity of contractual stipulation or provision waiving debtor's exemption, 94 ALR2d 967.

Validity, construction, and effect of lessor's covenant against use of his other property in competition with the lessee-covenantor, 97 ALR2d 4.

Attorney's recovery in quantum meruit for legal services rendered under a contract which is illegal or void as against public policy, 100 ALR2d 1378.

Rendering financial or other assistance to another as breach of covenant not to compete, 1 ALR3d 778.

Validity and construction of contract exempting hospital or doctrine from liability for negligence to patient, 6 ALR3d 704.

Validity and construction of statute regulating dealings between automobile manufacturers, distributors, and dealers, 7 ALR3d 1173.

Validity and propriety of arrangement by which attorney pays or advances expenses of client, 8 ALR3d 1155.

Validity, enforceability, and effect of provision in seamen's employment contract stipulating the maximum recovery for scheduled personal injuries, 9 ALR3d 417.

Validity, construction, and effect of agreement, in connection with real-estate lease or license by railroad, for exemption from liability or for indemnification by lessee or licensee, for consequences of railroad's own negligence, 14 ALR3d 446.

Enforceability of transaction entered into pursuant to referral sales arrangement, 14 ALR3d 1420.

Validity, construction, and effect of provision of lease exempting landlord or tenant from liability on account of fire, 15 ALR3d 786.

Covenant restricting use of land, made for purpose of guarding against competition, as running with land, 25 ALR3d 897.

Employee's duty, in absence of express contract, not to disclose or use in new employment special skills or techniques acquired in earlier employment, 30 ALR3d 631.

Waiver of right to widow's allowance by antenuptial agreement, 30 ALR3d 858.

Zoning or other public restrictions on the use of property as affecting rights and remedies of parties to contract for the sale thereof, 39 ALR3d 362.

Validity, in contract for installment sale of consumer goods, or commercial paper given in connection therewith, of provision waiving, as against assignee, defenses good against seller, 39 ALR3d 518.

Validity and construction of prescription drug insurance plans, 42 ALR3d 897.

Validity and construction of state and municipal enactments regulating lobbying, 42 ALR3d 1046.

Recovery against physician on basis of breach of contract to achieve particular result or cure, 43 ALR3d 1221.

Validity and construction of restrictive covenant controlling architectural style of buildings to be erected on property, 47 ALR3d 1232.

Validity of exculpatory clause in lease exempting lessor from liability, 49 ALR3d 321.

Validity and construction of restrictive covenant not to compete ancillary to franchise agreement, 50 ALR3d 746.

Sufficiency of consideration for employee's covenant not to compete, entered into after inception of employment, 51 ALR3d 825.

Validity of pyramid distribution plan, 54 ALR3d 217.

Insurable interest of brother or sister in life of sibling, 60 ALR3d 98.

Validity and construction of provision (escalator clause) in land contract or mortgage that rate of interest payable shall increase if legal rate is raised, 60 ALR3d 473.

Enforceability, insofar as restrictions would be unreasonable, of contract containing unreasonable restrictions on competition, 61 ALR3d 397.

Validity and construction of contractual restrictions on right of medical practitioner to practice, incident to sale of practice, 62 ALR3d 918.

Validity and construction of contractual restrictions on right of medical practitioner to practice, incident to partnership agreement, 62 ALR3d 970.

Validity and construction of contractual restrictions on right of medical practitioner to practice, incident to employment agreement, 62 ALR3d 1014.

Liability of subcontractor upon bond or other agreement indemnifying general contractor against liability for damage to person or property, 68 ALR3d 7.

Validity and construction of contract exempting agricultural fair or similar bailee from liability for articles delivered for exhibition, 69 ALR3d 1025.

Validity and construction of "no damage" clause with respect to delay in building or construction contract, 74 ALR3d 187.

Validity and construction of contract between hospital and physician providing for exclusive medical services, 74 ALR3d 1268.

Application of state antitrust laws to athletic leagues or associations, 85 ALR3d 970.

Doctrine of unconscionability as applied to insurance contracts, 86 ALR3d 862.

Practices forbidden by state deceptive trade practice and consumer protection acts, 89 ALR3d 449.

Validity of release of prospective right to wrongful death action, 92 ALR3d 1232.

What constitutes contract between husband or wife and third person promotive of divorce or separation, 93 ALR3d 523.

Liability for interference with invalid or unenforceable contracts, 96 ALR3d 1294.

Restrictive covenants as to height of structures or buildings, 1 ALR4th 1021.

Validity and construction of contractual restriction on right of accountant to practice, incident to sale of practice or with-

drawal from accountancy partnership, 13 ALR4th 661.

Validity and effect of stipulation in contract to effect that it shall be governed by law of particular state which is neither place where contract is made nor place where it is to be performed, 16 ALR4th 967.

Validity of contractual provision limiting place or court in which action may be brought, 31 ALR4th 404.

Enforceability of covenant not to compete involving radio or television personality, 36 ALR4th 1139.

Propriety, under state law, of manufacturer's or supplier's refusal to sell medical product to individual physician, hospital, or clinic, 45 ALR4th 1006.

Covenants to reimburse former employer for lost business, 52 ALR4th 139.

Modern status of view as to validity of premarital agreements contemplating divorce or separation, 53 ALR4th 22.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by fairness or adequacy of those terms — modern cases, 53 ALR4th 161.

Enforceability of sale-of-business agreement not to compete against nonsigner or nonowning signer, 60 ALR4th 294.

Anticompetitive covenants: aerial spray dust business, 60 ALR4th 965.

Validity, construction, and application of state statutes regulating dealings between automobile manufacturers, dealers, and franchisees, 82 ALR4th 624.

Enforceability, by purchaser or successor of business, of covenant not to compete entered into by predecessor and its employees, 12 ALR5th 847.

"Unconscionability," under UCC § 2-302, of bank's letter of credit or other financing arrangements, 15 ALR5th 365.

Validity, construction, and effect of agreement exempting operator of amusement facility from liability for personal injury or death of patron, 54 ALR5th 513.

Illegality as basis for denying remedy of specific performance for breach of contract, 58 ALR5th 387.

Who is "automobile manufacturer" for purposes of the Automobile Dealers Day in Court Act (15 USCS secs. 1221 et seq.), 51 ALR Fed. 812.

Vertical restraints on sales territory or location as violative of § 1 of Sherman Act (15 USC § 1)—post-GTE Sylvania cases, 92 ALR Fed. 436.

13-8-2.1. (For effective date, see note.) Contracts in partial restraint of trade.

(a) Contracts that restrain in a reasonable manner any party thereto from exercising any trade, business, or employment are contracts in partial restraint of trade and shall not be considered against the policy of the law, and such partial restraints, so long as otherwise lawful, shall be enforceable for all purposes. Without limiting the generality of the foregoing, contracts of the type described in subsections (b) through (d) of this Code section are considered to be reasonable.

(b)(1) As used in this subsection, the term:

(A) "Affiliate" means: (i) a person or entity that directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with a specified person or entity; (ii) any entity of which a specified person is an officer, director, or partner or holds an equity interest or ownership position that accounts for 25 percent or more of the voting or profits interest of such entity; (iii) any trust or other estate in which the specified person or entity has a beneficial interest of 25 percent or more or as to which such person or entity serves as trustee or in a similar fiduciary capacity; and (iv) the

spouse, lineal ancestors, lineal descendants, and siblings of the specified person, as well as their spouses.

(B) “Business” means any line of trade or business involved in a sale.

(C) “Buyer” means any person or entity, including any successor-in-interest to such an entity, that acquires a business or a controlling interest in a business.

(D) “Controlling interest” means any equity interest or ownership participation held by a person or entity with respect to a business: (i) which accounts for 25 percent or more of the voting or profits interest of the business prior to the sale, alone or in combination with the interest or participation held by affiliates of such person or entity; or (ii) the sale of which results in the owner thereof receiving consideration worth at least \$500,000.00, inclusive of any consideration received for the sale of business covenant.

(E) “Sale” means any sale or transfer of the good will or substantially all of the assets of a business or any sale or transfer of a controlling interest in a business, whether by sale, exchange, redemption, merger, or otherwise.

(F) “Sale of business covenant” means any agreement described in paragraph (2) of this subsection or any substantially equivalent agreement.

(G) “Seller” means any person or entity, including any successor-in-interest to such an entity, that is: (i) an owner of a controlling interest; (ii) an executive employee, officer, or manager of the business who receives, as a minimum, consideration in connection with either the sale or the sale of business covenant that is worth the equivalent of such person’s most recent annual base salary or is in the form of a commitment of continued employment for a period of at least one year; or (iii) an affiliate of a person or entity described in division (i) of this subparagraph; provided, however, that each sale of business covenant shall be binding only on the person or entity entering into such covenant, its successors-in-interest, and, if so specified in the covenant, any entity that directly or indirectly through one or more intermediaries is controlled by or is under common control of such person or entity.

(2) A seller may agree in writing for the benefit of a buyer to refrain from:

(A) Carrying on or engaging in any activity competitive with the business; or

(B) Soliciting or accepting business from the business’s customers which were customers at or prior to the time of the sale, including

actively sought prospective customers, for purposes of providing products or services competitive with those provided by the business

within the geographic area or areas where the business conducts its operations at the time of the sale, including any area where the business's customers and actively sought prospective customers are present and including any area into which the business is reasonably expected to expand, provided that such activity, business, and area must be described in such writing. A sale of business covenant may, if reasonable to protect the interests of the buyer or the good will of the business, be worldwide. A sale of business covenant may extend for any period of time that is reasonable to protect the interests of the buyer or the good will of the business. Each sale of business covenant shall, however, be considered to terminate at the time the business is discontinued or either the seller, including all successors-in-interest, or the buyer, including all successors-in-interest, ceases to exist.

(c)(1) As used in this subsection, the term:

(A) "Business" means any line of trade or business conducted by an employer.

(B) "Employee" means: (i) an executive employee, officer, manager, or key employee; (ii) research and development personnel or other persons or entities, including independent contractors, in possession of confidential information that is important to the business; (iii) any other person or entity, including an independent contractor, in possession of selective or specialized skills, learning, or abilities or customer contacts or customer information; or (iv) any party to a partnership agreement, franchise, distributorship, or license agreement or sales agent, broker, representative, or supervisor. The term "employee" shall not include, however, any employee who lacks selective or specialized skills, learning, customer contacts, or abilities.

(C) "Employer" means any corporation, partnership, proprietorship, or other organization, including any successor-in-interest to such an entity, that conducts a business or any person or entity that directly or indirectly owns an equity interest or ownership participation in such an entity that accounts for 50 percent or more of the voting or profits interest of such entity.

(D) "Material contact" exists between an employee and each customer or potential customer: (i) with whom the employee dealt; (ii) whose dealings with the employer were coordinated or supervised by the employee; (iii) about whom the employee obtained confidential information in the ordinary course of business as a result of such employee's association with the employer; or (iv) who receives products or services authorized by the employer, the sale or provision of which results or resulted in compensation, commissions, or earnings

for the employee within two years prior to the date of the employee's termination.

(E) "Post-employment covenant" includes any agreement described in paragraphs (2) through (4) of this subsection or any substantially equivalent agreement.

(F) "Products or services" means anything of commercial value, including without limitation goods; personal, real, or intangible property; services; financial products or services; business opportunities or assistance; or any other object or aspect of business or the conduct thereof.

(G) "Termination" means the termination of an employee's engagement with an employer, whether with or without cause and upon the initiative of either party, provided that any possible inequity that results from the discharge of an employee without cause or in violation of a contractual or other legal obligation of the employer may be considered as a factor affecting the choice of an appropriate remedy or, if the restraint as a whole is rendered unreasonable, the unenforceability thereof. For purposes of this definition, "the discharge of an employee without cause" does not include (i) a termination of a partnership agreement, franchise, distributorship, or license agreement or a sales agent, broker, representative, or supervisor agreement in accordance with the terms of the agreement or upon the completion or expiration of the agreement, (ii) any termination under retirement programs of the employer, (iii) any termination that follows the employee's refusal to accept an offer of continued employment on terms and conditions at least as favorable to the employee as those previously in effect, or (iv) any termination under circumstances where the employee remains or becomes entitled to receive earnings, commissions, or benefits that serve as compensation, at least in part, for the employee's compliance with the post-termination covenants.

(2) An employee may agree in writing for the benefit of an employer to refrain, for a stated period of time following termination, from conducting activity that is competitive with the activities the employee conducted for the employer within the geographic area or areas where the employee conducted such activities at or within a reasonable period of time prior to termination, provided that such activity and area must be described in such writing. The geographic area in which an employee works may include any area where any operations performed, supervised, or assisted in by the employee were conducted and any area where customers or actively sought prospective customers of the business with whom the employee had material contact are present.

(3) An employee may agree in writing for the benefit of an employer to refrain, for a stated period of time following termination, from

soliciting or accepting, or attempting to solicit or accept, directly or by assisting others, any business from any of such business's customers, including actively sought prospective customers, with whom the employee had material contact during his employment for purposes of providing products or services that are competitive with those provided by the employer's business. No express reference to geographic area or the types of products or services considered to be competitive shall be required in order for the restraint to be enforceable. Any reference to a prohibition against "soliciting or accepting business from customers," or similar language, shall be adequate for such purpose and narrowly construed to apply only to: (A) such of the business's customers, including actively sought prospective customers, with whom the employee had material contact; and (B) products and services that are competitive with those provided by the employer's business.

(4) An employee may agree in writing for the benefit of an employer to refrain, for a stated period of time following termination, from recruiting or hiring, or attempting to recruit or hire, directly or by assisting others, any other employee of the employer or its affiliates. No express reference to geographic area shall be required. Any reference to a prohibition against recruiting or hiring, or attempting to recruit or hire, other employees shall be narrowly construed to apply only to other employees who are still actively employed by or doing business with the employer or its affiliates at the time of the attempted recruiting or hiring.

(5) To the extent so stated in the post-employment covenant, a post-employment covenant may provide that any violation of the restraint shall automatically toll and suspend the period of the restraint for the amount of time that the violation continues, provided that the employer seeks enforcement promptly after discovery of the violation.

(6) A duration of two years or less in the case of a restraint of the type described in paragraph (2) of this subsection, and three years or less in the case of a restraint of the type described in paragraphs (3) and (4) of this subsection shall be presumed to be reasonable as the period of time stated for any post-employment covenant.

(d) Any restriction that operates during the term of an employment agreement, agency agreement, independent contractor agreement, partnership agreement, franchise, distributorship agreement, license, shareholders' agreement, or other ongoing business agreement shall not be considered unreasonable because it lacks any specific limitation upon scope of activity, duration, or territory, so long as it promotes or protects the purpose or subject matter of the agreement or deters any potential conflict of interest.

(e)(1) Activities, products, or services that are competitive with the activities, products, or services of an employer may include activities,

products, or services that are the same as or similar to the activities, products, or services of the employer. Whenever a description of activities, products and services, or areas is required by this Code section, any description that provides fair notice of the maximum reasonable scope of the restraint shall satisfy such requirement, even if the description is generalized or could possibly be stated more narrowly to exclude extraneous matters.

(2) In the case of a post-employment covenant entered into prior to termination, any good faith estimate of the activities, products and services, or areas that may be applicable at the time of termination shall also satisfy such requirement, even if such estimate is capable of including or ultimately proves to include extraneous activities, products and services, or areas. The post-employment covenant shall be construed ultimately to cover only so much of such estimate as relates to the activities actually conducted, the products and services actually offered, or the areas actually involved within a stated period of time prior to termination. Activities, products, or services shall be considered sufficiently described if a reference to the activities, products, or services is provided and qualified by the phrase “of the type conducted, authorized, offered, or provided within one year prior to termination,” or similar language. Further, the phrase “the areas where the (employee) is working at the time of (termination)” shall be considered sufficient as a description of areas if the person or entity bound by the restraint can reasonably determine the maximum reasonable scope of the restraint at the time of termination.

(f)(1) Whenever a person or entity desires to verify the terms of any partial restraint in effect at any time, or to obtain a clarification of a restraint believed to be unclear, such person or entity may, at its option, demand such verification or clarification by delivering to the persons or entities that benefit from such restraint a written statement that contains: (A) if verification is sought, a request for a copy of each partial restraint in effect between the parties; or (B) if clarification is sought, a description of the clarification requested; and (C) in all cases, the following statement: “THIS DEMAND IS MADE PURSUANT TO CODE SECTION 13-8-2.1(f)(2) OF THE OFFICIAL CODE OF GEORGIA ANNOTATED AND REQUIRES A RESPONSE WITHIN 30 DAYS.”

(2) Within 30 days after such other persons or entities or their authorized representatives have received such demand in person, they shall respond by sending the person or entity bound by the restraint the requested information or, if clarification is considered to be unnecessary because the restraint is believed to be clear, a statement to that effect. In no event shall such a response be required to include confidential information or business strategies as part of any clarification.

(3) In the interest of reducing or eliminating any unclear or overbroad aspect of the restraint, the persons or entities that benefit from any

existing restraint may provide the persons or entities bound by such restraint with a clarification or reformulation of the restraint, whether or not the clarification or reformulation was requested, so long as it is no broader than the terms of the original restraint. Any clarification or reformulation on lesser terms so provided by the persons or entities that benefit from the restraint shall supersede any conflicting terms of the restraint and be binding regardless of whether additional consideration is provided. The person or entity bound by the restraint may rely absolutely on such clarification or reformulation in complying with the terms of such restraint.

(4) Any failure or delay of the persons or entities that benefit from such restraint to respond to such a demand shall be considered as one factor by a court in determining how much of an unclear or overbroad restraint may be enforced as lawfully serving the business purposes and interests contemplated by the parties in their agreement. In addition, if the procedure provided for in this subsection is followed for the benefit of anyone who wishes to employ or do business with a person or entity, any subsequent enforcement of any restraint that was unknown, unclear, or overbroad but that is not properly identified, clarified, or reformulated by the persons or entities that benefit from the restraint following their receipt of such a demand shall be limited so as to avoid prejudice to the employment or business to which the unknown, unclear, or overbroad aspects of the restraint relate.

(g)(1) Every court of competent jurisdiction shall enforce through any appropriate remedy every contract in partial restraint of trade that is not against the policy of the law or otherwise unlawful. In the absence of extreme hardship on the part of the person or entity bound by such restraint, injunctive relief shall be presumed to be an appropriate remedy for the enforcement of the contracts described in subsections (b) through (d) of this Code section. If any portion of such restraint is against the policy of the law in any respect but such restraint, considered as a whole, is not so clearly unreasonable and overreaching in its terms as to be unconscionable, the court shall enforce so much of such restraint as it determines by a preponderance of the evidence to be necessary to protect the interests of the parties that benefit from such restraint. Such a restraint shall be subject to partial enforcement, whether or not it contains a severability or similar clause and regardless of whether the unlawful aspects of such restraint are facially severable from those found lawful.

(2) The enforceability of any partial restraint of trade shall be determined and shall be enforced independently of the enforceability of any other covenant or part thereof contained in the same contract or arrangement.

(3) Contractual terms that provide for a loss or forfeiture of rights or benefits conditioned upon any specified act or event shall not be

considered a restraint of trade. The fact that any such loss or forfeiture provision is contained in the same agreement or contract with an otherwise valid partial restraint of trade shall not impair the validity or enforceability of either such loss or forfeiture provision or such restraint, and the enforcement of either term shall not serve as grounds for delaying or withholding enforcement of the other term, including enforcement by injunctive relief. If a loss or forfeiture provision is contained in an agreement or contract that also contains other terms that are determined to be, in some respects, an unreasonable and unenforceable restraint of trade, such loss or forfeiture provision shall nonetheless be enforceable to the extent it may lawfully serve the purposes and interests of the parties that benefit from such provision. Such a loss or forfeiture provision shall be subject to enforcement, whether or not it contains a severability or similar clause, and regardless of whether the unlawful aspects of such restraint are facially severable from those found to be unlawful. (Code 1981, § 13-8-2.1, enacted by Ga. L. 1990, p. 1676, § 2; Ga. L. 1991, p. 94, § 13; Ga. L. 2009, p. 231, § 2/HB 173.)

Delayed effective date. — Ga. L. 2009, p. 231, § 4 provides that the 2009 repeal becomes effective following the ratification at the time of the 2010 general election of an amendment to the Constitution of Georgia providing for the enforcement of covenants in commercial contracts that limit competition and shall apply to contracts entered into on and after such date and shall not apply in actions determining the enforceability of restrictive covenants entered into before such date and that if such amendment is not so ratified, then this amendment shall stand automatically repealed. This Code section as repealed is not set out in the Code owing to the delayed effective date. After the ratification is made, this Code section will be repealed.

The 2009 amendment, provides for the

repeal of this Code section. For effective date of this amendment, see the delayed effective date note.

Editor's notes. — Ga. L. 1990, p. 1676, § 2, not codified by the General Assembly, provides: "This Act takes effect on July 1, 1990. As a statement of public policy, this Act shall have general applicability to the fullest extent permitted by law. This Act shall further apply to all remedies sought or granted after the effective date with respect to the subject matter of this Act."

Law reviews. — For article, "Georgia Constitution May Restrict the 1990 Restrictive Covenant Law," see 27 Ga. St. B.J. 82 (1990). For survey article on law relating to intellectual property, see 42 Mercer L. Rev. 295 (1990). For article, "Georgia Gets Competitive," see 15 (No. 4) Ga. St. B.J. 13 (2009).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 13-8-2.1 is beyond the power of the General Assembly, and is unlawful and void, inasmuch as the law authorizes contracts and agreements which may have the effect of or which are intended to have the effect of defeating or lessening competition or encouraging monopoly. *Jackson & Coker, Inc. v. Hart*, 261 Ga. 371, 405 S.E.2d 253 (1991), but see *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441 (11th Cir. 1991).

O.C.G.A. § 13-8-2.1 violates the constitu-

tional provision against restraint of trade in Ga. Const. 1983, Art. III, Sec. VI, Para V(c). *Rooney v. Jackson & Coker, Inc.*, 261 Ga. 533, 409 S.E.2d 522 (1991).

Retroactive application. — O.C.G.A. § 13-8-2.1 is procedural, and uncoded section two of the statute strongly implies that the legislature wanted a retroactive application of the statute. *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441 (11th Cir. 1991).

Retroactive application of O.C.G.A.

§ 13-8-2.1 does not violate Georgia statutory and constitutional provisions forbidding retroactive applications of statutes. *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441 (11th Cir. 1991).

Noncompetition agreement alone not personal service contract. — While a noncompetition agreement joined with affirmative promises is a personal services contract which terminates upon the death of the promisor, a noncompetition agreement

standing alone, with no affirmative promises, is not. *Mail & Media, Inc. v. Rotenberry*, 213 Ga. App. 826, 446 S.E.2d 517 (1994).

Injunctions are appropriate remedies and should issue except in limited cases. *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441 (11th Cir. 1991).

Cited in *Hamrick v. Kelley*, 260 Ga. 307, 392 S.E.2d 518 (1990); *Atlanta Bread Co. Int'l v. Lupton-Smith*, 285 Ga. 587, 679 S.E.2d 722 (2009).

RESEARCH REFERENCES

ALR. — Enforceability of agreement restricting right of attorney to compete with former law firm, 28 ALR5th 420.

13-8-3. Gambling contracts.

(a) Gambling contracts are void; and all evidences of debt, except negotiable instruments in the hands of holders in due course or encumbrances or liens on property, executed upon a gambling consideration, are void in the hands of any person.

(b) Money paid or property delivered upon a gambling consideration may be recovered from the winner by the loser by institution of an action for the same within six months after the loss and, after the expiration of that time, by institution of an action by any person, at any time within four years, for the joint use of himself and the educational fund of the county. (Laws 1764, Cobb's 1851 Digest, p. 725; Laws 1765, Cobb's 1851 Digest, p. 727; Code 1863, § 2717; Code 1868, § 2711; Code 1873, § 2753; Code 1882, § 2753; Civil Code 1895, § 3671; Civil Code 1910, § 4256; Ga. L. 1924, p. 126, § 57; Code 1933, § 20-505.)

Cross references. — Gambling generally, § 16-12-20 et seq.

Law reviews. — For note, "Recovery of Losses on Cotton Futures," see 1 Ga. L. Rev. No. 1, p. 43 (1927). For note discussing organized crime in Georgia with respect to the application of state gambling laws, and

suggesting proposals for combatting organized crime, see 7 Ga. St. B.J. 124 (1970).

For comment on *Moore v. Atlantic Athletic Club*, 79 Ga. App. 41, 52 S.E.2d 628 (1949), denying recovery to informer of money lost to slot machine, see 1 Mercer L. Rev. 314 (1950).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
CONSTITUTIONALITY
ACTIONS

General Consideration

This statute is exception to doctrine that court will not aid parties in *pari delicto*. *Quillian v. Johnson*, 122 Ga. 49, 49 S.E. 801 (1905) (see O.C.G.A. § 13-8-3).

Policy of law-making power of this state has been to frown consistently on gambling transactions of whatever character. *Gulf Collateral, Inc. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976).

Gambling transactions contravene public policy of Georgia and constitute obligations unenforceable in Georgia courts. *Gulf Collateral, Inc. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976).

Gambling contract or one based upon a gaming consideration is void and unenforceable. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Gambler shall not be protected in the gambler's unlawful gains. *Gulf Collateral, Inc. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976).

Wagering contracts are against policy of the law and are unenforceable. *Gulf Collateral, Inc. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976).

Section inapplicable to money deposited in slot machines. — Maintenance and operation of a slot machine, where persons playing the slot machine may, by chance, obtain money or articles of value worth more than money deposited in the machine, is a lottery or transaction in the nature of a lottery, and the law providing for recovery back of consideration paid under gaming contracts, is not applicable thereto. *Thompson v. Ledbetter*, 74 Ga. App. 427, 39 S.E.2d 720 (1946).

The law does not apply to a slot machine. What is generally known as a slot machine is a lottery and is not playing or betting at any game whatever, and this statute has reference to recovery of money or property paid or delivered upon account of losses by playing or betting at a game. *Moore v. Atlanta Athletic Club*, 79 Ga. App. 41, 52 S.E.2d 628 (1949) (see O.C.G.A. § 13-8-3).

Contracts known as options are not to be classed as gambling contracts under laws of Georgia, nor are the contracts otherwise condemned as unlawful for any reason. *Martin v. Citizens' Bank*, 177 Ga. 871, 171 S.E. 711 (1933).

Cited in *Doyle v. McIntyre*, 71 Ga. 673 (1883); *Quillian v. Johnson*, 122 Ga. 49, 49 S.E. 801 (1905); *Garland v. Isbell*, 139 Ga. 34, 76 S.E. 591 (1912); *Johnson, Lane, Space, Smith & Co. v. Lenny*, 129 Ga. App. 55, 198 S.E.2d 923 (1973).

Constitutionality

Statute was declared to be constitutional in *Neal v. Todd & Killebreed*, 28 Ga. 334 (1859) (see O.C.G.A. § 13-8-3).

Wagering contract defined. — Wagering contract has been defined to be one in which parties in effect stipulate that the parties shall gain or lose upon happening of uncertain event in which the parties have no interest, except that arising from possibility of such gain or loss. *Martin v. Citizens' Bank*, 177 Ga. 871, 171 S.E. 711 (1933).

In gambling contract, one party is certain to lose. — In an ordinary contract both parties may ultimately gain by entering into agreement; where in a gambling contract one of the parties is certain to lose, and by terms of such contract consideration must fall to one or the other upon determination of specified event. *Martin v. Citizens' Bank*, 177 Ga. 871, 171 S.E. 711 (1933).

Betting upon a game of golf is gaming. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Betting on a horse race is gaming; and one who has lost a horse by betting on such a race may recover the horse by suing therefor within six months. *Dyer v. Benson*, 69 Ga. 609 (1882).

Side bets placed upon ultimate outcome or final result of any game whatever constitutes gaming. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Betting that one game competitor, among many, will win is a side bet upon a game. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Agreement to purchase lottery ticket enforceable. — An agreement by parties in Georgia to purchase a Kentucky lottery ticket and share the proceeds if the ticket won was not a gambling contract unenforceable as against public policy. *Talley v. Mathis*, 265 Ga. 179, 453 S.E.2d 704 (1995).

Absence of purpose to deal with actual property marks distinction between legal and gambling contracts in reference to sale of personal property. *Martin v. Citizens'*

Constitutionality (Cont'd)

Bank, 177 Ga. 871, 171 S.E. 711 (1933).

Mere insertion of provision for forfeiture does not constitute gambling, nor make of agreement a gambling contract. *Martin v. Citizens' Bank*, 177 Ga. 871, 171 S.E. 711 (1933).

Instrument conveying nothing more than option to buy at certain price not a gambling contract. — An instrument should not be condemned as a gambling contract merely because the instrument conveys to one party nothing more than an option to buy at a certain price. *Martin v. Citizens' Bank*, 177 Ga. 871, 171 S.E. 711 (1933).

Options for the sale of real property are not void as being gambling contracts. *Baker v. Jellibeans, Inc.*, 252 Ga. 458, 314 S.E.2d 874 (1984).

Fact that gaming contract is made by insurance company does not render contract valid. — Fact that loser of a bet is an insurance company and that contract is made by such company does not render such contract valid and not a gaming contract. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Broker who brings parties together for purpose of entering wagering contract cannot recover for services. — When broker is privy to wagering contract, and brings parties together for very purpose of entering into illegal agreement, broker is particeps criminis, and cannot recover for services or losses incurred by broker in forwarding the transaction. *Hutchinson v. Brown*, 47 Ga. App. 82, 169 S.E. 848 (1933).

Under O.C.G.A. § 13-8-3 it does not matter if money won was won through an agent. — If owner can recover money lost to a winner by an agent when agency is not known to winner it seems that a loser could recover from joint principals when money is won for them by an agent. *Silver v. Ford*, 64 Ga. App. 679, 14 S.E.2d 132 (1941).

Money recovered for joint use of plaintiff and county education fund is split in half. — Money paid in pursuance of a bet may be recovered back within six months after being paid, and, if not sought to be recovered back by loser within that time, any person may bring action against person to whom such money is paid in settlement of bet, and upon

recovery one-half thereof shall be paid to county for use of educational fund thereof and one-half shall go to party instituting action. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Actions

When money was won jointly by several, loser may sue winners jointly. — If three people win money jointly it does not matter how the joint intent arose, whether by contract, conspiracy or otherwise. If the people won jointly, the money can be recovered from the winners jointly by owner in suit filed within six months. *Silver v. Ford*, 64 Ga. App. 679, 14 S.E.2d 132 (1941).

Georgia courts have jurisdiction if gaming contract is made or bet is laid in Georgia. — Fact that loser of bet resides in England and that money is paid from that country does not necessarily render matter not within the jurisdiction of the courts of this state, it is sufficient if gaming contract is made or bet is laid in State of Georgia. *Tatham v. Freeman*, 51 Ga. App. 477, 180 S.E. 871 (1935).

Text messaging to participate in televised game show. — With regard to federal class action lawsuit brought by text messagers to recover damages from organizers and sponsors of a televised game show, O.C.G.A. § 13-8-3(b) did not authorize the text messagers to recover text message charges paid to participate in the game, as no bet or wager was involved; contract between parties did not involve a bet or wager wherein any participant was certain to lose, and consideration of 99-cent text messaging entry fee never hung in the balance. *Hardin v. NBC Universal, Inc.*, 283 Ga. 477, 660 S.E.2d 374 (2008).

Enforcement of another state's laws is not required when those laws contravene public policy of Georgia. In diversity cases involving that issue, governing law is that of the state in which federal court is sitting. *Gulf Collateral, Inc. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976).

Comity as to laws of sister states is limited to laws not contravening public policy. — In enforcing comity in respect to laws of sister states, Georgia does so only so long as the law's enforcement is not contrary to policy of this state. *Gulf Collateral, Inc. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976).

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Contracts, §§ 116, 215 et seq., 280. 17A C.J.S., Contracts, § 301.

ALR. — Contracts of present sale of personal property with options as gambling contracts, 1 ALR 1548.

Agreement by which division of gate money depends upon outcome of game or contest as a wagering contract, 29 ALR 430.

Right of one in possession of fruits of illegal transaction to which he was not party to invoke rule against granting relief in support of such transaction, 50 ALR 293.

Who is nonprofessional or casual gambler within statute relating to recovery of gambling losses which in terms or by construction distinguishes between professional and nonprofessional or casual gamblers, 141 ALR 941.

Rights and remedies in respect of property pledged for payment of gambling debt, 172 ALR 701.

Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 ALR2d 500.

Assignment of, or succession to, statutory right of action for recovery of money lost at gambling, 18 ALR2d 999.

Action to recover money or property lost and paid through gambling as affected by statute of limitations, 22 ALR2d 1390.

Recovery of money or property lost through cheating or fraud in forbidden gambling or game, 39 ALR2d 1213.

Rights of owner of stolen money as against one who won it in gambling transaction from thief, 44 ALR2d 1242.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 ALR2d 1080.

Settlement negotiations as estopping reliance on statute of limitations, 39 ALR3d 127.

Law of forum against wagering transactions as precluding enforcement of claim based on gambling transactions valid under applicable foreign law, 71 ALR3d 178.

Fraud as extending statutory limitations period for contesting will or its probate, 48 ALR4th 1094.

Enforceability of contract to share winnings from legal lottery ticket, 90 ALR4th 784.

Right to recover money lent for gambling purposes, 74 ALR5th 369.

13-8-4. Liability of stakeholder of money risked on wager.

A stakeholder of money risked on a wager shall be obligated to repay the money to the party depositing it, upon demand, before it is actually paid to the winner; but if he pays the money to the winner bona fide, and without notice of the depositor's intention to retract, he shall not be liable for such payment. (Orig. Code 1863, § 2809; Code 1868, § 2817; Code 1873, § 2868; Code 1882, § 2868; Civil Code 1895, § 3721; Civil Code 1910, § 4315; Code 1933, § 20-1005.)

JUDICIAL DECISIONS

Retracting party may, after demand, recover from stakeholder in action for money had and received. McLennan v. Whiddon, 120 Ga. 666, 48 S.E. 201 (1904).

What constitutes sufficient demand. — See McLennan v. Whiddon, 120 Ga. 666, 48 S.E. 201 (1904).

RESEARCH REFERENCES

C.J.S. — 70 C.J.S., Payment, § 157.

ALR. — Who is nonprofessional or casual

gambler within statute relating to recovery of gambling losses which in terms or by

construction distinguishes between professional and nonprofessional or casual gamblers, 141 ALR 941.

ARTICLE 2

REGULATION OF AGRICULTURAL EQUIPMENT MANUFACTURERS, DISTRIBUTORS, AND DEALERS

Cross references. — Regulation of the distribution of farm equipment in Georgia, § 13-8-31 et seq.

Editor's notes. — Ga. L. 1993, p. 1585, § 4, effective April 27, 1993, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of §§ 13-8-11 through 13-8-25 and was based on Ga. L. 1982, p. 1753, § 1; Ga. L. 1983, p. 3, § 10; Ga. L. 1984, p. 22, § 13; Ga. L. 1989, p. 14, § 13; and Ga. L. 1992, p. 6, § 13.

Ga. L. 1993, p. 1585, § 1, not codified by the General Assembly, provides: "It is the intent of the General Assembly to substantively reenact certain legislation relating to

distribution of tractors, farm equipment, heavy equipment, and motor vehicles subsequent to the ratification at the 1992 general election of a constitutional amendment declaring that such distribution vitally affects the general economy of the state and the public interest and public welfare and authorizing the General Assembly to regulate such distribution. This Act is intended to ratify and affirm the validity of such legislation subsequent to the ratification of said constitutional amendment; and this Act shall not in any manner be construed to imply a legislative determination that such legislation was not valid prior to the ratification of said constitutional amendment."

13-8-11. Legislative findings.

The General Assembly finds that the distribution of equipment primarily designed for or used in agriculture in the State of Georgia vitally affects the general economy of the state and the public interest and public welfare and, in the exercise of its police power, it is necessary to regulate equipment primarily designed for or used in agriculture and related equipment manufacturers, distributors, dealers, and their representatives doing business in Georgia in order to prevent frauds, unfair business practices, unfair methods of competition, impositions, and other abuses upon its citizens. (Code 1981, § 13-8-11, enacted by Ga. L. 1993, p. 1585, § 4; Ga. L. 2002, p. 1101, § 1.)

13-8-12. Definitions.

As used in this article, the term:

(1) "Dealer" means any person who sells, maintains, solicits, or advertises the sale of new and used equipment to the consuming public. It shall not include (A) public officers while performing their duties as such officers; (B) persons making casual sales of their own equipment not subject to sales tax under the laws of the State of Georgia; (C) persons engaged in the auction sale of equipment; or (D) dealers in used equipment.

(2) "Dealership" means the business of selling or attempting to effect the sale by a dealer of new equipment or the right conferred by written or oral agreement with the manufacturer, distributor, or wholesaler for a definite or indefinite period of time to sell or attempt to effect the sale of new equipment.

(3) "Distributor" or "wholesaler" means any person, company, or corporation who sells or distributes new equipment to dealers and who maintains distributor representatives within the state.

(4) "Distributor branch" means a branch office maintained by a distributor or wholesaler which sells or distributes new equipment to dealers.

(5) "Distributor representative" means a representative employed by a distributor branch, distributor, or wholesaler.

(6) "Equipment" means tractors, farm equipment, or equipment primarily designed for or used in agriculture, horticulture, irrigation for agriculture or horticulture, and other such equipment which is considered tax exempt and sold by the franchised equipment dealer.

(7) "Factory branch" means a branch office maintained by a manufacturer which manufactures and assembles equipment for sale to distributors or dealers or which is maintained for directing and supervising the representatives of the manufacturer.

(8) "Factory representative" means a representative employed by a manufacturer or employed by a factory branch for the purpose of making or promoting the sale of equipment or for supervising, servicing, instructing, or contracting with equipment dealers or prospective dealers.

(9) "Franchise" means an oral or written agreement for a definite or indefinite period of time in which a manufacturer, distributor, or wholesaler grants to a dealer permission to use a trade name, service mark, or related characteristic, and in which there is a community of interest in the marketing of equipment or services related thereto at wholesale or retail, whether by leasing, sale, or otherwise.

(10) "Franchisee" means a dealer to whom a franchise is offered or granted.

(11) "Franchisor" means a manufacturer, distributor, or wholesaler who grants a franchise to a dealer.

(12) "Fraud" means, in addition to its normal legal connotation, the following: a misrepresentation in any manner, whether intentionally false or arising from gross negligence, of a material fact; a promise or representation not made honestly and in good faith; or an intentional failure to disclose a material fact.

(13) “Manufacturer” means any person engaged in the business of manufacturing or assembling new and unused equipment.

(14) “New equipment” means a unit of equipment which has not been previously sold to and put into regular use or service by any person except a distributor or wholesaler or dealer for resale.

(15) “Person” means a natural person, corporation, partnership, trust, or other business entity; and, in case of a business entity, it shall include any other entity in which it has a majority interest or which it effectively controls as well as the individual officers, directors, and other persons in active control of the activities of each such entity.

(16) “Relevant market area” means the geographic area for which a dealer is assigned responsibility for selling or soliciting or advertising the sale of equipment under the terms of a franchise.

(17) “Sale” means the issuance, transfer, agreement for transfer, exchange, pledge, hypothecation, or mortgage in any form, whether by transfer in trust or otherwise, of any unit of equipment or interest therein or of any franchise related thereto; any option, subscription or other contract, or solicitation looking to a sale; or an offer or attempt to sell in any form, whether in oral or written form.

(18) “Termination” of a contract or agreement means the termination, cancellation, nonrenewal, or noncontinuation of the contract or agreement. (Code 1981, § 13-8-12, enacted by Ga. L. 1993, p. 1585, § 4; Ga. L. 2002, p. 1101, § 1; Ga. L. 2003, p. 140, § 13.)

13-8-13. Persons subject to provisions of article.

Any person who engages directly or indirectly in purposeful contacts within this state in connection with the offering or advertising for sale of new equipment and parts shall be subject to the provisions of this article and shall be subject to the jurisdiction of the courts of this state upon service of process in accordance with the provisions of the laws of the State of Georgia. (Code 1981, § 13-8-13, enacted by Ga. L. 1993, p. 1585, § 4; Ga. L. 2002, p. 1101, § 1.)

13-8-14. Unfair competition; unfair or deceptive acts.

Unfair methods of competition and unfair or deceptive acts or practices as defined in Code Section 13-8-15 are declared to be unlawful. (Code 1981, § 13-8-14, enacted by Ga. L. 1993, p. 1585, § 4; Ga. L. 2002, p. 1101, § 1.)

13-8-15. Unfair methods of competition and unfair or deceptive acts or practices.

(a) It shall be deemed a violation of Code Section 13-8-14 for any manufacturer, factory branch, factory representative, distributor, or whole-

salor, distributor branch, distributor representative, or dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage in terms of law or equity to any of the parties or to the public.

(b) It shall be deemed a violation of Code Section 13-8-14 for a manufacturer, a distributor, a wholesaler, a distributor branch or division, a factory branch or division, or a wholesale branch or division, or officer, agent, or other representative thereof, to coerce, or attempt to coerce, any dealer:

(1) To order or accept delivery of any unit of equipment, parts or accessories therefor, or any other commodity or commodities which such dealer has not voluntarily ordered; or

(2) To order or accept delivery of any equipment with special features, accessories, or equipment not included in the base list price of such equipment as publicly advertised by the manufacturer thereof.

(c) It shall be deemed a violation of Code Section 13-8-14 for a manufacturer, a distributor, a wholesaler, a distributor branch or division, a factory branch or division, or a wholesale branch or division, or officer, agent, or other representative thereof:

(1) To refuse to deliver in reasonable quantities and within a reasonable time after receipt of dealer's order to any dealer having a franchise or contractual agreement for the retail sale of new equipment sold or distributed by such manufacturer, distributor branch or division, factory branch or division, or wholesale branch or division any item of equipment covered by such franchise or contract specifically advertised or represented by such manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesale branch or division to be available for immediate delivery; provided, however, that the failure to deliver any such unit of equipment shall not be considered a violation of this article if such failure is due to prudent and reasonable restriction on extension of credit by the franchisor to the dealer, an act of God, work stoppage or delay due to a strike or labor difficulty, a bona fide shortage of materials, freight embargo, or other cause over which the manufacturer, distributor, or wholesaler, or any agent thereof, shall have no control;

(2) To coerce, or attempt to coerce, any dealer to enter into any agreement, whether written or oral, supplementary to an existing franchise with such manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesale branch or division, or officer, agent, or other representative thereof; or to do any other act prejudicial to such dealer by threatening to cancel any franchise or any contractual agreement existing between such manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or

wholesale branch or division, and such dealer; provided, however, that notice in good faith to any dealer of such dealer's violation of any terms or provisions of such franchise or contractual agreement shall not constitute a violation of this article if such notice is in writing mailed by registered or certified mail or statutory overnight delivery to such dealer at his or her current business address;

(3)(A) To terminate the franchise or selling agreement of any such dealer without due cause, as defined in subparagraph (C) of this paragraph. The termination of a franchise or selling agreement, without due cause, shall constitute an unfair termination, regardless of the specified time period of such franchise or selling agreement. Except where the grounds for such termination fall within division (iii) of subparagraph (C) of this paragraph, such manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesale branch or division, or officer, agent, or other representative thereof, shall notify a dealer in writing of the termination of the franchise or selling agreement of such dealer at least 90 days before the effective date thereof, stating the specific grounds for such termination; and in no event shall the contractual term of any such franchise or selling agreement expire, without the written consent of the dealer involved, prior to the expiration of at least 90 days following such written notice. During the 90 day period, either party may, in appropriate circumstances, petition a court to modify such 90 day stay or to extend it pending a final determination of such proceedings on the merits. The court shall have authority to grant preliminary and final injunctive relief. Should the dealer cure the claimed deficiency within the 90 day period, then the franchise or selling agreement shall not be terminated.

(B) Before termination of the franchise or selling agreement because of the dealer's failure to meet reasonable marketing criteria or market penetration, the manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesale branch or division, or officer, agent, or other representative thereof, shall provide written notice of such intention at least one year in advance. After such notice, the manufacturer or other entity issuing the notice shall make good faith efforts to work with the dealer to gain the desired market share including, without limitation, reasonably making available to the dealer an adequate inventory of new equipment and parts and competitive marketing programs. The manufacturer or other entity, at the end of the one-year notice period, may terminate or elect not to renew the agreement only upon further written notice specifying the reasons for determining that the dealer failed to meet reasonable criteria or market penetration. Such written notice must specify that termination is effective 90 days from the date of the notice. Either party may petition the court pursuant to subparagraph (A) of this paragraph

for the relief specified therein. Should the dealer cure the claimed deficiency within the 90 day period, then the franchise or selling agreement shall not be terminated.

(C) As used in this paragraph, tests for determining what constitutes due cause for a manufacturer or distributor to terminate a franchise agreement shall include whether the dealer:

(i) Has transferred an ownership interest in the dealership without the manufacturer's or distributor's consent;

(ii) Has made a material misrepresentation in applying for or acting under the franchise agreement;

(iii) Has filed a voluntary petition in bankruptcy or has had an involuntary petition in bankruptcy filed against the dealer which has not been discharged within 30 days after the filing, is in default under the provisions of a security agreement in effect with the manufacturer or distributor, or is in receivership;

(iv) Has engaged in an unfair business practice;

(v) Has inadequately represented the manufacturer's or distributor's products with respect to sales, service, or warranty work;

(vi) Has engaged in conduct which is injurious or detrimental to the public welfare;

(vii) Has inadequate sales and service facilities and personnel;

(viii) Has failed to comply with an applicable licensing law;

(ix) Has been convicted of a crime, the effect of which would be detrimental to the manufacturer, distributor, or dealership;

(x) Has failed to operate in the normal course of business for seven consecutive business days;

(xi) Has relocated the dealer's place of business without the manufacturer's or distributor's consent; or

(xii) Has failed to comply with the terms of the dealership or franchise agreement;

(4) To resort to or use any false or misleading advertisement in connection with its business as such manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesale branch or division, or officer, agent, or other representative thereof;

(5) To offer to sell or to sell any new unit of equipment, or parts or accessories therefor, to any other dealer at a lower actual price therefor than the actual price offered to any other dealer for the same model equipment identically equipped; or to utilize any device including, but

not limited to, sales promotion plans or programs which result in such lesser actual price; provided, however, that the provisions of this paragraph shall not apply to sales to a dealer for resale to any unit of the United States government, the state, or any of its political subdivisions; and provided, further, that the provisions of this paragraph shall not apply so long as a manufacturer, distributor, or wholesaler, or any agent thereof, sells or offers to sell such new equipment, parts, or accessories to all their franchised dealers at an equal price;

(6) To discriminate willfully, either directly or indirectly, in price, programs, or terms of sale offered to franchisees, where the effect of such discrimination may be to lessen competition substantially or to give to one holder of a franchise any business or competitive advantage not offered to all holders of the same or similar franchise;

(7) To prevent or attempt to prevent, by contract or otherwise, any dealer from changing the capital structure of his or her dealership or the means by or through which he or she finances the operation of his or her dealership, provided such dealer at all times meets any reasonable capital standards agreed to between the dealership and the manufacturer, distributor, or wholesaler and provided such change by the dealer does not result in a change in the executive management of the dealership;

(8) To prevent or attempt to prevent, by contract or otherwise, any dealer or any officer, partner, or stockholder of any dealer from selling or transferring any part of the interest of any of them to any other person or persons or party or parties; provided, however, that no dealer, officer, partner, or stockholder shall have the right to sell, transfer, or assign the franchise or power of management or control thereunder without the consent of the manufacturer, distributor, or wholesaler, except that such consent shall not be unreasonably withheld;

(8.1) To prevent a dealer from having an investment in or holding a dealership contract for the sale of competing product lines or makes of equipment, or to require a dealer to provide separate facilities for competing product lines or makes of equipment;

(8.2) To impose, directly or indirectly, unreasonable restrictions on the dealer relative to transfer, sale, renewal, termination, location, or site control;

(9) To obtain money, goods, services, anything of value, or any other benefit from any other person with whom the dealer does business or employs on account of or in relation to the transactions between the dealer, the franchisor, and such other person; or

(10) To require a dealer to assent to a release, assignment, notation, waiver, or estoppel which would relieve any person from liability imposed by this article.

(d) It shall be deemed a violation of Code Section 13-8-14 for a dealer:

(1) To require a retail purchaser of a new unit of equipment, as a condition of sale and delivery thereof, also to purchase special features, appliances, equipment, parts, or accessories not desired or requested by the purchaser; provided, however, that this prohibition shall not apply to special features, appliances, equipment, parts, or accessories which are already installed when the unit of equipment is received by the dealer from the manufacturer, distributor, or wholesaler thereof;

(2) To represent and sell as new and unused any unit of equipment which has been used and operated for demonstration or other purposes without stating to the purchaser the approximate amount of use the unit of equipment has experienced; or

(3) To resort to or use any false or misleading advertisement in connection with his or her business as such dealer. (Code 1981, § 13-8-15, enacted by Ga. L. 1993, p. 1585, § 4; Ga. L. 1993, p. 91, § 13; Ga. L. 2000, p. 1589, § 3; Ga. L. 2002, p. 1101, § 1.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the Act was applicable to notices delivered on or after July 1, 2000.

13-8-15.1. Notice to competitors within market area.

Any manufacturer, distributor, or wholesaler which intends to establish a new dealership or to relocate a current dealership for a particular product line or make of equipment within the relevant market area of an existing dealership of the same product line or make of equipment shall give written 90 day notice of such intent by certified mail or statutory overnight delivery, return receipt requested, to such existing dealership. The notice shall include:

(1) The specific location of the additional or relocated dealership;

(2) The date on or after which the additional or relocated dealership will commence operation at the new location;

(3) The identity of all existing dealerships in whose relevant market area the new or relocated dealership is to be located; and

(4) The names and addresses of the dealer and principals in the new or relocated dealership. (Code 1981, § 13-8-15.1, enacted by Ga. L. 2002, p. 1101, § 1.)

13-8-15.2. Use of dealership by manufacturers, distributors, and wholesalers.

(a) A manufacturer, distributor, or wholesaler may sell or lease new equipment for use within this state. If the equipment is prepared for

delivery or serviced by a dealer, the manufacturer, distributor, or wholesaler shall reasonably compensate the dealer for the preparation and delivery of the new equipment and pay to the dealer a reasonable commission on the sale or lease of the new equipment which shall be not less than 8 percent of the sale price of the equipment. The manufacturer, distributor, or wholesaler, if practicable, shall utilize the dealer in the relevant market area described in subsection (b) of this Code section for preparation and delivery. This compensation must be paid or credited in the same manner as provided in Code Section 13-8-17. This subsection shall not be applicable to any liquidation or sale of equipment which has been ordered by any court.

(b) For purposes of this Code section, equipment is considered to be used primarily within a dealer's relevant market area if the new equipment is located or housed at a user's facility located within that relevant market area. (Code 1981, § 13-8-15.2, enacted by Ga. L. 2002, p. 1101, § 1.)

13-8-16. Predelivery and preparation obligations; repair parts availability; return of surplus parts inventory.

(a) Every manufacturer shall specify and every dealer shall provide and fulfill reasonable predelivery and preparation obligations for its equipment prior to delivery of same to retail purchasers.

(b) Every manufacturer shall provide for repair parts availability throughout the reasonable useful life of any equipment sold.

(c) Every manufacturer or distributor shall provide to each of its dealers, on an annual basis, an opportunity to return a portion of such dealer's surplus parts inventory for credit. The surplus parts return procedure shall be administered as follows:

(1) The manufacturer or distributor may specify and thereupon notify its dealers of a time period of at least 60 days' duration, during which time dealers may submit their surplus parts lists and return their surplus parts to the manufacturer or distributor;

(2) If a manufacturer or distributor has not notified a dealer of a specific time period for returning surplus parts within the preceding 12 months, then it shall authorize and allow the dealer's surplus parts return request within 30 days after receipt of such request from such dealer;

(3) Pursuant to the provisions of this subsection, a manufacturer or distributor must allow surplus parts return authority on a dollar value of parts equal to 8 percent of the total dollar value of parts purchased by the dealer from the manufacturer or distributor during the 12 month period immediately preceding the notification to such dealer by the manufacturer or distributor of the surplus parts return program, or the month such dealer's return request is made, whichever is applicable; provided,

however, that such dealer may, at his or her option, elect to return a dollar value of his or her surplus parts less than 8 percent of the total dollar value of parts purchased by such dealer from the manufacturer or distributor during the preceding 12 month period as provided in this subsection;

(4) No obsolete or superseded part may be returned, but any part listed in the manufacturer's, wholesaler's, or distributor's current parts price list at the date of notification to the dealer by the manufacturer or distributor of the surplus parts return program, or the date of a dealer's parts return request, whichever is applicable, shall be eligible for return and credit as specified in this subsection; provided, however, that returned parts must be in new and unused condition and must have been purchased from the manufacturer, wholesaler, or distributor to whom they are returned;

(5) The minimum lawful credit to be allowed for returned parts shall be 85 percent of the wholesale cost thereof as listed in the manufacturer's, wholesaler's, or distributor's current parts price list at the date of the notification to the dealer by the manufacturer, wholesaler, or distributor of the surplus parts return program, or the date of a dealer's parts return request, whichever is applicable;

(6) Applicable credit pursuant to this subsection must be issued to the dealer within 30 days after receipt of his or her returned parts by the manufacturer or distributor; or

(7) Packing and return freight expense incurred in any return of surplus parts pursuant to the terms of this Code section shall be borne by the dealer. (Code 1981, § 13-8-16, enacted by Ga. L. 1993, p. 1585, § 4; Ga. L. 2002, p. 1101, § 1.)

13-8-17. Warranty agreements; disapproval of claims under warranty agreements; special handling of claims; calculation of compensation to dealer for warranty work; amounts owed to a dealer; audit of warranty claims.

(a) Every manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesale branch or division shall provide a fair and reasonable warranty agreement on any new unit of equipment which it sells and shall fairly compensate each of its dealers for labor and parts used in fulfilling such warranty agreement. All claims for payment under such warranty agreements made by dealers under this subsection for such labor and parts shall be paid within 30 days following their approval. All such claims shall be either approved or disapproved within 30 days after their receipt; and, when any such claim is disapproved, the dealer who submits it shall be notified in writing of its disapproval within such period; and each such notice shall state the specific grounds upon

which the disapproval is based. Any special handling of claims required of the dealer by the manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesale branch or division, and not uniformly required of all dealers of that make, may be enforced only after 30 days' notice in writing to the dealer and upon good and sufficient reason.

(b) The minimum lawful basis for compensating said dealer for warranty work as provided for in this subsection shall be calculated for labor in accordance with the reasonable and customary amount of time required to complete such work, expressed in hours and fractions of hours multiplied by the dealer's established hourly retail labor rate. Prior to filing a claim for reimbursement for warranty work, the dealer must notify the applicable manufacturer, wholesaler, or distributor of his or her hourly retail labor rate. The minimum lawful basis for compensation to the dealer for parts used in fulfilling said warranty work shall be at the dealer's costs thereof, including all freight and handling charges applicable thereto, plus 15 percent of said sum to reimburse the dealer's reasonable costs of doing business and providing such warranty service on the manufacturer's behalf.

(c) It shall be unlawful to deny, delay payment for, or restrict a claim by a dealer for warranty service or parts, incentives, hold-backs, or other amounts owed to a dealer unless the denial, delay, or restriction is the direct result of a material defect in the claim that affects its validity.

(d) A manufacturer, distributor, or wholesaler may audit warranty claims submitted by its dealers only for a period of up to one year following payment of such claims and may charge back to its dealers only those amounts based upon paid claims shown by audit to be invalid; provided, however, that this limitation shall not apply in any case of fraudulent claims. (Code 1981, § 13-8-17, enacted by Ga. L. 1993, p. 1585, § 4; Ga. L. 2002, p. 1101, § 1.)

13-8-17.1. Time for audits of dealerships.

Any audit of a dealer by or on behalf of a manufacturer, distributor, or wholesaler for sales incentives, service incentives, rebates, or other forms of incentive compensation shall be completed not later than six months after the date of the termination of such incentive compensation program; provided, however, that this limitation shall not apply in any case of fraudulent claims. (Code 1981, § 13-8-17.1, enacted by Ga. L. 2002, p. 1101, § 1.)

13-8-18. Agreements to which article applies.

The provisions of this article shall apply to all written or oral agreements between a manufacturer, wholesaler, or distributor with a dealer including,

but not limited to, the franchise offering, the franchise agreement, sales of goods, services and advertising, leases or mortgages of real or personal property, promises to pay, security interests, pledges, insurance contracts, advertising contracts, construction or installation contracts, servicing contracts, and all other such agreements in which the manufacturer, wholesaler, or distributor has any direct or indirect interest. (Code 1981, § 13-8-18, enacted by Ga. L. 1993, p. 1585, § 4; Ga. L. 2002, p. 1101, § 1.)

13-8-19. Failure to renew, termination of, or restriction on transfer of franchise without due cause.

It shall be unlawful for the manufacturer, wholesaler, distributor, or franchisor, without due cause, to fail to renew on terms then equally available to all its dealers, to terminate a franchise, or to restrict the transfer of a franchise unless the franchisee shall receive fair and reasonable compensation for the inventory of the business. As used in this Code section, “due cause” shall be construed in accordance with the definition of same as contained in subparagraph (c)(3)(C) of Code Section 13-8-15. (Code 1981, § 13-8-19, enacted by Ga. L. 1993, p. 1585, § 4; Ga. L. 2002, p. 1101, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1994, “Code section” was substituted for “subsection” in the second sentence.

13-8-20. Damages recoverable for injuries sustained by violations; class actions; punitive damages.

(a) In addition to temporary or permanent injunctive relief as provided in subparagraph (c)(3)(A) of Code Section 13-8-15, any person who shall be injured in his or her business or property by reason of anything forbidden by or in noncompliance with the requirements of this article may bring an action therefor in the appropriate superior court of this state and shall recover the actual damages sustained and the costs of such action, including a reasonable attorney’s fee.

(b) When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may bring a class action for the benefit of the whole, including actions for injunctive relief.

(c) In an action for money damages, if the jury finds that the defendant acted maliciously, the jury may award punitive damages as permitted by Georgia law. (Code 1981, § 13-8-20, enacted by Ga. L. 1993, p. 1585, § 4; Ga. L. 2002, p. 1101, § 1.)

13-8-21. Contracts and agreements in violation of article deemed void.

Any contract or franchise agreement or part thereof or practice thereunder in violation of any provision of this article shall be deemed against

public policy and shall be void and unenforceable. (Code 1981, § 13-8-21, enacted by Ga. L. 1993, p. 1585, § 4; Ga. L. 2002, p. 1101, § 1.)

Editor's notes. — Ga. L. 2002, p. 1101, § 1, effective July 1, 2002, reenacted this Code section without change.

13-8-22. Repurchase of inventory upon termination of franchise; payment for inventory repurchased; title to repurchased inventory; exempt inventory items; civil liability for failure to repurchase inventory.

(a) Whenever any dealer enters into a franchise agreement with a manufacturer, distributor, or wholesaler wherein the dealer agrees to maintain an inventory of equipment or repair parts and the franchise is subsequently terminated, the manufacturer, distributor, or wholesaler shall repurchase the inventory as provided in this article. The dealer may keep the inventory if he or she desires. If the dealer has any outstanding debts to the manufacturer, distributor, or wholesaler, then the repurchase amount may be credited to the dealer's account.

(b) The manufacturer, distributor, or wholesaler shall repurchase that inventory previously purchased from it and held by the dealer on the date of termination of the contract. The manufacturer, distributor, or wholesaler shall pay 100 percent of the actual dealer cost, including freight, of all new, unsold, undamaged, and complete units of equipment which are resalable and 100 percent of the current wholesale price of all new, unused, undamaged repair parts and accessories which are listed in the manufacturer's current parts price list. The manufacturer, distributor, or wholesaler shall pay the dealer 5 percent of the current wholesale price on all new, unused, and undamaged repair parts returned to cover the cost of handling, packing, and loading. The manufacturer, distributor, or wholesaler shall have the option of performing the handling, packing, and loading in lieu of paying the 5 percent sum imposed by this subsection for these services.

(c) Upon payment within a reasonable time of the repurchase amount to the dealer, the title and right of possession to the repurchased inventory shall transfer to the manufacturer, distributor, or wholesaler, as the case may be.

(d) The provisions of this article shall not require the repurchase from a dealer of:

- (1) Any single repair part which is priced as a set of two or more items;
- (2) Any repair part which, because of its condition, is not resalable as a new part without repackaging or reconditioning;
- (3) Any inventory for which the dealer is unable to furnish evidence, reasonably satisfactory to the manufacturer, distributor, or wholesaler, of good title, free and clear of all claims, liens, and encumbrances;

(4) Any inventory which the dealer desires to keep, provided the dealer has a contractual right to do so;

(5) Any unit of equipment which is not in new, unused, undamaged, complete condition;

(6) Any repair parts which are not in new, unused, undamaged condition;

(7) Any inventory which was ordered by the dealer on or after the date of receipt of the notification of termination of the franchise; or

(8) Any inventory which was acquired by the dealer from any source other than the manufacturer, distributor, or wholesaler.

(e) If any manufacturer, distributor, or wholesaler shall fail or refuse to repurchase any inventory covered under the provisions of this article within 60 days after termination of a dealer's contract, it shall be civilly liable for 100 percent of the current wholesale price of the inventory plus any freight charges paid by the dealer, such dealer's reasonable attorney's fees, court costs, and interest on the current wholesale price computed at the legal interest rate from the sixty-first day after termination. (Code 1981, § 13-8-22, enacted by Ga. L. 1993, p. 1585, § 4; Ga. L. 2002, p. 1101, § 1.)

13-8-23. Repurchase of inventory upon death or incapacity of dealer or majority stockholder of corporate dealer.

In the event of the death or incapacity of the dealer or the majority stockholder of a corporation operating as a dealer, the manufacturer, distributor, or wholesaler shall, at the option of the heirs at law, if the dealer died intestate, or the devisees or transferees under the terms of the deceased dealer's last will and testament, if said dealer died testate, repurchase the inventory from said heirs or devisees as aforesaid as if the manufacturer, distributor, or wholesaler had terminated the contract, and the inventory repurchase provisions of Code Section 13-8-22 are made expressly applicable hereto. The heirs or devisees as aforesaid shall have one year from the date of the death of the retailer or majority stockholder to exercise their option under this article; provided, however, that nothing in this article shall require the repurchase of inventory if the heirs or devisees as aforesaid and the manufacturer, distributor, or wholesaler enter into a new franchise agreement to operate the retail dealership. (Code 1981, § 13-8-23, enacted by Ga. L. 1993, p. 1585, § 4; Ga. L. 2002, p. 1101, § 1.)

Editor's notes. — Ga. L. 2002, p. 1101, § 1, effective July 1, 2002, reenacted this Code section without change.

13-8-24. Indemnification of dealer for losses relating to manufacture, assembly, design, or functions beyond control of dealer.

A manufacturer, distributor, or wholesaler, as the case may be, will fully indemnify and hold harmless its dealer against any losses including, but not limited to: court costs and reasonable attorney's fees or damages arising out of complaints, claims, or lawsuits including, but not limited to, strict liability, negligence, misrepresentation, express or implied warranty, or rescission of the sale where the complaint, claim, or lawsuit relates to the manufacture, assembly, or design of new items covered by this article, parts or accessories, or other functions by the manufacturer, distributor, or wholesaler which are beyond the control of the dealer. (Code 1981, § 13-8-24, enacted by Ga. L. 1993, p. 1585, § 4; Ga. L. 2002, p. 1101, § 1.)

13-8-25. Applicability of article to existing contracts without expiration dates and to contracts entered or renewed on or after July 1, 2002.

The provisions of this article shall apply to all contracts now in effect which have no expiration date and are a continuing contract and all other contracts entered into or renewed on or after July 1, 2002. Any contract in force and effect prior to July 1, 2002, which by its own terms will terminate on a date subsequent thereto shall be governed by the law as it existed prior to July 1, 2002. (Code 1981, § 13-8-25, enacted by Ga. L. 1993, p. 1585, § 4; Ga. L. 2002, p. 1101, § 1.)

Editor's notes. — Ga. L. 2002, p. 1101, § 1, effective July 1, 2002, reenacted this Code section without change.

ARTICLE 3**REGULATION OF FARM EQUIPMENT MANUFACTURERS,
DISTRIBUTORS, AND DEALERS**

Cross references. — Regulation of the distribution of agricultural equipment, § 13-8-11 et seq.

Editor's notes. — Ga. L. 1993, p. 1585, § 4, effective April 27, 1993, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of §§ 13-8-31 through 13-8-45 and was based on Ga. L. 1982, p. 1791, § 1; Ga. L. 1983, p. 3, § 10; Ga. L. 1984, p. 22, § 13; and Ga. L. 1989, p. 14, § 13.

Ga. L. 1993, p. 1585, § 1, not codified by the General Assembly, provides: "It is the intent of the General Assembly to substantively reenact certain legislation relating to

distribution of tractors, farm equipment, heavy equipment, and motor vehicles subsequent to the ratification at the 1992 general election of a constitutional amendment declaring that such distribution vitally affects the general economy of the state and the public interest and public welfare and authorizing the General Assembly to regulate such distribution. This Act is intended to ratify and affirm the validity of such legislation subsequent to the ratification of said constitutional amendment; and this Act shall not in any manner be construed to imply a legislative determination that such legislation was not valid prior to the ratification of said constitutional amendment."

13-8-31. Legislative findings.

The General Assembly finds that the distribution of farm equipment in the State of Georgia vitally affects the general economy of the state and the public interest and public welfare and, in the exercise of its police power, it is necessary to regulate farm equipment manufacturers, distributors, dealers, and their representatives doing business in Georgia in order to prevent frauds, unfair business practices, unfair methods of competition, impositions, and other abuses upon its citizens. (Code 1981, § 13-8-31, enacted by Ga. L. 1993, p. 1585, § 4.)

13-8-32. Definitions.

As used in this article, the term:

(1) “Distributor” or “wholesaler” means any person, company, or corporation who purchases farm equipment or implements or parts from a manufacturer and resells the same at wholesale to dealers.

(2) “Distributor or wholesaler branch” means a branch office maintained by a distributor or wholesaler which sells or distributes farm equipment or implements or parts to tractor or farm equipment dealers.

(3) “Distributor representative” means a representative employed by a distributor branch or distributor.

(4) “Factory branch” means a branch office maintained by a manufacturer which manufactures and assembles farm equipment or implements or parts for sale to distributors, tractor or farm equipment dealers, or wholesalers or which is maintained for directing and supervising the representatives of the manufacturer.

(5) “Factory representative” means a representative employed by a manufacturer or employed by a factory branch for the purpose of making or promoting the sale of farm equipment or implements or parts or for supervising, servicing, instructing, or contracting with farm equipment dealers or prospective dealers or wholesalers.

(6) “Farm equipment dealer” means any person who sells, solicits, or advertises the sale of farm equipment to the consuming public. It shall not include (A) receivers, trustees, administrators, executors, guardians, or other persons appointed by or acting under judgment, decree, or order of any court; (B) public officers while performing their duties as such officers; (C) persons making casual sales of their own item of farm equipment not subject to sales tax under the laws of the State of Georgia; (D) persons engaged in the auction sale of farm equipment; or (E) dealers in used farm equipment.

(7) “Farm equipment or implements” means those farm implements primarily designed for use in agriculture.

(8) “Franchise” means an oral or written agreement for a definite or indefinite period of time in which a manufacturer grants to a wholesaler permission to use a trade name, service mark, or related characteristic, and in which there is a community of interest in the marketing of farm equipment or implements or parts or services related thereto at wholesale whether by leasing, sale, or otherwise.

(9) “Franchisee” means a wholesaler to whom a franchise is offered or granted.

(10) “Franchisor” means a manufacturer who grants a franchise to a wholesaler.

(11) “Fraud” means, in addition to its normal legal connotation, the following: a misrepresentation in any manner, whether intentionally false or arising from gross negligence, of a material fact; a promise or representation not made honestly and in good faith; or an intentional failure to disclose a material fact.

(12) “Manufacturer” means any person engaged in the business of manufacturing or assembling farm equipment or implements or parts.

(13) “New farm equipment or implements” means a unit of farm equipment or implement which has not been previously sold to and put into regular use or service by any person except a wholesaler for resale.

(14) “Person” means a natural person, corporation, partnership, trust, or other business entity; and, in case of a business entity, it shall include any other entity in which it has a majority interest or effectively controls as well as the individual officers, directors, and other persons in active control of the activities of each such entity.

(15) “Sale” means the issuance, transfer, agreement for transfer, exchange, pledge, hypothecation, or mortgage in any form, whether by transfer in trust or otherwise, of any unit of farm equipment or implement or parts or interest therein or of any franchise related thereto; any option, subscription or other contract, or solicitation, looking to a sale, or offer or attempt to sell in any form, whether in oral or written form. (Code 1981, § 13-8-32, enacted by Ga. L. 1993, p. 1585, § 4.)

JUDICIAL DECISIONS

Cited in *Carolina Tobacco Co. v. Baker*,
295 Ga. App. 115, 670 S.E.2d 811 (2008).

13-8-33. Persons subject to provisions of article.

Any person who engages directly or indirectly in purposeful contacts within this state in connection with the offering or advertising for sale of farm machinery or implements and parts shall be subject to the provisions

of this article and shall be subject to the jurisdiction of the courts of this state upon service of process in accordance with the provisions of the laws of the State of Georgia. (Code 1981, § 13-8-33, enacted by Ga. L. 1993, p. 1585, § 4.)

13-8-34. Unfair competition; unfair or deceptive acts.

Unfair methods of competition and unfair or deceptive acts or practices as defined in Code Section 13-8-35 are declared to be unlawful. (Code 1981, § 13-8-34, enacted by Ga. L. 1993, p. 1585, § 4.)

13-8-35. Unfair methods of competition and unfair or deceptive acts or practices.

(a) It shall be deemed a violation of Code Section 13-8-34 for any manufacturer, factory branch, factory representative, or wholesaler to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage in terms of law or equity to any of the parties or to the public.

(b) It shall be deemed a violation of Code Section 13-8-34 for a manufacturer, a factory branch or division, or officer, agent, or other representative thereof, to coerce, or attempt to coerce, any wholesaler:

(1) To order or accept delivery of any unit of farm equipment or implements or parts or accessories therefor, or any other commodity or commodities which such wholesaler has not voluntarily ordered; or

(2) To order or accept delivery of any farm equipment or implements with special features, accessories, or equipment not included in the base list price of such farm equipment or implements as publicly advertised by the manufacturer thereof.

(c) It shall be deemed a violation of Code Section 13-8-34 for a manufacturer, a factory branch or division, or officer, agent, or other representative thereof:

(1) To refuse to deliver in reasonable quantities and within a reasonable time after receipt of wholesaler's order to any wholesaler having a franchise or contractual agreement for the sale of farm equipment or implements sold by such manufacturer or factory branch or division any item of farm equipment covered by such franchise or contract specifically advertised or represented by such manufacturer or factory branch or division to be available for immediate delivery; provided, however, the failure to deliver any such unit of farm equipment or implements shall not be considered a violation of this article if such failure is due to prudent and reasonable restriction on extension of credit by the franchisor to the wholesaler, an act of God, work stoppage or delay due

to a strike or labor difficulty, a bona fide shortage of materials, freight embargo, or other cause over which the manufacturer or any agent thereof shall have no control;

(2) To coerce or attempt to coerce any wholesaler to enter into any agreement, whether written or oral, supplementary to an existing franchise with such manufacturer, factory branch or division, or officer, agent, or other representative thereof; or to do any other act prejudicial to such wholesaler by threatening to cancel any franchise or any contractual agreement existing between such manufacturer or factory branch or division, and such wholesaler; provided, however, that notice in good faith to any wholesaler of such wholesaler's violation of any terms or provisions of such franchise or contractual agreement shall not constitute a violation of this article if such notice is in writing mailed by registered or certified mail or statutory overnight delivery to such wholesaler at his current business address;

(3)(A) To terminate or cancel the franchise or selling agreement of any such wholesaler without due cause, as defined in subparagraph (B) of this paragraph. The nonrenewal of a franchise or selling agreement, without due cause, shall constitute an unfair termination or cancellation, regardless of the specified time period of such franchise or selling agreement. Except where the grounds for such termination or cancellation fall within division (iii) of subparagraph (B) of this paragraph, such manufacturer or factory branch or division, or officer, agent, or other representative thereof shall notify a wholesaler in writing of the termination or cancellation of the franchise or selling agreement of such wholesaler at least 60 days before the effective date thereof, stating the specific grounds for such termination or cancellation; and in no event shall the contractual term of any such franchise or selling agreement expire without the written consent of the wholesaler involved prior to the expiration of at least 60 days following such written notice. During the 60 day period, either party may, in appropriate circumstances, petition a court to modify such 60 day stay or to extend it pending a final determination of such proceedings on the merits. The court shall have authority to grant preliminary and final injunctive relief.

(B) As used in this paragraph, tests for determining what constitutes due cause for a manufacturer to terminate, cancel, or refuse to renew a franchise agreement shall include whether the wholesaler:

(i) Has transferred an ownership interest in the business without the manufacturer's consent;

(ii) Has made a material misrepresentation in applying for or acting under the franchise agreement;

(iii) Has filed a voluntary petition in bankruptcy or has had an involuntary petition in bankruptcy filed against the wholesaler which

has not been discharged within 30 days after the filing, is in default under the provisions of a security agreement in effect with the manufacturer, or is in receivership;

(iv) Has engaged in an unfair business practice;

(v) Has inadequately represented the manufacturer's products with respect to sales, service, or warranty work;

(vi) Has engaged in conduct which is injurious or detrimental to the public welfare;

(vii) Has inadequate sales and service facilities and personnel;

(viii) Has failed to comply with an applicable licensing law;

(ix) Has been convicted of a crime, the effect of which would be detrimental to the manufacturer or wholesale business;

(x) Has failed to operate in the normal course of business for seven consecutive business days;

(xi) Has relocated the wholesaler's place of business without the manufacturer's consent; or

(xii) Has failed to comply with the terms of the franchise agreement;

(4) To resort to or use any false or misleading advertisement in connection with his business as such manufacturer, or factory branch or division, or officer, agent, or other representative thereof;

(5) To offer to sell any unit of farm equipment or implements or parts or accessories therefor to any other wholesaler at a lower actual price therefor than the actual price offered to any other wholesaler for farm equipment or implement identically equipped; or to utilize any device including, but not limited to, sales promotion plans or programs which result in such lesser actual price; provided, however, the provisions of this paragraph shall not apply to sales to a wholesaler for resale to any unit of the United States government, the state, or any of its political subdivisions; and provided, further, that the provisions of this paragraph shall not apply so long as a manufacturer sells or offers to sell such new farm equipment or implement, parts, or accessories to all their franchised wholesalers at an equal price;

(6) To discriminate willfully, either directly or indirectly, in price, programs, or terms of sale offered to franchisees, where the effect of such discrimination may be to lessen competition substantially or to give to one holder of a franchise any business or competitive advantage not offered to all holders of the same or similar franchise;

(7) To prevent or attempt to prevent, by contract or otherwise, any wholesaler from changing the capital structure of his business or the

means by or through which he finances the operation of his business, provided the wholesaler at all times meets any reasonable capital standards agreed to between the wholesaler and the manufacturer and provided such change by the wholesaler does not result in a change in the executive management of the wholesaler;

(8) To prevent or attempt to prevent, by contract or otherwise, any wholesaler or any officer, partner, or stockholder of any wholesaler from selling or transferring any part of the interest of any of them to any other person or persons or party or parties; provided, however, that no wholesaler, officer, partner, or stockholder shall have the right to sell, transfer, or assign the franchise or power of management or control thereunder without the consent of the manufacturer, except that such consent shall not be unreasonably withheld;

(9) To obtain money, goods, services, anything of value, or any other benefit from any other person with whom the wholesaler does business or employs on account of or in relation to the transactions between the wholesaler, the franchisor, and such other person; or

(10) To require a wholesaler to assent to a release, assignment, notation, waiver, or estoppel which would relieve any person from liability imposed by this article.

(d) It shall be deemed a violation of Code Section 13-8-34 for a wholesaler:

(1) To require a purchaser of any unit of farm equipment or implement, as a condition of sale and delivery thereof, also to purchase special features, appliances, equipment, parts, or accessories not desired or requested by the purchaser; provided, however, that this prohibition shall not apply to special features, appliances, equipment, parts, or accessories which are already installed when a unit of farm equipment or implement is received by the wholesaler from the manufacturer thereof;

(2) To represent and sell as new and unused any unit of farm equipment or implement which has been used and operated for demonstration or other purposes without stating to the purchaser the approximate amount of use the unit of farm machinery or implement has experienced; or

(3) To resort to or use any false or misleading advertisement in connection with his business as such wholesaler. (Code 1981, § 13-8-35, enacted by Ga. L. 1993, p. 1585, § 4; Ga. L. 1994, p. 97, § 13; Ga. L. 2000, p. 1589, § 3.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the Act was applicable with respect to notices delivered on or after July 1, 2000.

13-8-36. Predelivery and preparation obligations; repair parts availability; return of surplus parts inventory.

(a) Every manufacturer shall specify and every wholesaler shall provide and fulfill reasonable predelivery and preparation obligations for its farm equipment or implements prior to delivery of same to purchasers.

(b) Every manufacturer shall provide for repair parts availability throughout the reasonable useful life of any farm equipment or implement sold.

(c) Every manufacturer shall provide to his wholesalers, on an annual basis, an opportunity to return a portion of his surplus parts inventory for credit. The surplus parts return procedure shall be administered as follows:

(1) The manufacturer may specify and thereupon notify his wholesalers of a time period of at least 60 days' duration, during which time wholesalers may submit their surplus parts list and return their surplus parts to the manufacturer;

(2) If a manufacturer has not notified a wholesaler of a specific time period for returning surplus parts within the preceding 12 months, then he shall authorize and allow the wholesaler's surplus parts return request within 30 days after receipt of such request from the wholesaler;

(3) Pursuant to the provisions of this subsection, a manufacturer must allow surplus parts return authority on a dollar value of parts equal to 10 percent of the total dollar value of purchases by the wholesaler from the manufacturer during the 12 month period immediately preceding the notification to the wholesaler by the manufacturer of the surplus parts return program, or the month the wholesaler's return request is made, whichever is applicable; provided, however, that the wholesaler may, at his option, elect to return a dollar value of his surplus parts less than 10 percent of the total dollar value of purchases by the wholesaler from the manufacturer during the preceding 12 month period as provided in this subsection;

(4) No obsolete or superseded part may be returned, but any part listed in the manufacturer's current parts price list at the date of notification to the wholesaler by the manufacturer of the surplus parts return program, or the date of a wholesaler's parts return request, whichever is applicable, shall be eligible for return and credit as specified in this subsection; provided, however, that returned parts must be in new and unused condition and must have been purchased from the manufacturer to whom they are returned;

(5) The minimum lawful credit to be allowed for returned parts shall be 85 percent of the wholesale cost thereof as listed in the manufacturer's current parts price list at the date of the notification to the wholesaler by

the manufacturer of the surplus parts return program, or the date of a wholesaler's parts return request, whichever is applicable;

(6) Applicable credit pursuant to this subsection must be issued to the wholesaler within 30 days after receipt of his returned parts by the manufacturer; and

(7) Packing and return freight expense incurred in any return of surplus parts pursuant to the terms of this Code section shall be borne by the wholesaler. (Code 1981, § 13-8-36, enacted by Ga. L. 1993, p. 1585, § 4.)

13-8-37. Warranty agreements; disapproval of claims under warranty agreements; special handling of claims; calculation of compensation to dealer for warranty work.

Every manufacturer or factory branch or division shall reimburse its wholesalers for any expenses they incur in complying with the provisions of Georgia laws pertaining to warranty requirements for farm equipment or implements as they apply to products of the manufacturer. (Code 1981, § 13-8-37, enacted by Ga. L. 1993, p. 1585, § 4.)

13-8-38. Agreements to which article shall apply.

The provisions of this article shall apply to all written or oral agreements between a manufacturer with a wholesaler including, but not limited to, the franchise offering, the franchise agreement, sales of goods, services and advertising, leases or mortgages of real or personal property, promises to pay, security interests, pledges, insurance contracts, advertising contracts, construction or installation contracts, servicing contracts, and all other such agreements in which the manufacturer has any direct or indirect interest. (Code 1981, § 13-8-38, enacted by Ga. L. 1993, p. 1585, § 4.)

13-8-39. Failure to renew, termination of, or restriction on transfer of franchise without due cause.

It shall be unlawful for the manufacturer or franchisor, without due cause, to fail to renew on terms then equally available to all its wholesalers, to terminate a franchise, or to restrict the transfer of a franchise unless the franchisee shall receive fair and reasonable compensation for the inventory of the business. As used in this Code section, "due cause" shall be construed in accordance with the definition of same as contained in subparagraph (c)(3)(B) of Code Section 13-8-35. (Code 1981, § 13-8-39, enacted by Ga. L. 1993, p. 1585, § 4.)

13-8-40. Damages recoverable for injuries sustained by violations of article; class actions; punitive damages.

(a) In addition to temporary or permanent injunctive relief as provided in subparagraph (c)(3)(A) of Code Section 13-8-35, any person who shall be injured in his business or property by reason of anything forbidden in this article may bring an action therefor in the appropriate superior court of this state and shall recover the actual damages sustained and the costs of such action, including a reasonable attorney's fee.

(b) When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may bring a class action for the benefit of the whole, including actions for injunctive relief.

(c) In an action for money damages, if the jury finds that the defendant acted maliciously, the jury may award punitive damages as permitted by Georgia law. (Code 1981, § 13-8-40, enacted by Ga. L. 1993, p. 1585, § 4.)

13-8-41. Contracts and agreements in violation of article as void.

Any contract or franchise agreement or part thereof or practice thereunder in violation of any provision of this article shall be deemed against public policy and shall be void and unenforceable. (Code 1981, § 13-8-41, enacted by Ga. L. 1993, p. 1585, § 4.)

13-8-42. Repurchase of inventory upon termination of franchise; payment for inventory repurchased; title to repurchased inventory; exempt inventory items; civil liability for failure to repurchase inventory.

(a) Whenever any wholesaler enters into a franchise agreement with a manufacturer wherein the wholesaler agrees to maintain an inventory of farm equipment or implements or repair parts and the franchise is subsequently terminated, the manufacturer shall repurchase the inventory as provided in this article. The wholesaler may keep the inventory if he desires. If the wholesaler has any outstanding debts to the manufacturer, then the repurchase amount may be credited to the wholesaler's account.

(b) The manufacturer shall repurchase that inventory previously purchased from him and held by the wholesaler on the date of termination of the contract. The manufacturer shall pay 100 percent of the actual wholesaler's cost, including freight, of all new, unsold, undamaged, and complete units of farm equipment or implements which are resalable, all demonstrator units of farm equipment or implements, and 100 percent of the current wholesale price of all new, unused, undamaged repair parts and accessories which are listed in the manufacturer's current parts price list. The manufacturer shall pay the wholesaler 5 percent of the current

wholesale price on all new, unused, and undamaged repair parts returned to cover the cost of handling, packing, and loading.

(c) Upon payment within a reasonable time of the repurchase amount to the wholesaler, the title and right of possession to the repurchased inventory shall transfer to the manufacturer.

(d) The provisions of this article shall not require the repurchase from a wholesaler of:

(1) Any repair part which has a limited storage life or is otherwise subject to deterioration;

(2) Any single repair part which is priced as a set of two or more items;

(3) Any repair part which, because of its condition, is not resalable as a new part without repackaging or reconditioning;

(4) Any inventory for which the wholesaler is unable to furnish evidence, reasonably satisfactory to the manufacturer, of good title, free and clear of all claims, liens, and encumbrances;

(5) Any inventory which the wholesaler desires to keep, provided the wholesaler has a contractual right to do so;

(6) Any unit of farm equipment or implement which is not in new, unused, undamaged, complete condition, except units that have been used by the wholesaler as demonstrators;

(7) Any repair parts which are not in new, unused, undamaged condition;

(8) Any inventory which was ordered by the wholesaler on or after the date of receipt of the notification of termination of the franchise; or

(9) Any inventory which was acquired by the wholesaler from any source other than the manufacturer.

(e) If any manufacturer shall fail or refuse to repurchase any inventory covered under the provisions of this article within 60 days after termination of a wholesaler's contract, he shall be civilly liable for 100 percent of the current wholesale price of the inventory plus any freight charges paid by the wholesaler, the wholesaler's reasonable attorney's fees, court costs, and interest on the current wholesale price computed at the legal interest rate from the sixty-first day after termination. (Code 1981, § 13-8-42, enacted by Ga. L. 1993, p. 1585, § 4.)

13-8-43. Repurchase of inventory upon death or incapacity of dealer or majority stockholder of corporate dealer.

In the event of the death or incapacity of the wholesaler or the majority stockholder of a corporation operating as a wholesaler, the manufacturer

shall, at the option of the heirs at law if the wholesaler died intestate, or the devisees or transferees under the terms of the deceased wholesaler's last will and testament if said wholesaler died testate, repurchase the inventory from said heirs or devisees as aforesaid as if the manufacturer had terminated the contract, and the inventory repurchase provisions of Code Section 13-8-42 are made expressly applicable hereto. The heirs or devisees as aforesaid shall have one year from the date of the death of the wholesaler or majority stockholder to exercise their option under this article; provided, however, that nothing in this article shall require the repurchase of inventory if the heirs or devisees as aforesaid and the manufacturer enter into a new franchise agreement to operate the wholesale business. (Code 1981, § 13-8-43, enacted by Ga. L. 1993, p. 1585, § 4.)

13-8-44. Indemnification of dealer for losses relating to manufacture, assembly, design, or functions beyond control of dealer.

A manufacturer will fully indemnify and hold harmless its wholesaler against any losses including, but not limited to, court costs and reasonable attorney's fees or damages arising out of complaints, claims, or lawsuits including, but not limited to, strict liability, negligence, misrepresentation, express or implied warranty, or rescission of the sale where the complaint, claim, or lawsuit relates to the manufacture, assembly, or design of new items covered by this article, parts or accessories, or other functions by the manufacturer which are beyond the control of the wholesaler. (Code 1981, § 13-8-44, enacted by Ga. L. 1993, p. 1585, § 4.)

13-8-45. Applicability of article to existing contracts without expiration dates and to contracts entered or renewed after November 1, 1982.

The provisions of this article shall apply to all contracts now in effect which have no expiration date and are a continuing contract and all other contracts entered into or renewed after November 1, 1982. Any contract in force and effect on November 1, 1982, which by its own terms will terminate on a date subsequent thereto shall be governed by the law as it existed prior to this article. (Code 1981, § 13-8-45, enacted by Ga. L. 1993, p. 1585, § 4.)

ARTICLE 4

RESTRICTIVE COVENANTS IN CONTRACTS

Delayed effective date. — Ga. L. 2009, p. 231, § 4 provides that the 2009 enactment of this article becomes effective following the ratification at the time of the 2010 general election of an amendment to the Constitution of Georgia providing for the enforcement of covenants in commercial contracts

that limit competition and shall apply to contracts entered into on and after such date and shall not apply in actions determining the enforceability of restrictive covenants entered into before such date and that if such amendment is not so ratified, then this article shall stand automatically repealed.

13-8-50. (For effective date, see note.) Legislative findings.

The General Assembly finds that reasonable restrictive covenants contained in employment and commercial contracts serve the legitimate purpose of protecting legitimate business interests and creating an environment that is favorable to attracting commercial enterprises to Georgia and keeping existing businesses within the state. Further, the General Assembly desires to provide statutory guidance so that all parties to such agreements may be certain of the validity and enforceability of such provisions and may know their rights and duties according to such provisions. (Code 1981, § 13-8-50, enacted by Ga. L. 2009, p. 231, § 3/HB 173.)

Editor's notes. — For information as to the effective date of this Code section, see the delayed effective date note at the beginning of this article.

Law reviews. — For article, "Georgia Gets Competitive," see 15 (No. 4) Ga. St. B.J. 13 (2009).

13-8-51. (For effective date, see note.) Definitions.

As used in this article, the term:

(1) "Affiliate" means:

(A) A person or entity that directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with another person or entity;

(B) Any entity of which a person is an officer, director, or partner or holds an equity interest or ownership position that accounts for 25 percent or more of the voting rights or profit interest of such entity;

(C) Any trust or other estate in which the person or entity has a beneficial interest of 25 percent or more or as to which such person or entity serves as trustee or in a similar fiduciary capacity; or

(D) The spouse, lineal ancestors, lineal descendants, and siblings of the person, as well as each of their spouses.

(2) "Business" means any line of trade or business conducted by the seller or employer, as such terms are defined in this Code section.

(3) "Confidential information" means data and information:

(A) Relating to the business of the employer, regardless of whether the data or information constitutes a trade secret as that term is defined in Article 1 of Chapter 10 of Title 10;

(B) Disclosed to the employee or of which the employee became aware of as a consequence of the employee's relationship with the employer;

(C) Having value to the employer;

(D) Not generally known to competitors of the employer; and

(E) Which includes trade secrets, methods of operation, names of customers, price lists, financial information and projections, route books, personnel data, and similar information;

provided, however, that such term shall not mean data or information (A) which has been voluntarily disclosed to the public by the employer, except where such public disclosure has been made by the employee without authorization from the employer; (B) which has been independently developed and disclosed by others; or (C) which has otherwise entered the public domain through lawful means.

(4) "Controlling interest" means any equity interest or ownership participation held by a person or entity with respect to a business that accounts for 25 percent or more of the voting rights or profit interest of the business prior to the sale, alone or in combination with the interest or participation held by affiliates of such person or entity.

(5) "Employee" means:

(A) An executive employee;

(B) Research and development personnel or other persons or entities of an employer, including, without limitation, independent contractors, in possession of confidential information that is important to the business of the employer;

(C) Any other person or entity, including an independent contractor, in possession of selective or specialized skills, learning, or abilities or customer contacts, customer information, or confidential information who or that has obtained such skills, learning, abilities, contacts, or information by reason of having worked for an employer; or

(D) A franchisee, distributor, lessee, licensee, or party to a partnership agreement or a sales agent, broker, or representative in connection with franchise, distributorship, lease, license, or partnership agreements.

Such term shall not include any employee who lacks selective or specialized skills, learning, or abilities or customer contacts, customer information, or confidential information.

(6) "Employer" means any corporation, partnership, proprietorship, or other business organization, whether for profit or not for profit, including, without limitation, any successor in interest to such an entity, who or that conducts business or any person or entity who or that directly or indirectly owns an equity interest or ownership participation in such an entity accounting for 25 percent or more of the voting rights or profit interest of such entity. Such term also means the buyer or seller of a business organization.

(7) "Executive employee" means a member of the board of directors, an officer, a key employee, a manager, or a supervisor of an employer.

(8) "Key employee" means an employee who, by reason of the employer's investment of time, training, money, trust, exposure to the public, or exposure to customers, vendors, or other business relationships during the course of the employee's employment with the employer, has gained a high level of notoriety, fame, reputation, or public persona as the employer's representative or spokesperson or has gained a high level of influence or credibility with the employer's customers, vendors, or other business relationships or is intimately involved in the planning for or direction of the business of the employer or a defined unit of the business of the employer. Such term also means an employee in possession of selective or specialized skills, learning, or abilities or customer contacts or customer information who has obtained such skills, learning, abilities, contacts, or information by reason of having worked for the employer.

(9) "Legitimate business interest" includes, but is not limited to:

(A) Trade secrets, as defined by Code Section 10-1-761, et seq.;

(B) Valuable confidential information that otherwise does not qualify as a trade secret;

(C) Substantial relationships with specific prospective or existing customers, patients, vendors, or clients;

(D) Customer, patient, or client good will associated with:

(i) An ongoing business, commercial, or professional practice, including, but not limited to, by way of trade name, trademark, service mark, or trade dress;

(ii) A specific geographic location; or

(iii) A specific marketing or trade area; and

(E) Extraordinary or specialized training.

(10) "Material contact" means the contact between an employee and each customer or potential customer:

(A) With whom or which the employee dealt on behalf of the employer;

(B) Whose dealings with the employer were coordinated or supervised by the employee;

(C) About whom the employee obtained confidential information in the ordinary course of business as a result of such employee's association with the employer; or

(D) Who receives products or services authorized by the employer, the sale or provision of which results or resulted in compensation, commissions, or earnings for the employee within two years prior to the date of the employee's termination.

(11) "Modification" means the limitation of a restrictive covenant to render it reasonable in light of the circumstances in which it was made. Such term shall include:

(A) Severing or removing that part of a restrictive covenant that would otherwise make the entire restrictive covenant unenforceable; and

(B) Enforcing the provisions of a restrictive covenant to the extent that the provisions are reasonable.

(12) "Modify" means to make, to cause, or otherwise to bring about a modification.

(13) "Products or services" means anything of commercial value, including, without limitation, goods; personal, real, or intangible property; services; financial products; business opportunities or assistance; or any other object or aspect of business or the conduct thereof.

(14) "Professional" means an employee who has as a primary duty the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. Such term shall not include employees performing technician work using knowledge acquired through on-the-job and classroom training, rather than by acquiring the knowledge through prolonged academic study, such as might be performed, without limitation, by a mechanic, a manual laborer, or a ministerial employee.

(15) "Restrictive covenant" means an agreement between two or more parties that exists to protect the first party's or parties' interest in property, confidential information, customer good will, business relationships, employees, or any other economic advantages that the second party has obtained for the benefit of the first party or parties, to which the second party has gained access in the course of his or her relationship with the first party or parties, or which the first party or parties has acquired from the second party or parties as the result of a sale. Such restrictive covenants may exist within or ancillary to contracts between or among employers and employees, distributors and manufacturers, lessors and lessees, partnerships and partners, employers and independent contractors, franchisors and franchisees, and sellers and purchasers of a business or commercial enterprise and any two or more employers. A restrictive covenant shall not include covenants appurtenant to real property.

(16) "Sale" means any sale or transfer of the good will or substantially all of the assets of a business or any sale or transfer of a controlling interest in a business, whether by sale, exchange, redemption, merger, or otherwise.

(17) "Seller" means any person or entity, including any successor-in-interest to such an entity, that is:

(A) An owner of a controlling interest;

(B) An executive employee of the business who receives, at a minimum, consideration in connection with a sale; or

(C) An affiliate of a person or entity described in subparagraph (A) of this paragraph; provided, however, that each sale involving a restrictive covenant shall be binding only on the person or entity entering into such covenant, its successors-in-interest, and, if so specified in the covenant, any entity that directly or indirectly through one or more affiliates is controlled by or is under common control of such person or entity.

(18) "Termination" means the termination of an employee's engagement with an employer, whether with or without cause, upon the initiative of either party.

(19) "Trade dress" means the distinctive packaging or design of a product that promotes the product and distinguishes it from other products in the marketplace. (Code 1981, § 13-8-51, enacted by Ga. L. 2009, p. 231, § 3/HB 173.)

Editor's notes. — For information as to the delayed effective date note at the beginning of this article, see the effective date of this Code section.

13-8-52. (For effective date, see note.) Application.

(a) The provisions of this article shall be applicable only to contracts and agreements between or among:

(1) Employers and employees, as such terms are defined in Code Section 13-8-51;

(2) Distributors and manufacturers;

(3) Lessors and lessees;

(4) Partnerships and partners;

(5) Franchisors and franchisees;

(6) Sellers and purchasers of a business or commercial enterprise; and

(7) Two or more employers.

(b) The provisions of this article shall not apply to any contract or agreement not described in subsection (a) of this Code section. (Code 1981, § 13-8-52, enacted by Ga. L. 2009, p. 231, § 3/HB 173.)

Editor's notes. — For information as to the delayed effective date note at the beginning of this article, see the effective date of this Code section, see

13-8-53. (For effective date, see note.) Enforcement of covenants; determining competitive status; time geographic limitations.

(a) Notwithstanding any other provision of this chapter, enforcement of contracts that restrict competition during the term of a restrictive covenant, so long as such restrictions are reasonable in time, geographic area, and scope of prohibited activities, shall be permitted. However, enforcement of contracts that restrict competition after the term of employment, as distinguished from a customer nonsolicitation provision, as described in subsection (b) of Code Section 13-8-53, or a nondisclosure of confidential information provision, as described in subsection (e) of Code Section 13-8-53, shall not be permitted against any employee who does not, in the course of his or her employment:

(1) Customarily and regularly solicit for the employer customers or prospective customers;

(2) Customarily and regularly engage in making sales or obtaining orders or contracts for products or services to be performed by others;

(3) Perform the following duties:

(A) Have a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(B) Customarily and regularly direct the work of two or more other employees; and

(C) Have the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees; or

(4) Perform the duties of a key employee or of a professional.

(b) Notwithstanding any other provision of this chapter, an employee may agree in writing for the benefit of an employer to refrain, for a stated period of time following termination, from soliciting, or attempting to solicit, directly or by assisting others, any business from any of such employer's customers, including actively seeking prospective customers, with whom the employee had material contact during his or her employment for purposes of providing products or services that are competitive

with those provided by the employer's business. No express reference to geographic area or the types of products or services considered to be competitive shall be required in order for the restraint to be enforceable. Any reference to a prohibition against 'soliciting or attempting to solicit business from customers' or similar language shall be adequate for such purpose and narrowly construed to apply only to: (1) such of the employer's customers, including actively sought prospective customers, with whom the employee had material contact; and (2) products and services that are competitive with those provided by the employer's business.

(c)(1) Activities, products, or services that are competitive with the activities, products, or services of an employer shall include activities, products, or services that are the same as or similar to the activities, products, or services of the employer. Whenever a description of activities, products, and services, or geographic areas, is required by this Code section, any description that provides fair notice of the maximum reasonable scope of the restraint shall satisfy such requirement, even if the description is generalized or could possibly be stated more narrowly to exclude extraneous matters. In case of a postemployment covenant entered into prior to termination, any good faith estimate of the activities, products, and services, or geographic areas, that may be applicable at the time of termination shall also satisfy such requirement, even if such estimate is capable of including or ultimately proves to include extraneous activities, products, and services, or geographic areas. The postemployment covenant shall be construed ultimately to cover only so much of such estimate as relates to the activities actually conducted, the products and services actually offered, or the geographic areas actually involved within a reasonable period of time prior to termination.

(2) Activities, products, or services shall be considered sufficiently described if a reference to the activities, products, or services is provided and qualified by the phrase 'of the type conducted, authorized, offered, or provided within two years prior to termination' or similar language containing the same or a lesser time period. The phrase "the territory where the employee is working at the time of termination" or similar language shall be considered sufficient as a description of geographic areas if the person or entity bound by the restraint can reasonably determine the maximum reasonable scope of the restraint at the time of termination.

(d) Any restrictive covenant not in compliance with the provisions of this article is unlawful and is void and unenforceable; provided, however, that a court may modify a covenant that is otherwise void and unenforceable as long as the modification does not render the covenant more restrictive with regard to the employee than as originally drafted by the parties.

(e) Nothing in this article shall be construed to limit the period of time for which a party may agree to maintain information as confidential or as a

trade secret, or to limit the geographic area within which such information must be kept confidential or as a trade secret, for so long as the information or material remains confidential or a trade secret, as applicable. (Code 1981, § 13-8-53, enacted by Ga. L. 2009, p. 231, § 3/HB 173.)

Editor's notes. — For information as to the effective date of this Code section, see the delayed effective date note at the beginning of this article.

13-8-54. (For effective date, see note.) Judicial construction of covenants.

(a) A court shall construe a restrictive covenant to comport with the reasonable intent and expectations of the parties to the covenant and in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement.

(b) In any action concerning enforcement of a restrictive covenant, a court shall not enforce a restrictive covenant unless it is in compliance with the provisions of Code Section 13-8-53; provided, however, that if a court finds that a contractually specified restraint does not comply with the provisions of Code Section 13-8-53, then the court may modify the restraint provision and grant only the relief reasonably necessary to protect such interest or interests and to achieve the original intent of the contracting parties to the extent possible. (Code 1981, § 13-8-54, enacted by Ga. L. 2009, p. 231, § 3/HB 173.)

Editor's notes. — For information as to the effective date of this Code section, see the delayed effective date note at the beginning of this article.

13-8-55. (For effective date, see note.) Requirements of person seeking enforcement of covenants.

The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. If a person seeking enforcement of the restrictive covenant establishes by prima-facie evidence that the restraint is in compliance with the provisions of Code Section 13-8-53, then any person opposing enforcement has the burden of establishing that the contractually specified restraint does not comply with such requirements or that such covenant is unreasonable. (Code 1981, § 13-8-55, enacted by Ga. L. 2009, p. 231, § 3/HB 173.)

Editor's notes. — For information as to the effective date of this Code section, see the delayed effective date note at the beginning of this article.

13-8-56. (For effective date, see note.) Reasonableness determinations restricting competition; presumptions.

In determining the reasonableness of a restrictive covenant that limits or restricts competition during the course of an employment or business relationship, the court shall make the following presumptions:

(1) A time period equal to or measured by duration of the parties' business or commercial relationship is reasonable;

(2) A geographic territory which includes the areas in which the employer does business at any time during the parties' commercial relationship, even if not known at the time of entry into the restrictive covenant, is reasonable provided that:

(A) The total distance encompassed by the provisions of the covenant also is reasonable;

(B) The agreement contains a list of particular competitors as prohibited employers for a limited period of time after the term of employment or a commercial or business relationship; or

(C) Both subparagraphs (A) and (B) of this paragraph;

(3) The scope of competition restricted is measured by the business of the employer or other person or entity in whose favor the restrictive covenant is given; provided, however, that a court shall not refuse to enforce the provisions of a restrictive covenant because the person seeking enforcement establishes evidence that a restrictive covenant has been violated but has not proven that the covenant has been violated as to the entire scope of the prohibited activities of the person seeking enforcement or as to the entire geographic area of the covenant; and

(4) Any restriction that operates during the term of an employment relationship, agency relationship, independent contractor relationship, partnership, franchise, distributorship, license, ownership of a stake in a business entity, or other ongoing business relationship shall not be considered unreasonable because it lacks any specific limitation upon scope of activity, duration, or geographic area as long as it promotes or protects the purpose or subject matter of the agreement or relationship or deters any potential conflict of interest. (Code 1981, § 13-8-56, enacted by Ga. L. 2009, p. 231, § 3/HB 173.)

Editor's notes. — For information as to the delayed effective date note at the beginning of this article, see

13-8-57. (For effective date, see note.) Reasonableness determinations restricting time; presumptions.

(a) In determining the reasonableness in time of a restrictive covenant sought to be enforced after a term of employment, a court shall apply the rebuttable presumptions provided in this Code section.

(b) In the case of a restrictive covenant sought to be enforced against a former employee and not associated with the sale or ownership of all or a material part of:

(1) The assets of a business, professional practice, or other commercial enterprise;

(2) The shares of a corporation;

(3) A partnership interest;

(4) A limited liability company membership; or

(5) An equity interest or profit participation, of any other type, in a business, professional practice, or other commercial enterprise,

a court shall presume to be reasonable in time any restraint two years or less in duration and shall presume to be unreasonable in time any restraint more than two years in duration, measured from the date of the termination of the business relationship.

(c) In the case of a restrictive covenant sought to be enforced against a current or former distributor, dealer, franchisee, lessee of real or personal property, or licensee of a trademark, trade dress, or service mark and not associated with the sale of all or a part of:

(1) The assets of a business, professional practice, or other commercial enterprise;

(2) The shares of a corporation;

(3) A partnership interest;

(4) A limited liability company membership; or

(5) An equity interest or profit participation, of any other type, in a business, professional practice, or other commercial enterprise,

a court shall presume to be reasonable in time any restraint three years or less in duration and shall presume to be unreasonable in time any restraint more than three years in duration, measured from the date of termination of the business relationship.

(d) In the case of a restrictive covenant sought to be enforced against the owner or seller of all or a material part of:

- (1) The assets of a business, professional practice, or other commercial enterprise;
- (2) The shares of a corporation;
- (3) A partnership interest;
- (4) A limited liability company membership; or
- (5) An equity interest or profit participation, of any other type, in a business, professional practice, or other commercial enterprise,

a court shall presume to be reasonable in time any restraint the longer of five years or less in duration or equal to the period of time during which payments are being made to the owner or seller as a result of any sale referred to in this subsection and shall presume to be unreasonable in time any restraint more than the longer of five years in duration or the period of time during which payments are being made to the owner or seller as a result of any sale referred to in this subsection, measured from the date of termination or disposition of such interest. (Code 1981, § 13-8-57, enacted by Ga. L. 2009, p. 231, § 3/HB 173.)

Editor's notes. — For information as to the delayed effective date note at the beginning of this article, see the effective date of this Code section, see

13-8-58. (For effective date, see note.) Enforcement by third parties.

(a) A court shall not refuse to enforce a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract.

(b) In determining the enforceability of a restrictive covenant, it is not a defense that the person seeking enforcement no longer continues in business in the scope of the prohibited activities that is the subject of the action to enforce the restrictive covenant if such discontinuance of business is the result of a violation of the restriction.

(c) A court shall enforce a restrictive covenant by any appropriate and effective remedy available at law or equity, including, but not limited to, temporary and permanent injunctions.

(d) In determining the reasonableness of a restrictive covenant between an employer and an employee, as such terms are defined in subparagraphs (A) through (C) of paragraph (5) of Code Section 13-8-51, a court may consider the economic hardship imposed upon an employee by enforcement of the covenant; provided, however, that this subsection shall not apply to contracts or agreements between or among those persons or entities listed in paragraphs (2) through (7) of subsection (a) of Code Section 13-8-52. (Code 1981, § 13-8-58, enacted by Ga. L. 2009, p. 231, § 3/HB 173.)

Editor's notes. — For information as to the delayed effective date note at the beginning of this article, see the effective date of this Code section, see

13-8-59. (For effective date, see note.) Construction with federal provisions.

Nothing in this article shall be construed or interpreted to allow or to make enforceable any restraint of trade or commerce that is otherwise illegal or unenforceable under the laws of the United States or under the Constitution of this state or of the United States. (Code 1981, § 13-8-59, enacted by Ga. L. 2009, p. 231, § 3/HB 173.)

Editor's notes. — For information as to the delayed effective date note at the beginning of this article, see the effective date of this Code section, see

CHAPTER 9

CONTRACTS FOR FUTURE DELIVERY OF COTTON, GRAIN, ETC.

Sec.		Sec.	
13-9-1.	Definitions.	13-9-4.	Furnishing of written statement as to location, date, and other details of execution of contract for future delivery of cotton, grain, stocks to principal for whom contract executed; effect of failure to furnish statement.
13-9-2.	Requirements for valid and enforceable contracts of sale for future delivery of cotton, grain, stocks, and other items, generally; future delivery contracts where actual delivery of commodities bought or sold not contemplated declared unlawful.	13-9-5.	Organization of cotton exchanges, boards of trade to receive and post quotations; adoption of rules and regulations; inspection of books.
13-9-3.	Contracts of sale for future delivery of cotton, grain, stocks, or other commodities, absent bona fide intention of parties as to delivery, execution of contract upon floor of exchange declared null and void; penalty for entering into or assisting entering into such contracts.	13-9-6.	Maintenance or operation of bucket shop.
		13-9-7.	Effect of conflict between provisions of chapter and Uniform Commercial Code.

Cross references. — Commodities and commodity contracts and options, Ch. 5A, T. 10.

Law reviews. — For note, “Opportunity

Costs: Nonjudicial Foreclosure and the Subprime Mortgage Crisis in Georgia,” see 25 Ga. St. U.L. Rev. 1205 (2009).

JUDICIAL DECISIONS

This chapter merely legalized certain brokerage activities which had been illegal under prior Georgia law. Mitchell-Huntley Cotton Co. v. Lawson, 377 F. Supp. 661 (M.D. Ga. 1973).

There can be a sale of an unplanted crop. Cone Mills Corp. v. A.G. Estes, Inc., 377 F. Supp. 222 (N.D. Ga. 1974).

Cited in Hutchinson v. Brown, 47 Ga. App. 82, 169 S.E. 848 (1933).

RESEARCH REFERENCES

ALR. — Validity and construction of contract for sale of season’s output, 1 ALR 1392; 9 ALR 276; 23 ALR 574.

Validity and effect of provision in contract

of sale which, in effect, guarantees the buyer against decline in prices, 29 ALR 112.

Validity of transactions in futures, 83 ALR 522.

13-9-1. Definitions.

As used in this chapter, the term:

(1) “Contract for sale” means sales, purchases, agreements of sale, agreements to sell, and agreements to purchase; and

(2) "Person" means individuals, associations, partnerships, and corporations. (Ga. L. 1929, p. 245, § 1; Code 1933, § 20-601.)

JUDICIAL DECISIONS

Cited in *Mitchell-Huntley Cotton Co. v. Lawson*, 377 F. Supp. 661 (M.D. Ga. 1973).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 1 et seq., 5 et seq.

13-9-2. Requirements for valid and enforceable contracts of sale for future delivery of cotton, grain, stocks, and other items, generally; future delivery contracts where actual delivery of commodities bought or sold not contemplated declared unlawful.

(a) All contracts of sale for future delivery of cotton, grain, stocks, or other commodities (1) made in accordance with the rules of any board of trade, exchange, or similar institution, (2) actually executed on the floor of such board of trade, exchange, or similar institution and performed or discharged according to the rules thereof, and (3) placed with or through a regular member in good standing of a cotton exchange, grain exchange, board of trade, or similar institution organized under the laws of this state or any other state shall be valid and enforceable in the courts according to their terms, provided that contracts of sale for future delivery of cotton, in order to be valid and enforceable as provided in this Code section, must not only conform to the requirements of clauses (1), (2), and (3) of this subsection, but must also be made subject to the United States Cotton Futures Act, approved August 11, 1916, and any amendments thereto; provided, further, that if this clause should for any reason be held inoperative, then contracts for future delivery of cotton shall be valid and enforceable if they conform to the requirements of clauses (1), (2), and (3) of this subsection.

(b) All contracts as defined in Code Section 13-9-1, where it is not contemplated by a party to the contract that there shall be an actual delivery of the commodities sold or bought, shall be unlawful. (Ga. L. 1929, p. 245, § 2; Code 1933, § 20-602; Ga. L. 1982, p. 3, § 13.)

Cross references. — Securities regulation, Ch. 5, T. 10. Futures Act, referred to in this Code section, is codified as 7 U.S.C. § 15b.

U.S. Code. — The United States Cotton

JUDICIAL DECISIONS

Although former Code 1933, § 20-602 be read with Ga. L. 1962, p. 156, § 1 (see (see O.C.G.A. § 13-9-2) was explicit, it must O.C.G.A. §§ 11-2-301 and 11-2-308(a)).

Cone Mills Corp. v. A.G. Estes, Inc., 377 F. Supp. 222 (N.D. Ga. 1974).

Contracts for future delivery of commodities where parties contemplate actual delivery are valid. Taunton v. Allenberg Cotton Co., 378 F. Supp. 34 (M.D. Ga. 1973).

Law does not affect validity of contracts for future delivery of goods where parties contemplate that there shall be actual delivery. R.N. Kelly Cotton Merchant, Inc. v. York, 379 F. Supp. 1075 (M.D. Ga. 1973), *aff'd*, 494 F.2d 41 (5th Cir. 1974).

Cited in Fenner & Beane v. Calhoun, 56 Ga. App. 823, 194 S.E. 51 (1937); Mitchell-Huntley Cotton Co. v. Lawson, 377 F. Supp. 661 (M.D. Ga. 1973); R.N. Kelly Cotton Merchant, Inc. v. York, 494 F.2d 41 (5th Cir. 1974); R.L. Kimsey Cotton Co. v. Ferguson, 233 Ga. 962, 214 S.E.2d 360 (1975); Cone Mills Corp. v. A.G. Estes, Inc., 399 F. Supp. 938 (N.D. Ga. 1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, §§ 30 et seq., 73. 68 Am. Jur. 2d, Sales, § 206.

ALR. — Validity and construction of contract for sale of season's output, 1 ALR 1392; 9 ALR 276; 23 ALR 574.

Nature and validity of "hedging" transactions on the commodity market, 20 ALR 1422.

Validity of transactions in futures, 83 ALR 522.

13-9-3. Contracts of sale for future delivery of cotton, grain, stocks, or other commodities, absent bona fide intention of parties as to delivery, execution of contract upon floor of exchange declared null and void; penalty for entering into or assisting entering into such contracts.

(a) Any contract of sale for future delivery of cotton, grain, stocks, or other commodities shall be null and void and unenforceable in any court by any party thereto where it is not the bona fide intention of a party to the contract that the cotton, grain, stocks, or other commodities mentioned therein are to be delivered, but that the contract be settled according to or upon the basis of the public market quotations or prices made on any board of trade, exchange, or other similar institution, without any actual bona fide execution and the carrying out of such contract upon the floor of such exchange, board of trade, or similar institution, in accordance with the rules thereof.

(b) Any person, either as agent or principal, who enters into or assists in making a contract of sale for the future delivery of cotton, grain, stocks, or other commodities of the nature provided for in subsection (a) of this Code section shall be guilty of a felony and, upon conviction, shall be imprisoned for a period not exceeding two years. (Ga. L. 1929, p. 245, §§ 3, 6; Code 1933, §§ 20-603, 20-9901.)

Cross references. — Gambling generally, § 16-12-20.

Law reviews. — For note, "Recovery of

Losses on Cotton Futures," see 1 Ga. L. Rev. No. 1, p. 43 (1927).

JUDICIAL DECISIONS

Cited in *Fenner & Beane v. Calhoun*, 56 Ga. App. 823, 194 S.E. 51 (1937); *Mitchell-Huntley Cotton Co. v. Lawson*, 377 F. Supp. 661 (M.D. Ga. 1973).

RESEARCH REFERENCES

ALR. — Violation of statute relating to bucket shops or bucket shop transactions as ground of action by customer or patron, 113 ALR 853.

13-9-4. Furnishing of written statement as to location, date, and other details of execution of contract for future delivery of cotton, grain, stocks to principal for whom contract executed; effect of failure to furnish statement.

Every person shall furnish upon demand, to any principal for whom such person has executed any contract for future delivery of any cotton, grain, stocks, or other commodities, a written instrument setting forth the name and location of the exchange, board of trade, or similar institution upon which such contract has been executed, the date of the execution of the contract, and the name and address of the person with whom such contract was executed; and if such person shall refuse or neglect to furnish such statement upon reasonable demand, such refusal or neglect shall be prima-facie evidence that such contract was an illegal contract within the provisions of Code Section 13-9-3 and that the person who executed it was engaged in the maintenance and operation of a bucket shop within the provisions of Code Section 13-9-6. (Ga. L. 1929, p. 245, § 5; Code 1933, § 20-605.)

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Contracts, § 9.

ALR. — Nature and validity of “hedging” transactions on the commodity market, 20 ALR 1422.

Accountability to owner of one who receives funds for “bucket shop” transaction from third person acting without authority, 35 ALR 427.

13-9-5. Organization of cotton exchanges, boards of trade to receive and post quotations; adoption of rules and regulations; inspection of books.

There may be organized in any municipality voluntary associations to be known as cotton exchanges, boards of trade, or similar institutions, to receive and post quotations on cotton, grain, stocks, or other commodities for the benefit of the members or other persons engaged in the production of cotton, grain, stocks, or other commodities. Such associations shall adopt a uniform set of rules and regulations not incompatible with the laws of this state and of the United States. Such associations shall open their books to inspection by all proper courts and officers when required to do so. (Ga. L. 1929, p. 245, § 7; Code 1933, § 20-606.)

13-9-6. Maintenance or operation of bucket shop.

(a) As used in this Code section, the term “bucket shop” means any place of business in which contracts of the nature provided for in Code Section 13-9-3 are made.

(b) The maintenance or operation of a bucket shop is prohibited.

(c) Any person, either as agent or principal, who maintains or operates a bucket shop shall be guilty of a felony and, upon conviction, shall be imprisoned for a period not exceeding two years. (Ga. L. 1929, p. 245, §§ 4, 6; Code 1933, §§ 20-604, 20-9901.)

Cross references. — Keeping a gambling place, § 16-12-23.

RESEARCH REFERENCES

ALR. — Accountability to owner of one who receives funds for “bucket shop” transaction from third person acting without authority, 35 ALR 427.

Violation of statute relating to bucket shops or bucket shop transactions as ground

of action by customer or patron, 113 ALR 853.

Right or duty to refuse telephone, telegraph, or other wire service in aid of illegal gambling operations, 30 ALR3d 1143.

13-9-7. Effect of conflict between provisions of chapter and Uniform Commercial Code.

In the event of a conflict between this chapter and Title 11, the “Uniform Commercial Code,” the Uniform Commercial Code shall control.

CHAPTER 10

CONTRACTS FOR PUBLIC WORKS

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RESEARCH REFERENCES

ALR. — Validity, construction, and effect of requirement under state statute or local ordinance giving local or locally qualified contractors a percentage preference in determining lowest bid, 89 ALR4th 587.

Authority of state, municipality, or other governmental entity to accept late bids for public works contracts, 49 ALR5th 747.

ARTICLE 1

GENERAL PROVISIONS

PART 1

BONDS

Editor's notes. — Former Code Sections 13-10-1 and 13-10-2, concerning bid bonds, other securities and periodic progress payments, were repealed by Ga. L. 2001, p. 820, § 1 and were based on Ga. L. 1910, p. 86, § 1; Ga. L. 1916, p. 94, § 1; Code 1933, § 23-1705; Ga. L. 1956, p. 340, § 1; Ga. L. 1975, p. 810, § 1; Ga. L. 1982, p. 686, §§ 1, 2; Ga. L. 1985, p. 1043, § 1; Ga. L. 1988, p. 348, § 1; Ga. L. 1989, p. 278, § 1; Ga. L. 1989, p. 461, § 1; Ga. L. 1989, p. 1794, § 1; Ga. L. 1991, p. 777, § 1; Ga. L. 1992, p. 6, § 13; Ga. L. 1998, p. 1048, § 1; Ga. L. 2000, p. 498, § 6; Ga. L. 2001, p. 4, § 13.

Cross references. — Further provisions regarding bonds for public contractors, § 36-82-100 et seq. Public works bidding, § 36-91-1 et seq.

Law reviews. — For article surveying important general legal principles of municipal and county government purchasing and contracting in Georgia, see 16 Mercer L. Rev. 371 (1965). For article discussing role of attorney in representing subcontractor and available enforcement mechanisms, see 14 Ga. St. B.J. 104 (1978). For survey article on local government law, see 34 Mercer L. Rev. 225 (1982). For annual survey of local government law, see 43 Mercer L. Rev. 317 (1991). For survey article on construction law, see 44 Mercer L. Rev. 125 (1992). For annual survey article discussing surety, bond, and guarantor issues, see 46 Mercer L. Rev. 117 (1994). For annual survey article discussing developments in construction law, see 51 Mercer L. Rev. 181 (1999).

JUDICIAL DECISIONS

Lien created by operation of law, bond by contract. — The lien is created and imposed by operation of law, while the bond is a matter of contract, albeit a contract required by the statute to be made in order to give

validity to another. *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), *aff'd*, 667 F.2d 30 (11th Cir. 1982).

13-10-1. "State" defined.

As used in this article, the term "state" means the state of Georgia, any agency of the state, and any state authority. (Code 1981, § 13-10-1, enacted by Ga. L. 2001, p. 820, § 1.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PAYMENT BONDS

1. IN GENERAL
2. APPLICABILITY
3. MACHINERY AND EQUIPMENT COSTS RECOVERABLE
4. PLEADINGS AND PRACTICE

General Consideration

Editor's note. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1916, p. 94, former Code 1933, § 23-1705 and former O.C.G.A. § 13-10-1, are included in the annotations for this Code section.

There are two main conditions of bond under the law; first, to guarantee and insure completion of contract in accordance with the contract's terms and specifications and, second, to guarantee payment to third parties of work, tools, machinery, skill, and materials. *Seibels, Bruce & Co. v. National Sur. Corp.*, 63 Ga. App. 520, 11 S.E.2d 705 (1940) (decided under former Code 1933, § 23-1705).

Bond required by law is for use of two classes of persons: first, the state, county, or municipality; and, second, all persons doing work or furnishing skill, tools, machinery, or materials under or for purpose of such contracts. *Hackman v. Fulton County*, 77 Ga. App. 410, 48 S.E.2d 706 (1948) (decided under former Code 1933, § 23-1705).

Court will look to decisions of federal courts construing this section. *Amcon, Inc. v. Southern Pipe & Supply Co.*, 134 Ga. App. 655, 215 S.E.2d 712 (1975) (decided under former Code 1933, § 23-1705).

Bond complying with law may be valid notwithstanding inclusion of condition not authorized by law. — Validity of bond given in compliance with a statute, and which meets requirements of the statute is not affected or its nature changed by inclusion in it of condition that is either not authorized or is repugnant to the statute, except in instances where law expressly provides that bond not made strictly in accordance with it is void. No law declares that a bond given in compliance with the law but which includes a condition not authorized by the law is void or invalid. *St. Paul-Mercury Indem. Co. v. Koppers Co.*, 95 Ga. App. 687, 99 S.E.2d 275 (1957); *H.W. Ivey Constr. Co. v. Southwest Steel Prods.*, 111 Ga. App. 527, 142 S.E.2d

394 (1965) (decided under former Code 1933, § 23-1705).

Such unauthorized conditions are invalid and unenforceable. — Clause in bond requiring that notice be given to principal therein, or to state authority, designated as owner, is not authorized by law, in conformity with which the bond was made. Hence, the condition is invalid and unenforceable. *St. Paul-Mercury Indem. Co. v. Koppers Co.*, 95 Ga. App. 687, 99 S.E.2d 275 (1957) (decided under former Code 1933, § 23-1705).

Board of education was a public board within meaning of former Code 1933, § 23-1705, and was subject to suit under former Code 1933, § 23-1706. *Lance Roofing Co. v. Board of Educ.*, 235 Ga. 590, 221 S.E.2d 23 (1975); *Lance Roofing Co. v. Board of Educ.*, 138 Ga. App. 364, 226 S.E.2d 161 (1976) (decided under former Code 1933, § 23-1705).

City housing authority is a public body within meaning of statute. *Housing Auth. v. Marbut Co.*, 127 Ga. App. 379, 193 S.E.2d 574 (1972) (decided under former Code 1933, § 23-1705).

Paragraph (8) of Ga. L. 1962, p. 734, § 32 (see O.C.G.A. § 8-3-30) did not prevent former Code 1933, §§ 23-1705 and 23-1706 from applying to Housing Authority. *Housing Auth. v. Marbut Co.*, 127 Ga. App. 379, 193 S.E.2d 574 (1972) (decided under former Code 1933, § 23-1705).

Reformation allowed when language of bond and circumstances evidences parties' intent to execute statutory bond. — Reformation upheld when language in bond was similar to language of section and bond itself, taken in connection with other evidence and circumstances, was sufficient to authorize jury to find that it was intention of parties to contract to execute a statutory bond. *Fidelity & Deposit Co. v. State Hwy. Dep't*, 174 Ga. 443, 163 S.E. 174 (1932) (decided under former Code 1933, § 23-1705).

Payment Bonds

1. In General

Legislative intent as to parties to be protected. — Legislature intended that the bond required by paragraph (2) should protect those third parties only who would have liens under general lien laws of this state. *Seibels, Bruce & Co. v. National Sur. Corp.*, 63 Ga. App. 520, 11 S.E.2d 705 (1940) (decided under former Code 1933, § 23-1705).

County failing to take bond is liable for resulting losses of covered parties. — When political subdivision of this state fails to take from contractor with whom it has contracted to do public work, bond required of contractor as provided by this section, the political subdivision making the contract is liable to persons covered by section for any loss resulting to them from such failure. *Sinclair Ref. Co. v. Colquitt County*, 42 Ga. App. 718, 157 S.E. 358 (1931) (decided under Ga. L. 1916, p. 94).

After county made contract for building public road without taking bond from contractor as required by section, and work was proceeded with, county became liable to materialman who furnished contractor with material used in work for loss sustained by materialman by reason of want of bond, notwithstanding county gave notice to materialman that it would not be responsible for material so furnished. *Eaton Oil & Auto Co. v. Greene County*, 53 Ga. App. 145, 185 S.E. 296 (1936) (decided under former Code 1933, § 23-1705).

2. Applicability

Statute covers freight and demurrage charges for transporting materials used in constructing state highway. — Claim of a railroad for unpaid freight and demurrage charges, due for transportation of materials used in construction of state highway project, is covered by contractor's bond given pursuant to statute. *Sommers Constr. Co. v. Atlantic C.L. Ry.*, 62 Ga. App. 23, 7 S.E.2d 429 (1940) (decided under former Code 1933, § 23-1705).

Insurer performing administrative function. — When the insurer performed an administrative function on behalf of the contract, to the extent the insurer was seen

as providing a service, it was an administrative service provided for the benefit of the contractor and could not be seen as providing labor to the project. *Gulf Ins. Co. v. GFA Group, Inc.*, 251 Ga. App. 539, 554 S.E.2d 746 (2001) (decided under former O.C.G.A. § 13-10-1).

Subcontractors and their employees are protected by statute. — Statute not only protects persons doing work or furnishing materials to contractor but also protects subcontractors and employees of subcontractors furnishing work or materials for purpose of principal contract. *Western Cas. & Sur. Co. v. Fulton Supply Co.*, 60 Ga. App. 710, 4 S.E.2d 690 (1939) (decided under former Code 1933, § 23-1705).

Fact that subcontractor paid part of premium on bond does not prevent subcontractors recovery thereunder. *Whitley v. Bryant*, 59 Ga. App. 58, 200 S.E. 317 (1938) (decided under former Code 1933, § 23-1705).

One furnishing material to subcontractor under or for purpose of contract is protected by bond required under paragraph (2). *Western Cas. & Sur. Co. v. Fulton Supply Co.*, 60 Ga. App. 710, 4 S.E.2d 690 (1939) (decided under former Code 1933, § 23-1705).

Materialman cannot recover from general contractor on public works contract not bonded as required by former Code 1933, §§ 23-1705 and 23-1706 for materials furnished to insolvent subcontractor and used on job. *Electrical Equip. Co. v. Daniel*, 109 Ga. App. 463, 136 S.E.2d 491 (1964) (decided under former Code 1933, § 23-1705).

Paragraph (2) is inapplicable to contract for professional services, such as engineer employed to survey water system of city. *Booker v. Mayor of Milledgeville*, 40 Ga. App. 540, 150 S.E. 652 (1929) (decided under Ga. L. 1916, p. 94).

Insurance premiums for workers' compensation and public liability coverage not recoverable under paragraph (2). — Insurance premiums covering workmen's compensation and employee's liability coverage, and public liability and property damage coverage, may not be recovered from surety on the surety's bond executed in compliance with paragraph (2). *Seibels, Bruce & Co. v. National Sur. Corp.*, 63 Ga. App. 520, 11 S.E.2d 705 (1940) (decided under former Code 1933, § 23-1705).

Use of pasture land in performance does not fall within section's coverage. — Utilization of pasture land by contractor in order for the contractor to properly perform the contractor's contract does not fall within categories of supplying labor, material, machinery, and equipment. *Chapman v. Argonaut Ins. Co.*, 135 Ga. App. 885, 219 S.E.2d 620 (1975) (decided under former Code 1933, § 23-1705).

3. Machinery and Equipment Costs Recoverable

Paragraph (2) covers reasonable stipulated rental for machinery furnished and used in prosecution of such work. *American Sur. Co. v. Corr Serv. Erection Co.*, 47 Ga. App. 295, 170 S.E. 325 (1933) (decided under former Code 1933, § 23-1705).

Bond of contractor for public works includes within its purview stipulated rental for machinery furnished and used in prosecution of work. *Moore v. Standard Accident Ins. Co.*, 48 Ga. App. 508, 173 S.E. 481 (1934) (decided under former Code 1933, § 23-1705).

Wear and tear is essential element in establishing rental value recoverable for leased machinery. — While action cannot be maintained for compensation for wear and tear upon machinery furnished, in so many words, wear and tear is an essential, if not the principal element in establishing rental value of leased machinery, which value is recoverable. *Moore v. Standard Accident Ins. Co.*, 48 Ga. App. 508, 173 S.E. 481 (1934) (decided under former Code 1933, § 23-1705).

One furnishing machinery for purpose of completing contract under paragraph (2) may recover the following upon contractor's bond: (a) stipulated rental for machinery used solely in prosecution of work, provided that this does not exceed reasonable rental value, which covers fair compensation for wear and tear upon such machinery in work itself; or (b) reasonable rental value for such use, in some degree measured by such wear and tear, when there is no expressly stipulated amount of rental; or (c) purchase price of machinery furnished in work, provided that machinery was necessary to particular work, and was not merely equipment used or available to contractor on other projects or in his general business, and amount sought

to be recovered does not exceed reasonable rental value, covering and to some extent measured by what would be a fair compensation for wear and tear caused only by work, if machine had been leased instead of sold, especially if machine had been worn out by work. *Moore v. Standard Accident Ins. Co.*, 48 Ga. App. 508, 173 S.E. 481 (1934) (decided under former Code 1933, § 23-1705).

Paragraph (2) covers incidental and current repairs to contractor's machinery contributing only to execution of particular contract, and not amounting to substantial additions to contractor's equipment. *Yancey Bros. v. American Sur. Co.*, 43 Ga. App. 740, 160 S.E. 100 (1931) (decided under Ga. L. 1916, p. 94).

While there may be recovery on public contractor's payment bond for material and labor used in incidental and current repairs to contractor's machinery, there can be none for major repairs involving replacement of old with new parts, in absence of proof that new parts were consumed in work covered by bond. *Western Cas. & Sur. Co. v. Fulton Supply Co.*, 60 Ga. App. 710, 4 S.E.2d 690 (1939) (decided under former Code 1933, § 23-1705).

Limitation on recovery under bond. — Surety on bond is liable to one who furnishes labor and material used in incidental and current repairs to contractor's equipment and machinery employed in work, but there can be no recovery upon such bond for purchase price of machinery and equipment bought for use in carrying out contract, and available for other work as well, or for major repairs involving a substantial rebuilding of machinery by replacement of old with new parts, in absence of proof that new parts were consumed in work covered by bond. *Moore v. Standard Accident Ins. Co.*, 48 Ga. App. 508, 173 S.E. 481 (1934) (decided under former Code 1933, § 23-1705).

Paragraph (2) does not cover purchase price of machinery as permanent equipment in conduct of contractor's general business, such as steam shovels, trucks, and other expensive and permanent equipment far exceeding entire cost of particular building upon construction of which they might first be employed. *Moore v. Standard Accident Ins. Co.*, 48 Ga. App. 508, 173 S.E. 481 (1934) (decided under former Code 1933, § 23-1705).

Payment Bonds (Cont'd)**4. Pleadings and Practice****Suits must be brought in name of body contracted with for use of persons covered.**

— Suits for recovery of the value of work, material and other items furnished to contractors constructing public buildings must be brought upon contractor's bond in name of body contracted with, for use of person who furnished skill, labor, or materials of any kind. *Yancey Tractor Co. v. Southern Sur. Co.*, 172 Ga. 110, 157 S.E. 298 (1931) (decided under Ga. L. 1916, p. 94).

Subcontractor or employee may protect

rights by intervention. — Subcontractor or employee of subcontractor, although not initiating the action may protect the subcontractor's rights by intervention. *Whitley v. Bryant*, 59 Ga. App. 58, 200 S.E. 317 (1938) (decided under former Code 1933, § 23-1705).

One must prove as part of prima facie case that it had been unable to collect money from contractor and thus that its loss occurred because of contractor's failure to take bond. *Turner County Bd. of Educ. v. Pascoe Steel Corp.*, 240 Ga. 88, 239 S.E.2d 517 (1977) (decided under former Code 1933, § 23-1705).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under Ga. L. 1916, p. 94, former Code 1933, § 23-1705 and former O.C.G.A. § 13-10-1, are included in the annotations for this Code section.

Both bonds required by section may be included in same instrument. — Section requires giving of two bonds, a performance bond, and a payment bond, each to be in

penal sum of not less than amount of contract for which given, but, those bonds being contracts between same parties and growing out of same transaction, there is no legal reason why both of such bonds should not be included in the same instrument. 1958-59 Op. Att'y Gen. p. 179.

No election permissible between requirements of former Code 1933, §§ 23-1704 and 23-1705. 1977 Op. Att'y Gen. No. U77-15.

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contractors' Bond, § 21.

C.J.S. — 72 C.J.S. Supp., Public Contracts, § 42 et seq.

ALR. — Leave of court as prerequisite to action on statutory bond, 2 ALR 563.

Validity of condition in bond of contractor for public work which is beyond requirements of statute or ordinance with respect to claims of third persons, 18 ALR 1227.

Liability of municipal corporations and their licensees for the torts of independent contractors, 25 ALR 426; 52 ALR 1012.

Estoppel to deny validity of municipal bonds issued under an unconstitutional statute, 37 ALR 1310.

Recovery of premiums paid on bond of contractor for public improvement not legally authorized, 42 ALR 307.

Rental of equipment as within contractor's bond, 44 ALR 381.

Contractor's bond as covering clothing, food, or lodging for laborers, 46 ALR 511; 65 ALR 260.

Effect of affirmative provision in public contractor's bond excluding statutory conditions, 47 ALR 502; 89 ALR 457.

Labor and materials furnished to subcontractor as within the coverage of principal contractor's bond for public improvements, 70 ALR 308; 111 ALR 311; 92 ALR2d 1250.

Construction and effect of provision in bond purporting to protect contractee in building contract against release of surety, 77 ALR 229.

Statutory conditions prescribed for public contractor's bond as part of bond which does not in terms include them, 89 ALR 446.

Claims for gasoline and oil as within contractor's bond, 91 ALR 1027.

Liability of public contractor for damages from acts or conditions necessarily incident to work which would otherwise amount to nuisance, 97 ALR 205.

Workmen's compensation insurance premiums as within coverage of contractor's bond, 102 ALR 135; 164 ALR 1468.

Liability of surety on subcontractor's bond to principal contractor for public improvement or to his surety, in respect claims for labor or materials furnished to subcontractor, 117 ALR 662.

Loss of profit of subcontractor, laborer, or materialman as within coverage of contractor's bond, 119 ALR 1281.

Validity of statute or ordinance which requires liability or indemnity insurance or bond as condition of license for conduct of business or profession, 120 ALR 950.

Value of services or material furnished by subcontractor, laborer, or materialman, or price fixed by the contract by which they were employed, as measure of their recovery on bond of principal contractor, or as against amount earned by contractor withheld by contractee or paid into court, 123 ALR 416.

Money loaned or advanced to contractor as within coverage of bond of building or construction contractor, 127 ALR 974; 164 ALR 782.

Contractor's bond as covering insurance premiums other than workmen's compensation insurance, 129 ALR 1087.

Money loaned or advanced to contractor as within coverage for bond of building or construction contractor, 164 ALR 782.

Workmen's compensation insurance premiums as within coverage of contractor's bond, 164 ALR 1468.

False receipts or the like as estopping

materialmen or laborers from recovering on public work bond, 39 ALR2d 1104.

Relative rights, as between surety on public work contractor's bond and unpaid laborers or materialmen, in percentage retained by obligee, 61 ALR2d 899.

Surety's liability for obligee's attorney fees under provisions of performance bond of public contractor or subcontractor, 69 ALR2d 1046.

Surety's liability on bid bond for public works, 70 ALR2d 1370.

What constitutes supplying labor and material "in the prosecution of the work" provided for in the primary contract under Miller Act, 79 ALR2d 843.

Protection under bond given under Miller Act [40 USC §§ 270a-270e] of one supplying labor or material to one other than the prime contractor or his immediate subcontractor, 79 ALR2d 855.

Labor or material furnished subcontractor for public work or improvement as within coverage of bond of principal contractor, 92 ALR2d 1250.

Construction of attorneys' fees provision in contractor's bond, 8 ALR3d 1438.

Building contractor's liability, upon bond or other agreement to indemnify owner, for injury or death of third persons resulting from owner's negligence, 27 ALR3d 663.

What constitutes "public work" within statute relating to contractor's bond, 48 ALR4th 1170.

13-10-2. Approval of bond; strengthening of bond.

(a)(1) Any bid bond, performance bond, payment bond, or security deposit required for a state public works construction contract shall be approved and filed with the treasurer or the person performing the duties usually performed by a treasurer of the obligee named in such bond. At the option of the state, if the surety named in the bond is other than a surety company authorized by law to do business in this state pursuant to a current certificate of authority to transact surety business by the Commissioner of Insurance, such bond shall not be approved and filed unless such surety is on the United States Department of Treasury's list of approved bond sureties.

(2) Any bid bond, performance bond, or payment bond required by this chapter shall be approved as to form and as to the solvency of the surety by an officer of the state or the agency or authority of the state negotiating the contract on behalf of the state. In the case of a bid bond, such approval shall be obtained prior to acceptance of the bid or

proposal. In the case of a payment bond or a performance bond, such approval shall be obtained prior to the execution of the contract.

(b) Whenever, in the judgment of the obligee:

(1) Any surety on a bid, performance, or payment bond has become insolvent;

(2) Any corporate surety is no longer certified or approved by the Commissioner of Insurance to do business in the state; or

(3) For any cause there are no longer proper or sufficient sureties on any or all of the bonds,

the obligee may require the contractor to strengthen any or all of the bonds or to furnish a new or additional bond or bonds within ten days. Thereupon, if so ordered by the obligee, all work on the contract shall cease unless such new or additional bond or bonds are furnished. If such bond or bonds are not furnished within such time, the obligee may terminate the contract and complete the same as the agent of and at the expense of the contractor and his or her sureties. (Code 1981, § 13-10-2, enacted by Ga. L. 2001, p. 820, § 1.)

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. —

7A Am. Jur. Pleading and Practice Forms,
Contractors' Bonds, § 2.

13-10-3. Determining Georgia residency for businesses; preferences; adherence to policies and procedures of State Construction Manual.

(a) For the purpose of determining residency under this Code section, a Georgia resident business shall include any business that regularly maintains a place from which business is physically conducted in Georgia for at least one year prior to any bid or proposal submitted pursuant to this Code section or a new business that is domiciled in Georgia which regularly maintains a place from which business is physically conducted in Georgia; provided, however, that a place of business shall not include a post office box, site trailer, or temporary structure.

(b) Whenever the state contracts for the doing of a public work, materialmen, contractors, builders, architects, engineers, and laborers resident in the State of Georgia are to be granted the same preference over materialmen, contractors, builders, architects, engineers, and laborers resident in another state in the same manner, on the same basis, and to the same extent that preference is granted in awarding bids for the same goods or services by such other state to materialmen, contractors, builders, architects, engineers, and laborers resident in such other state over materialmen, contractors, builders, architects, engineers, and laborers

resident in the State of Georgia. However, these requirements shall in no way impair the ability of the state to compare the quality of materials proposed for purchase and to compare the qualifications, character, responsibility, and fitness of materialmen, contractors, builders, architects, engineers, and laborers proposed for employment in its consideration of the purchase of materials or employment of persons. This subsection shall not apply to transportation projects for which federal aid funds are available.

(c) All state agencies, authorities, departments, commissions, boards, and similar entities shall adhere to the policies and procedures contained in the State Construction Manual for project management and procurement of, and contracting for, design, construction, and other project related professional services for all state owned buildings in Georgia funded by state bonds or other state revenue. The State Construction Manual shall be jointly edited and posted on a state website by the Georgia State Financing and Investment Commission and the Board of Regents and shall be updated on a periodic basis to reflect evolving owner needs and industry best practices after consultation with other state agency and industry stakeholders. (Code 1981, § 13-10-3, enacted by Ga. L. 2010, p. 308, § 1/SB 447.)

Effective date. — This Code section became effective July 1, 2010. See editor's note for applicability.

Editor's notes. — Ga. L. 2010, p. 308, § 4, not codified by the General Assembly, pro-

vides, in part, that this Code section shall apply to contracts which are first advertised or otherwise given public notice on or after July 1, 2010.

PART 2

BID BONDS

13-10-20. Large public works contracts; requirements for bid bonds; withdrawal of bid.

(a) Bid bonds shall be required for all state public works construction contracts with estimated bids or proposals over \$100,000.00; provided, however, that the state or any public board or body of the state may require a bid bond for projects with estimated bids or proposals of \$100,000.00 or less.

(b) In the case of competitive sealed bids, except as provided in Code Sections 13-10-22 and 13-10-23, a bid may not be revoked or withdrawn until 60 days after the time set by the state or any public board or body of the state for opening of bids. Upon expiration of such 60 day time period, the bid will cease to be valid, unless the bidder provides written notice to the state prior to the scheduled expiration date that the bid will be extended for a time period specified by the state.

(c) In the case of competitive sealed proposals, the state shall advise offerors in the request for proposals of the number of days that offerors will be required to honor their proposals; provided, however, that if an offeror is not selected within 60 days of opening the proposals, any offeror that is determined by the state to be unlikely of being selected for contract award shall be released from his or her proposal.

(d) If the state requires a bid bond for any public works construction contract, no bid or proposal for a contract with the state shall be valid for any purpose unless the contractor gives a bid bond with good and sufficient surety or sureties approved by the state. The bid bond shall be in the amount of not less than 5 percent of the total amount payable by the terms of the contract. No bid or proposal shall be considered if a proper bid bond or other security authorized in Code Section 13-10-21 has not been submitted. The provisions of this subsection shall not apply to any bid or proposal for a contract that is required by law to be accompanied by a proposal guaranty and shall not apply to any bid or proposal for a contract with any public agency or body which receives funding from the United States Department of Transportation and which is primarily engaged in the business of public transportation. (Code 1981, § 13-10-20, enacted by Ga. L. 2001, p. 820, § 1.)

Editor's notes. — Ga. L. 2001, p. 820, § 1, Code Section 13-10-20 as present Code Section 13-10-81, redesignated former

13-10-21. Alternatives to bid bond.

(a) In lieu of the bid bond provided for in Code Section 13-10-20, the state may accept a cashier's check, certified check, or cash in the amount of not less than 5 percent of the total amount payable by the terms of the contract payable to and for the protection of the state.

(b) When the amount of any bid bond required under this article does not exceed \$300,000.00, the state may, in its sole discretion, accept an irrevocable letter of credit issued by a bank or savings and loan association, as defined in Code Section 7-1-4, in the amount of and in lieu of the bond otherwise required under Code Section 13-10-20. (Code 1981, § 13-10-21, enacted by Ga. L. 2001, p. 820, § 1.)

Editor's notes. — Ga. L. 2001, p. 820, § 1, Code Section 13-10-21 as present Code Section 13-10-82, redesignated former

13-10-22. "Bid" and "bidder" defined; appreciable errors in calculation of bids; withdrawing bids.

(a) As used in this Code section, the term "bid" shall include proposals and the term "bidder" shall include offerors.

(b) When receiving bids subject to this article, the state shall permit a bidder to withdraw a bid from consideration after the bid opening without forfeiture of the bid security if the bidder has made an appreciable error in the calculation of his or her bid and if:

(1) Such error in the calculation of his or her bid can be documented by clear and convincing written evidence;

(2) Such error can be clearly shown by objective evidence drawn from inspection of the original work papers, documents, or materials used in the preparation of the bid sought to be withdrawn;

(3) The bidder serves written notice upon the state or the agency or authority of the state which invited proposals for the work prior to the award of the contract and not later than 48 hours after the opening of bids, excluding Saturdays, Sundays, and legal holidays;

(4) The bid was submitted in good faith and the mistake was due to a calculation or clerical error, an inadvertent omission, or a typographical error as opposed to an error in judgment; and

(5) The withdrawal of the bid will not result in undue prejudice to the state or other bidders by placing them in a materially worse position than they would have occupied if the bid had never been submitted.

(c) In the event that an apparent successful bidder has withdrawn his or her bid as provided in subsection (b) of this Code section, action on the remaining bids should be considered as though the withdrawn bid had not been received. In the event the project is relet for bids, under no circumstances shall a bidder who has filed a request to withdraw a bid be permitted to resubmit a bid for the work.

(d) No bidder who is permitted to withdraw a bid pursuant to subsection (b) of this Code section shall for compensation supply any material or labor to, or perform any subcontract or other work agreement for, the person or firm to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted. (Code 1981, § 13-10-22, enacted by Ga. L. 2001, p. 820, § 1.)

Editor's notes. — Ga. L. 2001, p. 820, § 1, Code Section 13-10-22 as present Code Section 13-10-83.
effective July 1, 2001, redesignated former

13-10-23. Affiliated corporations.

(a) As used in this Code section, the term:

(1) “Affiliated corporation” means, with respect to any corporation, any other corporation related thereto:

(A) As a parent corporation;

(B) As a subsidiary corporation;

- (C) As a sister corporation;
- (D) By common ownership or control; or
- (E) By control of one corporation by the other.

(2) The term “bid” shall include proposals.

(b) In any case where two or more affiliated corporations bid for a contract under this Code section and any one or more of such affiliated corporations subsequently rescind or revoke their bid or bids in favor of another such affiliated corporation whose bid is for a higher amount and the contract is awarded at such higher amount to such other affiliated corporation, then the bid bond, proposal guaranty, or other security otherwise required under this article of each affiliated corporation rescinding or revoking its bid shall be forfeited. (Code 1981, § 13-10-23, enacted by Ga. L. 2001, p. 820, § 1.)

13-10-24. Maintenance of action on bid bond by obligee.

The obligee in any bid bond required to be given in accordance with this article shall be entitled to maintain an action thereon at any time upon any breach of such bond; provided, however, that no action may be instituted on the bonds or security deposits after one year from the completion of the contract and the acceptance of the public work by the state. (Code 1981, § 13-10-24, enacted by Ga. L. 2001, p. 820, § 1.)

PART 3

PERFORMANCE BONDS

13-10-40. Large public works contracts; requirement for performance bond.

Except as otherwise provided in Title 32, performance bonds shall be required for all state public works construction contracts with an estimated contract amount greater than \$100,000.00; provided, however, that the state may require a performance bond for public works construction contracts that are estimated at \$100,000.00 or less. No public works construction contract requiring a performance bond shall be valid for any purpose unless the contractor gives such performance bond. The performance bond shall be in the amount of at least the total amount payable by the terms of the contract and shall be increased as the contract amount is increased. (Code 1981, § 13-10-40, enacted by Ga. L. 2001, p. 820, § 1.)

Law reviews. — For article, “A Georgia Performance Bond Claims,” see 60 Mercer L. Rev. Practitioner’s Guide to Construction Perfor- 509 (2010).

13-10-41. Alternatives to performance bond.

When the amount of the performance bond required under this article does not exceed \$300,000.00, the state may, in its sole discretion, accept an irrevocable letter of credit by a bank or savings and loan association, as defined in Code Section 7-1-4, in the amount of and in lieu of the bond otherwise required under this article. (Code 1981, § 13-10-41, enacted by Ga. L. 2001, p. 820, § 1.)

13-10-42. Maintenance of action on performance bond by obligee.

The obligee in any performance bond required to be given in accordance with this article shall be entitled to maintain an action thereon at any time upon any breach of such bond; provided, however, no action can be instituted on the bonds or security deposits after one year from the completion of the contract and the acceptance of the public work by the state. (Code 1981, § 13-10-42, enacted by Ga. L. 2001, p. 820, § 1.)

PART 4

PAYMENT BONDS

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PAYMENT BONDS

- 1. IN GENERAL
- 2. APPLICABILITY
- 3. MACHINERY AND EQUIPMENT COSTS RECOVERABLE
- 4. ROLE OF COUNTY

General Consideration

Editor’s notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 13-10-1 prior to its 2001 amendment are included in the annotations for this Code section.

Performance bond cannot be considered to have the force and effect of a payment bond. See *B & B Elec. Supply Co. v. H.J. Russell Constr. Co.*, 166 Ga. App. 499, 304 S.E.2d 544 (1983) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Construction of bonds for public contracts. — As compared with private bonds, statutory bonds for public contracts are liberally construed to effectuate the intent of the statute. The presumption under a statutory bond is that the intention of the parties

was to execute a bond in accordance with the aims of the statute. *Sims’ Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), *aff’d*, 667 F.2d 30 (11th Cir. 1982) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Security under liens and bonds compared. — Under O.C.G.A. § 44-14-361, the lien on the property is the security for the laborer and the materialman, while under former O.C.G.A. § 13-10-1, when no lien can be secured, the bond is the security. *Sims’ Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), *aff’d*, 667 F.2d 30 (11th Cir. 1982) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Incorporation of statutory conditions into bond. — When construing a public contrac-

General Consideration (Cont'd)

tor's statutory payment bond, courts are mindful of the special legislative policy considerations underpinning the statute, and often incorporate the statutory conditions into the bond. *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), *aff'd*, 667 F.2d 30 (11th Cir. 1982) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Conditions precedent to action on bond.

— Breach of the condition or promise may be viewed as a condition precedent to an action on the bond. *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), *aff'd*, 667 F.2d 30 (11th Cir. 1982) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Liability of county. — Provision that no contract with the county is valid unless the contractor gives a payment bond with good and sufficient surety does not purport to impose any duty or liability upon a county. *DeKalb County v. J & A Pipeline Co.*, 263 Ga. 645, 437 S.E.2d 327 (1993) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

County complying with statutory requirements not liable to subcontractor. — When a county board of education obtained a payment bond from a general contractor in compliance with statutory requirements, the board could not be held liable for subcontractor's claim for payment for work performed under the board's construction contract with the general contractor. *ABE Eng'g, Inc. v. Fulton County Bd. of Educ.*, 214 Ga. App. 514, 448 S.E.2d 221 (1994) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Payment Bonds**1. In General**

Payment bond will be strictly construed and will not be extended by implication or interpretation. Thus, a bond guaranteeing payment only to the public body and not to all parties furnishing services or supplies under the contract does not meet the statutory requirement of a payment bond. *B & B Elec. Supply Co. v. H.J. Russell Constr. Co.*, 166 Ga. App. 499, 304 S.E.2d 544 (1983) (decided under former O.C.G.A. § 13-10-1

prior to its 2001 amendment).

Bond must have required terms to be enforceable as payment bond. — To satisfy the statutory purpose of a payment bond, a payment bond for public work must include the specific statement that the bond is intended for all persons furnishing work or material for the public improvement or that the contract is to be construed so as to be in accordance with applicable statutes. In the absence of one of these terms, a bond is not a "payment" bond and is not enforceable as such by a subcontractor or the subcontractor's materialmen. The materialman's remedy in such a case appears to be against the public body. *B & B Elec. Supply Co. v. H.J. Russell Constr. Co.*, 166 Ga. App. 499, 304 S.E.2d 544 (1983) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Construction of terminology not uniform for all remedies afforded materialmen. — Remedies afforded a particular materialman under (1) O.C.G.A. § 44-14-361, (2) former O.C.G.A. § 13-10-1, and (3) the contractual rights appurtenant to a private payment bond are distinct and separate, and, even though certain terminology may overlap, the judicial construction of that terminology is not uniform for all remedies. *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), *aff'd*, 667 F.2d 30 (11th Cir. 1982) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Effect of definition of claimant under the bond on rights of materialmen. — If the general contractor's payment bond defines a claimant under the bond as one supplying material to a subcontractor, then a materialman of a subcontractor may sue on the bond for the subcontractor's nonpayment; if the bond expressly limits a right of action on the bond to the named obligees or is conditioned on the general contractor's payment of only materialmen having a direct relationship with the general contractor, then a materialman of a subcontractor may not sue on the payment bond; and if the bond is conditioned on the general contractor's payment of all persons furnishing labor and material under or for the contract, then, at a minimum, materialmen of the general contractor may maintain an action on the bond. *Sims' Crane Serv., Inc. v. Reliance Ins.*

Co., 514 F. Supp. 1033 (S.D. Ga. 1981), aff'd, 667 F.2d 30 (11th Cir. 1982) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Right of action on bond. — Although the term “materials,” as judicially interpreted, may exclude certain items as nonlienable, the word may very well include the same items for purposes of a separate statute, such as former O.C.G.A. § 13-10-1. Clearly, then, the lack of a right of action to enforce a special lien under O.C.G.A. § 44-14-361, as statutorily provided or judicially discerned, does not, of itself, preclude a beneficiary's right to sue on a statutory payment bond, or by analogy, on a private payment bond. *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), aff'd, 667 F.2d 30 (11th Cir. 1982) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Third party may not sue on performance bond. — When a performance bond was executed to guarantee the completion of work under a public contract, a private person not a party to the contract could not collect damages for flooding and loss of business resulting from nonperformance of the contract because the private person was not a party to the contract and was not protected by the bond. *Long v. City of Midway*, 169 Ga. App. 72, 311 S.E.2d 508 (1983) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Cause of action on payment bond provided. — Former O.C.G.A. § 36-82-104 provides that there is a cause of action to every person entitled to the protection of a “payment” bond required to be obtained by the prime contractor and former O.C.G.A. § 13-10-1 requires a payment bond to be obtained, made payable to the public body for which the work was to be done, and for the use and protection of subcontractors supplying labor and materials in the prosecution of the work on the public project. *B & B Elec. Supply Co. v. H.J. Russell Constr. Co.*, 166 Ga. App. 499, 304 S.E.2d 544 (1983) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Name in which action on bond brought. — Materialmen having a beneficial interest in a contractor's bond may bring an action on the bond in the materialmen's own name rather than in the name of the nominal

obligee. *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), aff'd, 667 F.2d 30 (11th Cir. 1982) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Materialman has burden of proving lien and must bring oneself clearly within the law. *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), aff'd, 667 F.2d 30 (11th Cir. 1982) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Underground Atlanta is a public works. — Because Underground Atlanta is a public works project, the city was required to obtain payment and performance bonds for the Underground Atlanta project. To require such bonds for only one portion of the project is not sufficient to discharge the city's obligation under former O.C.G.A. § 13-10-1. *City of Atlanta v. United Elec. Co.*, 202 Ga. App. 239, 414 S.E.2d 251 (1991) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

County had a duty to require a contractor to procure a payment bond which was not procured; thus, a subcontractor had a right to sue the county for materials furnished because of the county's failure to require the payment bond. *Kelly Energy Sys. v. Board of Comm'rs.*, 196 Ga. App. 519, 396 S.E.2d 498, cert. denied, 196 Ga. App. 908, 396 S.E.2d 498 (1990) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Claim including obligations to third tier subcontractors. — Sub-subcontractor who provided goods and services for a public works contract could include in the sub-subcontractor's claim against the payment bond the amounts which the sub-subcontractor was contractually obligated to pay the sub-subcontractors third tier subcontractors. *Sunderland v. Vertex Assocs.*, 199 Ga. App. 278, 404 S.E.2d 574 (1990), cert. denied, 199 Ga. App. 907, 404 S.E.2d 574 (1991) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

2. Applicability

Supplier of materials to subcontractor protected. — When the general contractor on a government construction contract subcontracted the procurement of certain materials to a subcontractor, which in turn

Payment Bonds (Cont'd)

2. Applicability (Cont'd)

purchased the materials from plaintiff supplier, the plaintiff was not too remote a supplier to recover under the general contractor's statutory payment bond. *Barton Malow Co. v. Metro Mfg., Inc.*, 214 Ga. App. 56, 446 S.E.2d 785 (1994) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

3. Machinery and Equipment Costs Recoverable

Cost of repairs "consumed" in performing work is recoverable. — Repair costs are recoverable under a statutory surety bond if the repairs were "consumed" in the prosecution of the work covered by the bond, in the sense that the repairs specially contributed to the pending work only and were not of particular use in other unrelated work. *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), aff'd, 667 F.2d 30 (11th Cir. 1982) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Rental value of machinery is properly considered within protection of bond. — Rental value of machinery owing to a lessor materialman of a subcontractor is properly considered an item within the intended protection of the surety's promise, required by the obligees, to pay all persons furnishing materials consumed in the general contract. *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), aff'd, 667 F.2d 30 (11th Cir. 1982) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Distinction between those equipment and machinery costs covered by bond and those excluded from coverage. — Determinative distinction is between items going into work, or specially contributing to its execution and nothing else, and those properly chargeable to plant and equipment of contractor and available not only for pending work but for other work as well. *Moore v. Standard Accident Ins. Co.*, 48 Ga. App. 508, 173 S.E. 481 (1934); *Western Cas. & Sur. Co. v. Fulton Supply Co.*, 60 Ga. App. 710, 4 S.E.2d 690 (1939) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

While there may be a recovery on a public

contractor's bond for material and labor used in incidental and current repairs to the contractor's machinery, there can be none for major repairs involving the replacement of old with new parts, in the absence of proof that the new parts were consumed in the work covered by the bond. The determinative distinction is between the items going into the work, or specially contributing to the execution of the contract and nothing else, and those properly chargeable to the plant and equipment of the contractor, and available not only for the pending work but for other work as well. *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), aff'd, 667 F.2d 30 (11th Cir. 1982) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

4. Role of County

Clarification by 1991 amendment. — The 1991 amendment which provides that the required payment bond be approved as to form and as to the solvency of the surety by the officer of the public entity who negotiates the contract on behalf of the public entity, clarified the previously implicit understanding that a surety is not "good and sufficient" unless the surety is solvent. *J & A Pipeline Co. v. DeKalb County*, 208 Ga. App. 123, 430 S.E.2d 13, modified on other grounds, *DeKalb County v. J & A Pipeline Co.*, 263 Ga. 645, 437 S.E.2d 327 (1993) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Retroactive application of 1991 amendment. — See *Atlanta Mechanical, Inc. v. DeKalb County*, 209 Ga. App. 307, 434 S.E.2d 494 (1993) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Obtaining an affidavit from a surety is intended to be in addition to rather than instead of the requirement for a county that the surety be approved as "good and sufficient." *J & A Pipeline Co. v. DeKalb County*, 208 Ga. App. 123, 430 S.E.2d 13, modified on other grounds, *DeKalb County v. J & A Pipeline Co.*, 263 Ga. 645, 437 S.E.2d 327 (1993) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

County school board. — County school board was a public body within the meaning of former O.C.G.A. § 13-10-1 and § 36-82-102, and it could therefore be held

liable under the latter section for failure to investigate the solvency of a surety as required by subsection (f) of former § 13-10-1. *Hall County Sch. Dist. v. C. Robert*

Beals & Assocs., 231 Ga. App. 492, 498 S.E.2d 72 (1998) (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

OPINIONS OF THE ATTORNEY GENERAL

Editor’s notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 13-10-1 prior to its 2001 amendment are included in the annotations for this Code section.

State body for which work is to be done should also approve the required bonds. 1980 Op. Att’y Gen. No. 80-99. (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

Contract amount. — Performance bonds are required on all county contracts in the amount of \$5,000.00 or more for the construction, reconstruction or maintenance of public roads. Payment bonds are required on this type of contract if the contract amount is in excess of \$20,000.00 [now \$40,000.00]. 1988 Op. Att’y Gen. U88-32. (decided under former O.C.G.A. § 13-10-1 prior to its 2001 amendment).

13-10-60. Large public works contracts; requirement for payment bonds.

Except as otherwise provided in Title 32, payment bonds shall be required for all state public works construction contracts with an estimated contract amount greater than \$100,000.00; provided, however, that the state may require a payment bond for public works construction contracts that are estimated at \$100,000.00 or less. No public works construction contract requiring a payment bond shall be valid for any purpose unless the contractor gives such payment bond; provided, however, that in lieu of such payment bond, the state, in its discretion, may accept a cashier’s check, certified check, or cash for the use and protection of all subcontractors and all persons supplying labor, materials, machinery, and equipment in the prosecution of work provided in the contract. The payment bond or other security accepted in lieu of a payment bond shall be in the amount of at least the total amount payable by the terms of the initial contract and shall be increased if requested by the state as the contract amount is increased. (Code 1981, § 13-10-60, enacted by Ga. L. 2001, p. 820, § 1.)

Law reviews. — For survey article on 2002 through May 31, 2003, see 55 *Mercer L. construction law* for the period from June 1, Rev. 85 (2003).

13-10-61. Liability of contracting entity for failure to comply with article.

If a payment bond or security deposit is not taken in the manner and form required in this article, the corporation or body for which work is done under the contract shall be liable to all subcontractors and to all persons supplying labor, materials, machinery, or equipment to the contractor or subcontractor thereunder for any loss resulting to them from such failure. No agreement, modification, or change in the contract, change in the work covered by the contract, or extension of time for the

completion of the contract shall release the sureties of such payment bond. (Code 1981, § 13-10-61, enacted by Ga. L. 2001, p. 820, § 1.)

13-10-62. Notice of commencement.

(a) The contractor furnishing the payment bond or security deposit shall post on the public works construction site and file with the clerk of the superior court in the county in which the site is located a notice of commencement no later than 15 days after the contractor physically commences work on the project and supply a copy of the notice of commencement to any subcontractor, materialman, or person who makes a written request of the contractor. Failure to supply a copy of the notice of commencement within ten calendar days of receipt of the written request from such subcontractor, materialman, or person shall render the provisions of paragraph (1) of subsection (a) of Code Section 13-10-63 inapplicable to such subcontractor, materialman, or person making the request. The notice of commencement shall include:

- (1) The name, address, and telephone number of the contractor;
- (2) The name and location of the public work being constructed or a general description of the improvement;
- (3) The name and address of the state or the agency or authority of the state that is contracting for the public works construction;
- (4) The name and address of the surety for the performance and payment bonds, if any; and
- (5) The name and address of the holder of the security deposit provided, if any.

(b) The failure to file a notice of commencement shall render the notice to the contractor requirements of paragraph (1) of subsection (a) of Code Section 13-10-63 inapplicable.

(c) The clerk of the superior court shall file the notice of commencement within the records of that office and maintain an index separate from other real estate records or an index with the preliminary notices specified in subsection (a) of Code Section 44-14-361.3. Each such notice of commencement shall be indexed under the name of the state and the name of the contractor as contained in the notice of commencement. (Code 1981, § 13-10-62, enacted by Ga. L. 2001, p. 820, § 1.)

13-10-63. Pursuit of action by person entitled to protection of payment bond; liability of public entity.

(a) Every person entitled to the protection of the payment bond or security deposit required to be given who has not been paid in full for labor

or materials furnished in the prosecution of the work referred to in such bond or security deposit before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by such person or the material or equipment or machinery was furnished or supplied by such person for which such claim is made, or when he or she has completed his or her subcontract for which claim is made, shall have the right to bring an action on such payment bond or security deposit for the amount, or the balance thereof, unpaid at the time of the commencement of such action and to prosecute such action to final execution and judgment for the sum or sums due such person; provided, however, that:

(1) Any person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such payment bond or security deposit on a public works construction project where the contractor has not complied with the notice of commencement requirements shall have the right of action upon the payment bond or security deposit upon giving written notice to the contractor within 90 days from the day on which such person did or performed the last of the labor or furnished the last of the material or machinery or equipment for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was performed or done. The notice to the contractor may be served by registered or certified mail or statutory overnight delivery, postage prepaid, duly addressed to the contractor, at any place at which the contractor maintains an office or conducts his or her business or at his or her residence, by depositing such notice in any post office or branch post office or any letter box under the control of the United States Postal Service; alternatively, notice may be served in any manner in which the sheriffs of this state are authorized by law to serve summons or process; and

(2) Any person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such payment bond or security deposit on a public works construction project where the contractor has complied with the notice of commencement requirements in accordance with subsection (a) of Code Section 13-10-62 shall have the right of action on the payment bond or security deposit, provided that such person shall, within 30 days from the filing of the notice of commencement or 30 days following the first delivery of labor, material, machinery, or equipment, whichever is later, give to the contractor a written notice setting forth:

(A) The name, address, and telephone number of the person providing labor, material, machinery, or equipment;

(B) The name and address of each person at whose instance the labor, material, machinery, or equipment is being furnished;

(C) The name and the location of the public works construction site; and

(D) A description of the labor, material, machinery, or equipment being provided and, if known, the contract price or anticipated value of the labor, material, machinery, or equipment to be provided or the amount claimed to be due, if any.

(b) Nothing contained in this Code section shall limit the right of action of a person entitled to the protection of the payment bond or security deposit required to be given pursuant to this article to the 90 day period following the day on which such person did or performed the last of the labor or furnished the last of the material or machinery or equipment for which such claim is made.

(c) Every action instituted under this Code section shall be brought in the name of the claimant without making the state or the agency or authority of the state for which the work was done or was to be done a party to such action. (Code 1981, § 13-10-63, enacted by Ga. L. 2001, p. 820, § 1.)

JUDICIAL DECISIONS

Sureties liable under payment bond. — Trial court correctly granted summary judgment to a subcontractor in the subcontractor's action against a general contractor and sureties to recover under a payment bond because the subcontractor stated a cause of action pursuant to the Little Miller Act, O.C.G.A. § 13-10-63(a). The sureties con-

sented to the delegation of the subcontractor's duties under the subcontract to an assignee; thus, the sureties remained liable for the labor and materials expended before that assignment. *Western Sur. Co. v. APAC-Southeast, Inc.*, 302 Ga. App. 654, 691 S.E.2d 234 (2010).

13-10-64. Supplying copy of bond or security deposit agreement and contract; fees for certified copies.

The official who has the custody of the bond or security deposit required by this article is authorized and directed to furnish to any person making application therefor a copy of the bond or security deposit agreement and the contract for which it was given, certified by the official who has custody of the bond or security deposit. With his or her application, such person shall also submit an affidavit that he or she has supplied labor or materials for such work and that payment therefor has not been made or that he or she is being sued on any such bond or security deposit. Such copy shall be primary evidence of the bond or security deposit and contract and shall be admitted in evidence without further proof. Applicants shall pay for such certified copies and such certified statements such fees as the official fixes to cover the cost of preparation thereof, provided that in no case shall the fee fixed exceed the fees which the clerks of the superior courts are permitted to charge for similar copies. (Code 1981, § 13-10-64, enacted by Ga. L. 2001, p. 820, § 1.)

13-10-65. Time for instituting action.

No action can be instituted on the payment bonds or security deposits after one year from the completion of the contract and the acceptance of the public works construction by the proper public authorities. Every action instituted under this article shall be brought in the name of the claimant, without the state or the agency or authority of the state for which the work was done or was to be done being made a party thereto. (Code 1981, § 13-10-65, enacted by Ga. L. 2001, p. 820, § 1.)

ARTICLE 2

**RETENTION OF CONTRACTUAL PAYMENTS AND
CREATION OF ESCROW ACCOUNTS ON
CONTRACTS FOR INSTALLATION,
IMPROVEMENT, MAINTENANCE,
OR REPAIR OF WATER OR
SEWER FACILITIES**

13-10-80. Definitions; contract requirements; application; effect of greater benefits contracted for; evidence of indebtedness paid.

(a) As used in this Code section, the term:

(1) “Contractor” means a person having a direct contract with the owner.

(2) “Lower tier subcontractor” means a person other than a contractor having a direct contract with a subcontractor.

(3) “Owner” means the state, any county, municipal corporation, authority, board of education, or other public board, public body, department, agency, instrumentality, or political subdivision of the state.

(4) “Owner’s authorized contract representative” means the architect or engineer in charge of the project for the owner or such other contract representative or officer as designated in the contract documents as the party representing the owner’s interest regarding administration and oversight of the project.

(5) “Subcontractor” means a person other than an owner having a direct contract with the contractor.

(b) In any public works construction contract entered into on or after July 1, 2001, with an owner, as defined in paragraph (3) of subsection (a) of this Code section, such contract shall provide for the following:

(1) After work has commenced at the construction site, progress payments to be made on some periodic basis, and at least monthly, based

on the value of work completed as may be provided in the contract documents plus the value of materials and equipment suitably stored, insured, and protected at the construction site and at the owner's discretion such materials and equipment suitably stored, insured, and protected off site at a location approved by the owner's authorized contract representative when allowed by the contract documents, less retainage; and

(2)(A) Retainage to a maximum of 10 percent of each progress payment; provided, however, when 50 percent of the contract value including change orders and other additions to the contract value provided for by the contract documents is due and the manner of completion of the contract work and its progress are reasonably satisfactory to the owner's authorized contract representative, the owner shall withhold no more retainage. At the discretion of the owner and with the approval of the contractor, the retainage of each subcontractor may be released separately as the subcontractor completes his or her work.

(B) If, after discontinuing the retention, the owner's authorized contract representative determines that the work is unsatisfactory or has fallen behind schedule, retention may be resumed at the previous level. If retention is resumed by an owner, the contractor and subcontractors shall be entitled to resume withholding retainage accordingly.

(C) At substantial completion of the work or such other standard of completion as may be provided in the contract documents and as the owner's authorized contract representative determines the work to be reasonably satisfactory, the owner shall, within 30 days after invoice and other appropriate documentation as may be required by the contract documents are provided, pay the retainage to the contractor. If at that time there are any remaining incomplete minor items, an amount equal to 200 percent of the value of each item as determined by the owner's authorized contract representative shall be withheld until such item or items are completed. The reduced retainage shall be shared by the contractor and subcontractors as their interests may appear.

(D) The contractor shall, within ten days from the contractor's receipt of retainage from the owner, pass through payments to subcontractors and shall reduce each subcontractor's retainage in the same manner as the contractors retainage is reduced by the owner; provided, however, that the value of each subcontractor's work complete and in place equals 50 percent of his or her subcontract value, including approved change orders and other additions to the subcontract value, provided, further, that the work of the subcontractor is proceeding satisfactorily and the subcontractor has provided or provides such satisfactory reasonable assurances of continued performance and financial responsibility to complete his or her work

including any warranty work as the contractor in his or her reasonable discretion may require, including, but not limited to, a payment and performance bond.

(E) The subcontractor shall, within ten days from the subcontractor's receipt of retainage from the contractor, pass through payments to lower tier subcontractors and shall reduce each lower tier subcontractor's retainage in the same manner as the subcontractors retainage is reduced by the contractor; provided, however, that the value of each lower tier subcontractor's work complete and in place equals 50 percent of his or her subcontract value, including approved change orders and other additions to the subcontract value; provided, further, that the work of the lower tier subcontractor is proceeding satisfactorily and the lower tier subcontractor has provided or provides such satisfactory reasonable assurances of continued performance and financial responsibility to complete his or her work including any warranty work as the subcontractor in his or her reasonable discretion may require, including, but not limited to, a payment and performance bond.

(c) This Code section shall not apply to:

(1) Any contracts let by the Department of Transportation of this state for the construction, improvement, or maintenance of roads or highways in this state or purposes incidental thereto; or

(2) Any contracts whose value or duration at the time of the award does not exceed \$150,000.00 or 45 days in duration.

(d) Contract and subcontract provisions inconsistent with the benefits extended to contractors, subcontractors, and lower tier subcontractors by this Code section shall be unenforceable; provided, however, that nothing in this Code section shall render unenforceable any contract or subcontract provisions allowing greater benefits to be extended to such contractors, subcontractors, or lower tier subcontractors, the provisions and benefits of this Code section being minimal only.

(e) Nothing shall preclude a payor under this Code section, prior to making a payment, from requiring the payee to submit satisfactory evidence that all payrolls, material bills, and other indebtedness connected with the work have been paid. (Code 1981, § 13-10-80, enacted by Ga. L. 2001, p. 820, § 1.)

13-10-81. Authorization and procedure for retention of contractual payments by state or political subdivisions; procedure for final payment.

(a) Any department, agency, or instrumentality of the state or any political subdivision of the state is authorized to insert in the specifications

of all contracts relating to the installation, extension, improvement, maintenance, or repair of any water or sewer facility a clause providing for the retention of amounts not exceeding 10 percent of the gross value of the completed work as may be provided for in the contract; provided, however, that no amounts shall be retained on estimates or progress payments submitted after 50 percent of the work on the project has been completed if in the opinion of the department, agency, or instrumentality of the state or any political subdivision thereof such work is satisfactory and has been completed on schedule. This will not affect the retained amounts on the first 50 percent of the work on the project which may continue to be held to ensure satisfactory completion of the project. If, after discontinuing the retention, the department, agency, or instrumentality of the state or any political subdivision thereof determines that the work is unsatisfactory or has fallen behind schedule, retention may be resumed at the previous level. Retainage shall be invested at the current market rate and any interest earned on the retained amount by such department, agency, or instrumentality of the state or any political subdivision of the state shall be paid to the contractor when the project has been completed within the time limits specified and for the price specified in the contract, or in any amendments or change orders approved in accord with the terms of the contract, as certified pursuant to subsection (b) of this Code section.

(b) Final payment of the retained amounts to the contractor under the contract to which the retained amounts relate shall be made after certification by the engineer in charge of the project covered by the contract that the work has been satisfactorily completed and is accepted in accordance with the contract, plans, and specifications. Payment to the contractor of interest earned on the retained amounts shall be made after certification by the engineer in charge of the project covered by the contract that the work has been completed within the time specified and within the price specified in the contract.

(c) At substantial completion of the work and as the governmental entity's authorized contract representative determines the work to be reasonably satisfactory, the governmental entity shall within 30 days after invoice and other appropriate documentation as may be required by the contract documents are provided pay the retainage to the contractor. If at that time there are any remaining incomplete minor items, an amount equal to 200 percent of the value of each item as determined by the governmental entity's authorized contract representative shall be withheld until such item or items are completed. (Ga. L. 1975, p. 1045, § 1; Code 1981, § 13-10-20; Ga. L. 1983, p. 475, § 1; Ga. L. 1992, p. 2091, § 1; Code 1981, § 13-10-81, as redesignated by Ga. L. 2001, p. 820, § 1.)

Cross references. — Authority of municipal corporations to construct and improve water and sewage systems, § 36-34-5.

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Federal supremacy does not prevent application. — The provisions of O.C.G.A. § 13-10-20 (see now O.C.G.A. § 13-10-81) are fully applicable to retainage for public contracts for installation, improvement, maintenance, or repair of water or sewer facilities in the State of Georgia, any time such retainage is withheld, whether or not the project is funded with federal funds. 1993 Op. Att'y Gen. No. U93-1.

Discretion in determining amount retained. — O.C.G.A. § 13-10-20 (see now O.C.G.A. § 13-10-81) provides the appropriate public administrator with the discretion to determine what percentage of retainage is best suited to protect the public investment. 1981 Op. Att'y Gen. No. 81-24.

Construction with regulations of Environmental Protection Agency. — Environmental Protection Agency regulations pertaining to retainage during construction of EPA projects, 40 C.F.R. 35.938-7, are not necessarily inconsistent with provisions of O.C.G.A. § 13-10-20 (see now O.C.G.A. § 13-10-81),

and may therefore be applied to EPA construction grants projects in Georgia, should the appropriate public official, in the official's discretion, choose to do so. 1981 Op. Att'y Gen. No. 81-24.

Discretion conferred by statute. — O.C.G.A. §§ 13-10-20 and 13-10-21 (see now O.C.G.A. §§ 13-10-81 and 13-10-82) confer upon appropriate administrator of contracting agency discretion to determine if retainage is to be used and amount of such retainage. The administrator has further discretion to specify method of retainage to be utilized. 1981 Op. Att'y Gen. No. 81-58.

Agency must be party to contract in order to require use of retainage method. — When director of Environmental Protection Division (EPD) is involved in administration of construction grants for certain projects, but EPD is not a party to the contracts, the director would be unable to require use of escrow account or any other method of retainage. 1981 Op. Att'y Gen. No. 81-58.

RESEARCH REFERENCES

Am. Jur. 2d. — 64 Am. Jur. 2d, Public Works and Contracts, §§ 90, 91.

C.J.S. — 72 C.J.S. Supp., Public Contracts, §§ 25 et seq.

13-10-82. Authorization and procedure for creation and maintenance of escrow accounts by state or political subdivisions.

(a) In lieu of the retained amounts provided for in Code Section 13-10-81, any department, agency, or instrumentality of the state or any political subdivision of the state is authorized to insert a clause in the specifications of all contracts provided for in Code Section 13-10-81, providing for an alternate procedure for the maintenance of an escrow account in an amount at least equal to the amount authorized to be retained by the contract.

(b) Any such escrow agreement entered into pursuant to this Code section must contain as a minimum the following provisions:

(1) Only state or national banks chartered within the State of Georgia may serve as an escrow agent;

(2) The escrow agent must limit the investment of funds of the contractor held in escrow in lieu of retained amounts provided for in Code Section 13-10-81 to negotiable certificates of deposits issued by any state or national bank in the State of Georgia (including, but not limited

to, certificates of deposit issued by the bank acting as escrow agent) registered in the name of the escrow agent as such under escrow agreement with the contractor;

(3) As interest on certificates of deposit held in escrow becomes due, it shall be collected by the escrow agent and paid to the contractor;

(4) The escrow agent shall promptly acknowledge to the appropriate fiscal officer the amount and value of the escrow account held by the escrow agent, and any additions to the escrow account shall be reported immediately. Withdrawals from the escrow account shall only be made subject to the written approval of the fiscal officer of the department, agency, or instrumentality of the state or any political subdivision entering into the contract;

(5) Upon default or overpayment of any contract subject to the procedure provided for in this Code section and upon the written demand of the fiscal officer provided for in paragraph (4) of this subsection, the escrow agent shall within ten days deliver a certified check to the appropriate fiscal officer in the amount of the escrow account balance relating to the contract in default;

(6) The escrow account may be terminated upon completion and acceptance of the contract as provided for in Code Section 13-10-81;

(7) All fees and expenses of the escrow agent shall be paid by the contractor to the escrow agent and, if not paid, shall constitute a lien on the interest accruing to the escrow account and shall be paid therefrom;

(8) The escrow account shall constitute a specific pledge to the state or any political subdivision and the contractor shall not, except to his or her surety, otherwise assign, pledge, discount, sell, or transfer his or her interest in said escrow account, the funds of which shall not be subject to levy, garnishment, attachment, or any other process whatsoever; and

(9) The form of the escrow agreement and provisions thereof in compliance with this Code section, as well as such other provisions as the appropriate fiscal officer shall from time to time prescribe, shall be subject to written approval of the fiscal officer. The approval of the escrow agreement by the appropriate fiscal officer shall authorize the escrow agent to accept appointment in such capacity.

(c) The department, agency, or instrumentality of the state or political subdivision of this state shall not be liable to the contractor or his or her surety for the failure of the escrow agent to perform under the escrow agreement or for the failure of any bank to honor certificates of deposit issued by it which are held in the escrow account. (Ga. L. 1975, p. 1045, §§ 2, 3; Code 1981, § 13-10-21; Code 1981, § 13-10-82, as redesignated by Ga. L. 2001, p. 820, § 1.)

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Discretion conferred by statute. — O.C.G.A. §§ 13-10-20 and 13-10-21 (see now O.C.G.A. §§ 13-10-80 and 13-10-81) confer upon appropriate administrator of contracting agency discretion to determine if retainage is to be used and amount of such retainage. The administrator has further discretion to specify method of retainage to be utilized. 1981 Op. Att’y Gen. No. 81-58.

Agency must be party to contract in order to require use of retainage method. — When director of Environmental Protection Division (EPD) is involved in administration of construction grants for certain projects, but EPD is not a party to the contracts, the director would be unable to require use of escrow account or any other method of retainage. 1981 Op. Att’y Gen. No. 81-58.

13-10-83. Construction of provisions of article.

Nothing in this article shall be construed or deemed to affect any contract covered by the provisions of Code Sections 32-2-75 through 32-2-77. (Ga. L. 1975, p. 1045, § 4; Code 1981, § 13-10-22; Code 1981, § 13-10-83, as redesignated by Ga. L. 2001, p. 820, § 1.)

ARTICLE 3

SECURITY AND IMMIGRATION COMPLIANCE

Editor’s notes. — Ga. L. 2006, p. 105, § 1, not codified by the General Assembly, provides: “This Act shall be known and may be cited as the ‘Georgia Security and Immigration Compliance Act.’ All requirements of this Act concerning immigration or the classification of immigration status shall be construed in conformity with federal immigration law.”

Ga. L. 2006, p. 105, § 2, purported to enact a new Article 4 of Chapter 10, Title 13, but actually enacted only Article 3 of Chapter 10, Title 13.

Law reviews. — For article on 2006 enactment of this article, see 23 Ga. St. U.L. Rev. 247 (2006).

13-10-90. Definitions.

As used in this article, the term:

(1) “Commissioner” means the Commissioner of the Georgia Department of Labor.

(2) “Federal work authorization program” means any of the electronic verification of work authorization programs operated by the United States Department of Homeland Security or any equivalent federal work authorization program operated by the United States Department of Homeland Security to verify information of newly hired employees, pursuant to the Immigration Reform and Control Act of 1986 (IRCA), D.L. 99-603.

(2.1) “Physical performance of services” means the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to public real property, including the construction, reconstruction, or maintenance of all or part

of a public road; or any other performance of labor for a public employer under a contract or other bidding process.

(3) “Public employer” means every department, agency, or instrumentality of the state or a political subdivision of the state.

(4) “Subcontractor” includes a subcontractor, contract employee, staffing agency, or any contractor regardless of its tier. (Code 1981, § 13-10-90, enacted by Ga. L. 2006, p. 105, § 2/SB 529; Ga. L. 2010, p. 308, § 2/SB 447.)

The 2010 amendment, effective July 1, 2010, added paragraph (2.1). See editor’s note for applicability.

Editor’s notes. — Ga. L. 2010, p. 308, § 4, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to contracts which are first advertised or otherwise given public notice on or after July 1, 2010.

Law reviews. — For annual survey of labor and employment law, see 58 Mercer L. Rev. 211 (2006). For article, “The Georgia Security and Immigration Compliance Act: Comprehensive Immigration Reform in Georgia — ‘Think Globally ... Act Locally’,” see 13 Ga. St. B.J. 14 (2007).

13-10-91. Verification of new employee eligibility; applicability; rules and regulations.

(a) Every public employer, including, but not limited to, every municipality and county, shall register and participate in the federal work authorization program to verify employment eligibility of all newly hired employees. Upon federal authorization, a public employer shall permanently post the employer’s federally issued user identification number and date of authorization, as established by the agreement for authorization, on the employer’s website; provided, however, that if a local public employer does not maintain a website, the identification number and date of authorization shall be published annually in the official legal organ for the county. State departments, agencies, or instrumentalities may satisfy the requirement of this Code section by posting information required by this Code section on one website maintained and operated by the state.

(b)(1) No public employer shall enter into a contract pursuant to this chapter for the physical performance of services within this state unless the contractor registers and participates in the federal work authorization program to verify information of all newly hired employees or subcontractors. Before a bid for any such service is considered by a public employer, the bid shall include a signed, notarized affidavit from the contractor attesting to the following:

(A) The affiant has registered with and is authorized to use the federal work authorization program;

(B) The user identification number and date of authorization for the affiant; and

(C) The affiant is using and will continue to use the federal work authorization program throughout the contract period.

An affidavit required by this subsection shall be considered an open public record once a public employer has entered into a contract for physical performance of services; provided, however, that any information protected from public disclosure by federal law or by Article 4 of Chapter 18 of Title 50 shall be redacted. Affidavits shall be maintained by the public employer for five years from the date of receipt.

(2) No contractor or subcontractor who enters a contract pursuant to this chapter with a public employer or a contractor of a public employer shall enter into such a contract or subcontract in connection with the physical performance of services within this state unless the contractor or subcontractor registers and participates in the federal work authorization program to verify information of all newly hired employees. Any employee, contractor, or subcontractor of such contractor or subcontractor shall also be required to satisfy the requirements of this paragraph.

(3) Upon contracting with a new subcontractor, a contractor or subcontractor shall, as a condition of any contract or subcontract entered into pursuant to this chapter, provide a public employer with notice of the identity of any and all subsequent subcontractors hired or contracted by that contractor or subcontractor. Such notice shall be provided within five business days of entering into a contract or agreement for hire with any subcontractor. Such notice shall include an affidavit from each subsequent contractor attesting to the subcontractor's name, address, user identification number, and date of authorization to use the federal work authorization program.

(4) Contingent upon appropriation or approval of necessary funding and in order to verify compliance with the provisions of this subsection, each year the Commissioner shall conduct no fewer than 100 random audits of public employers and contractors. The results of the audits shall be published on the www.open.georgia.gov website and on the Georgia Department of Labor's website no later than December 31 of each year. The Georgia Department of Labor shall seek funding from the United States Secretary of Labor to the extent such funding is available.

(5) Any person who knowingly and willfully makes a false, fictitious, or fraudulent statement in an affidavit submitted pursuant to this subsection shall be guilty of a violation of Code Section 16-10-20 and, upon conviction, shall be punished as provided in such Code section. Contractors and subcontractors convicted for false statements based on a violation of this subsection shall be prohibited from bidding on or entering into any public contract for 12 months following such conviction.

(c) This Code section shall be enforced without regard to race, religion, gender, ethnicity, or national origin.

(d) Except as provided in subsection (e) of this Code section, the Commissioner shall prescribe forms and promulgate rules and regulations deemed necessary in order to administer and effectuate this Code section and publish such rules and regulations on the Georgia Department of Labor's website.

(e) The commissioner of the Georgia Department of Transportation shall prescribe all forms and promulgate rules and regulations deemed necessary for the application of this Code section to any contract or agreement relating to public transportation and shall publish such rules and regulations on the Georgia Department of Transportation's website.

(f) No employer or agency or political subdivision, as such term is defined in Code Section 50-36-1, shall be subject to lawsuit or liability arising from any act to comply with the requirements of this Code section. (Code 1981, § 13-10-91, enacted by Ga. L. 2006, p. 105, § 2/SB 529; Ga. L. 2009, p. 970, § 1/HB 2; Ga. L. 2010, p. 308, § 2.A/SB 447.)

The 2009 amendment, effective January 1, 2010, rewrote subsections (a) and (b) and added subsection (f).

The 2010 amendment, effective July 1, 2010, in the undesignated paragraph of paragraph (b)(1), inserted "physical performance of", inserted "or by Article 4 of Chapter 18 of Title 50", and added the last sentence; in paragraph (b)(2), inserted "or a contractor of a public employer" and added the last sentence; and added paragraphs (b)(3) through (b)(5). See editor's note for applicability.

Editor's notes. — Ga. L. 2010, p. 308, § 4, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to contracts which are first advertised or otherwise given public notice on or after July 1, 2010.

Law reviews. — For annual survey of labor and employment law, see 58 Mercer L. Rev. 211 (2006). For article, "The Georgia Security and Immigration Compliance Act: Comprehensive Immigration Reform in Georgia — 'Think Globally ... Act Locally,'" see 13 Ga. St. B.J. 14 (2007).

CHAPTER 11

PROMPT PAYMENT

Sec.		Sec.	
13-11-1.	Short title.	13-11-6.	Conditions authorizing payments to subcontractors.
13-11-2.	Definitions.	13-11-7.	Interest on late payments.
13-11-3.	Contractors' and subcontractors' entitlement to payment.	13-11-8.	Attorneys' fees.
13-11-4.	Time limits for payments to contractors and subcontractors.	13-11-9.	Nonexclusive remedies.
13-11-5.	Grounds for withholding payments.	13-11-10.	Improvements excepted from chapter.
		13-11-11.	Applicability of chapter.

Editor's notes. — Ga. L. 1994, p. 1398, § 4, not codified by the General Assembly, provides that the Act is not intended to repeal or affect the applicability of Code Section 7-4-16.

13-11-1. Short title.

This chapter shall be known and may be cited as the “Georgia Prompt Pay Act.” (Code 1981, § 13-11-1, enacted by Ga. L. 1994, p. 1398, § 1.)

Law reviews. — For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004).

JUDICIAL DECISIONS

Cited in Pipe Solutions, Inc. v. Inglis, 291 Ga. App. 328, 661 S.E.2d 683 (2008); Christie v. Rainmaster Irrigation, Inc., 299 Ga. App. 383, 682 S.E.2d 687 (2009).

13-11-2. Definitions.

As used in this chapter, the term:

- (1) “Contractor” means a person who contracts with an owner to improve real property, to perform construction services, or to perform construction management services for an owner.
- (2) “Improve” means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property or to excavate, clear, grade, fill, or landscape any real property or to construct driveways and private roadways or to furnish materials, including trees and shrubbery, for any of such purposes or to perform any labor upon such improvements.
- (3) “Improvement” means all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or

landscaping, including trees and shrubbery, driveways, and roadways, on real property.

(4) “Owner” means a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made. “Owner” includes private persons and entities and state, local, or municipal government agencies, instrumentalities, or entities; provided, however, that the provisions of this chapter shall not apply when the owner is a county having a population of less than 10,000 according to the United States decennial census of 1990 or any such future census or when the owner is a municipality having a population of less than 2,500 according to the United States decennial census of 1990 or any such future census.

(5) “Owner’s representative” means the architect or engineer in charge of the project for the owner or such other contract representative or officer as designated in the contract documents as the party representing the owner’s interest regarding administration and oversight of the project.

(6) “Real property” means the real estate that is improved, including lands, leaseholds, tenements, and improvements placed on the real property.

(7) “Receipt” means actual receipt of cash or funds in the contractor’s or subcontractor’s bank account.

(8) “Subcontractor” means any person who has contracted to furnish labor or materials to, or has performed labor or supplied materials for, a contractor or another subcontractor in connection with a contract to improve real property. For purposes of this chapter, the term “subcontractor” shall also include materialmen as defined in Code Section 44-14-360. (Code 1981, § 13-11-2, enacted by Ga. L. 1994, p. 1398, § 1; Ga. L. 1995, p. 10, § 13.)

13-11-3. Contractors’ and subcontractors’ entitlement to payment.

Performance by a contractor or subcontractor in accordance with the provisions of his or her contract and the satisfaction of the conditions of his or her contract precedent to payment entitles such person to payment from the party with whom he or she contracts. (Code 1981, § 13-11-3, enacted by Ga. L. 1994, p. 1398, § 1.)

JUDICIAL DECISIONS

Subcontractor not entitled to payment. — Trial court erred in granting summary judgment to a subcontractor in the subcontractor’s breach of contract action against a general contractor and the contractor’s surety, arising from the parties’ work on a construction project, as the court interpreted the terms of the parties’ contract

pursuant to O.C.G.A. § 13-2-1 to mean that the general contractor was entitled to withhold final payment to the subcontractor pursuant to O.C.G.A. § 13-11-3 when the suppliers' bills were not paid, and the general contractor was also entitled to offset that

final payment by amounts owed to the suppliers, as the risk of loss was on the subcontractor. *Foster & Co. Gen. Contrs., Inc. v. House HVAC/Mechanical, Inc.*, 277 Ga. App. 595, 627 S.E.2d 188 (2006).

13-11-4. Time limits for payments to contractors and subcontractors.

(a) When a contractor has performed in accordance with the provisions of a contract, the owner shall pay the contractor within 15 days of receipt by the owner or the owner's representative of any payment request based upon work completed or service provided under the contract.

(b) When a subcontractor has performed in accordance with the provisions of its subcontract and the subcontract conditions precedent to payment have been satisfied, the contractor shall pay to that subcontractor and each subcontractor shall pay to its subcontractor, within ten days of receipt by the contractor or subcontractor of each periodic or final payment, the full amount received for such subcontractor's work and materials based on work completed or service provided under the subcontract, provided that the subcontractor has provided or provides such satisfactory reasonable assurances of continued performance and financial responsibility to complete his or her work as the contractor in his or her reasonable discretion may require, including but not limited to a payment and performance bond. (Code 1981, § 13-11-4, enacted by Ga. L. 1994, p. 1398, § 1.)

13-11-5. Grounds for withholding payments.

(a) Nothing in this chapter shall prevent the owner from withholding payment to its contractor because of the following: unsatisfactory job progress; defective construction which has not been remedied; disputed work; third-party claims filed or reasonable evidence that a claim will be filed; failure of the contractor or its subcontractor to make timely payments for labor, equipment, and materials; damage caused by the contractor to the owner, other contractors, or subcontractors; or reasonable evidence that the contract cannot be completed for the unpaid balance of the contract sum. In addition to the other bases for withholding set forth in this subsection, the owner may withhold a reasonable amount for retainage, provided that the retainage withheld by the owner shall not exceed the retainage percentage set forth in the contract between the contractor and the owner.

(b) Nothing in this chapter shall prevent the contractor or a subcontractor from withholding payment to a subcontractor for: unsatisfactory job progress; defective construction which has not been remedied; disputed work; third-party claims filed or reasonable evidence that a claim will be filed; failure of the subcontractor to make timely payments for labor,

equipment, and materials; damage caused by the subcontractor to the owner, the contractor, or contractors or subcontractors; or reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum. In addition to the other bases for withholding set forth in this subsection, the contractor or the subcontractor, as the case may be, may withhold a reasonable amount for retainage, provided that the retainage withheld shall not exceed the percentage retained from the contractor by the owner on account of the subcontractor's work. (Code 1981, § 13-11-5, enacted by Ga. L. 1994, p. 1398, § 1.)

13-11-6. Conditions authorizing payments to subcontractors.

The contractor shall, within ten days from the contractor's receipt of retainage from the owner, pass through payments to subcontractors and shall reduce each subcontractor's retainage in the same manner as the contractor's retainage is reduced by the owner, provided that the value of the subcontractor's work complete and in place equals 50 percent of his or her subcontract value, including approved change orders and other additions to the subcontract value and, provided, further, that the work of the subcontractor is proceeding satisfactorily and, provided, further, that the subcontractor has provided or provides such satisfactory reasonable assurances of continued performance and financial responsibility to complete his or her work as the contractor in his or her reasonable discretion may require, including but not limited to a payment and performance bond. (Code 1981, § 13-11-6, enacted by Ga. L. 1994, p. 1398, § 1.)

13-11-7. Interest on late payments.

(a) Except as provided in Code Section 13-11-5, if a periodic or final payment to a contractor is delayed by more than 15 days or if a periodic or final payment to a subcontractor is delayed more than ten days after receipt of periodic or final payment by the contractor or subcontractor, the owner, contractor, or subcontractor, as the case may be, shall pay his or her contractor or subcontractor interest, beginning on the day following the due date, at the rate of 1 percent per month or a pro rata fraction thereof on the unpaid balance as may be due. However, no interest is due unless the person being charged interest has been notified of the provision of this Code section at the time the request for payment is made. Acceptance of progress payments or final payment shall release all claims for interest on said payments.

(b) Nothing in this chapter shall prohibit owners, contractors, and subcontractors from agreeing by contract to rates of interest, payment periods, and contract and subcontract terms different from those stipulated in this Code section, and in this event, these contractual provisions shall control. In case of a willful breach of the contract provisions as to the time

of payment, the interest rate specified in this Code section shall apply. (Code 1981, § 13-11-7, enacted by Ga. L. 1994, p. 1398, § 1.)

13-11-8. Attorneys' fees.

In any action to enforce a claim under this chapter, the prevailing party is entitled to recover a reasonable fee for the services of its attorney including but not limited to trial and appeal and arbitration, in an amount to be determined by the court or the arbitrators, as the case may be. (Code 1981, § 13-11-8, enacted by Ga. L. 1994, p. 1398, § 1.)

Law reviews. — For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004).

JUDICIAL DECISIONS

Evidence supported award. — An award of attorney fees entered against a home builder, pursuant to both O.C.G.A. §§ 13-6-11 and 13-11-8, was upheld on appeal because an award pursuant to the latter statute did not require a finding of bad faith, and evidence of the home builder's stubborn litigiousness and the unnecessary trouble and expense the home builder caused the two contractors supported an award under the former statute. *Hampshire Homes, Inc. v. Espinosa Constr. Servs.*, 288 Ga. App. 718, 655 S.E.2d 316 (2007).

Award of attorney's fees properly denied since contract related to single residence. — Trial court properly denied attorney fees to a contractor in a breach of contract suit brought under the Georgia Prompt Pay Act, O.C.G.A. § 13-11-1 et seq., against a homeowner for the failure of the homeowner to pay for the installation of a wrought iron fence as O.C.G.A. § 13-11-10 specifically provided that the Act did not apply to contracts involving single family

residences and no evidence to support a bad faith litigation award was made. Since § 13-11-10 specifically provided that the Act did not apply, there was no other statutory basis under the Act to support the contractor's claim for attorney fees. *Pipe Solutions, Inc. v. Inglis*, 291 Ga. App. 328, 661 S.E.2d 683 (2008).

Award of attorney's fees properly denied in a maritime contract case. — American rule barring the shifting of attorneys' fees was a feature of maritime law and O.C.G.A. § 13-11-8 of the Georgia Prompt Payment Act (GPPA), O.C.G.A. § 13-11-1 et seq., was in direct conflict with that principle; thus, defendant subcontractor, a prevailing party in a suit involving a maritime contract (a dredging contract), was not entitled to fees. Further, a clearly established exception existed wherein the subcontractor was free to contract for the indemnification of attorneys' fees but chose not to include such a provision in the contract. *Misener Marine Constr., Inc. v. Norfolk Dredging Co.*, 594 F.3d 832 (11th Cir. 2010).

13-11-9. Nonexclusive remedies.

Neither the right to recover interest on a payment nor the right to recover attorneys' fees under this chapter are exclusive remedies. This chapter does not modify the remedies available to any person under the terms of a contract or by another statute. (Code 1981, § 13-11-9, enacted by Ga. L. 1994, p. 1398, § 1.)

13-11-10. Improvements excepted from chapter.

The provisions of this chapter do not apply to improvements to real property intended for residential purposes which consist of 12 or fewer residential units. (Code 1981, § 13-11-10, enacted by Ga. L. 1994, p. 1398, § 1.)

JUDICIAL DECISIONS

Contract related to single residence thus no attorney fees. — Trial court properly denied attorney fees to a contractor in a breach of contract suit brought under the Georgia Prompt Pay Act, O.C.G.A. § 13-11-1 et seq., against a homeowner for the failure of the homeowner to pay for the installation of a wrought iron fence as O.C.G.A. § 13-11-10 specifically provided that the Act

did not apply to contracts involving single family residences and no evidence to support a bad faith litigation award was made. Since § 13-11-10 specifically provided that the Act did not apply, there was no other statutory basis under the Act to support the contractor's claim for attorney fees. *Pipe Solutions, Inc. v. Inglis*, 291 Ga. App. 328, 661 S.E.2d 683 (2008).

13-11-11. Applicability of chapter.

The provisions of this chapter do not apply to contracts or subcontracts entered into prior to January 1, 1995. (Code 1981, § 13-11-11, enacted by Ga. L. 1994, p. 1398, § 1.)

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